eserve
FM
031
M66

Montana Code Annotated

Annotations 2004



Government Structure & Administration • Judiciary, Courts
Legislative Branch • Local Government • Military Affairs and
Disaster & Emergency Services • Elections

STATE LAW LIBRARY
FEB 1 1 2004
OF MONTANA

STATE LAW LIBRARY
FEB 11 2004
OF MONTANA

ANNOTATIONS
to the
MONTANA CODE ANNOTATED

Code Commissioner & Director of Legal Services
Gregory J. Petesch

Staff Attorneys
Bart Campbell
Lee Heiman
Valencia Lane
Eddye McClure
John MacMaster
David Niss
Doug Sternberg, Legal Researcher

Legislative Editors
Carol Ann Jacobsen, Chief Editor
Sally Bush, Senior Editor
Connie Dixon, Legislative Editor

Office of Legislative Information Technology
Hank Trenk - Director

Central Services Office
Lois Menzies - Director

Documents Services Manager
Ann Patten

Proofreader/Data Entry
Kip Davis

Distribution & Typesetting
Kevin Hayes

Published and Distributed by
Montana Legislative Services Division
Capitol Bldg Rm 110
1301 E 6th Ave
PO Box 201706
Helena, MT 59620-1706
Telephone (406)444-3064 FAX (406)444-3036

Internet http://leg.state.mt.us

Printed and Bound by
West Group
610 Opperman Dr
Eagan MN 55123

2004 ANNOTATIONS to the MONTANA CODE ANNOTATED

CONTENTS

Volume 1

Table of Session Law to Code — 2003
Table of 2002 Ballot Issues
Official Report of the Montana Code Commissioner — 2003
Enabling Act
Constitution of Montana
Title
1. General Laws and Definitions

Volume 2

Titles
2. Government Structure and Administration
3. Judiciary, Courts
4. Reserved
5. Legislative Branch
6. Reserved
7. Local Government
8 and 9. Reserved
10. Military Affairs and Disaster and Emergency Services
11 and 12. Reserved
13. Elections
14. Reserved

Volume 3

Titles
15. Taxation
16. Alcohol and Tobacco
17. State Finance
18. Public Contracts
19. Public Retirement Systems
20. Education
21. Reserved
22. Libraries, Arts, and Antiquities

Volume 4

Titles
23. Parks, Recreation, Sports, and Gambling
24. Reserved
25. Civil Procedure

Volume 5

Titles
26. Evidence
27. Civil Liability, Remedies, and Limitations

Volume 6

Titles
28. Contracts and Other Obligations
29. Reserved
30. Trade and Commerce

Volume 7

Titles
31. Credit Transactions and Relationships
32. Financial Institutions
33. Insurance and Insurance Companies
34. Reserved
35. Corporations, Partnerships, and Associations
36. Reserved
37. Professions and Occupations
38. Reserved

Volume 8

Titles
39. Labor
40. Family Law
41. Minors
42. Adoption
43. Reserved

Volume 9

Titles
44. Law Enforcement
45. Crimes
46. Criminal Procedure
47 and 48. Reserved

Volume 10

Titles
49. Human Rights
50. Health and Safety
51. Reserved
52. Family Services
53. Social Services and Institutions
54-59. Reserved
60. Highways and Transportation
61. Motor Vehicles
62-66. Reserved
67. Aeronautics
68. Reserved
69. Public Utilities and Carriers

Volume 11

Titles
70. Property
71. Mortgages, Pledges, and Liens
72. Estates, Trusts, and Fiduciary Relationships
73 and 74. Reserved
75. Environmental Protection

Volume 12

Titles
76. Land Resources and Use
77. State Lands
78 and 79. Reserved
80. Agriculture
81. Livestock
82. Minerals, Oil, and Gas
83 and 84. Reserved
85. Water Use
86. Reserved
87. Fish and Wildlife
88 and 89. Reserved
90. Planning, Research, and Development
91-99. Reserved

PREFACE TO VOLUME 2
(Annotations — February 2004)

Annotations to this volume include case notes of applicable court decisions through public domain citation 2003 MT 91, volume 315 Montana Reports page 165, volume 69 Pacific Reporter (3rd Series) page 641, volume 276 Federal Supplement (2nd Series) page 1382, volume 345 Federal Reporter (3rd Series) page 909, and volume 123 Supreme Court Reporter page 2669. Digests of Montana Attorney General's opinions are provided through volume 50 opinion number 1 of the Report and Official Opinions of Attorney General. Citations to the Administrative Rules of Montana implementing or authorized by a section of law and adopted through Issue 20 of the 2003 Montana Administrative Register are also included.

Amendment notes listed under compiler's comments are intended to explain only amendments made in the year indicated and may not accurately reflect current statutory language because of subsequent amendment.

The annotations are provided as a convenience to the user and are not intended to be an exhaustive compilation of the law under a given statute or in a given area.

TITLE 2
GOVERNMENT STRUCTURE AND ADMINISTRATION

CHAPTER 1
SOVEREIGNTY AND JURISDICTION

Part 1
Sovereignty and Jurisdiction of the State

2-1-101. Sovereignty and style of process.

Law Review Articles

"Greening" the Constitution—Harmonizing Environmental and Constitutional Values, Percival, 32 Envtl. L. 809 (2002).

21st-Century Technology Meets 20th-Century Laws: Tension Between Old Divisions of Federal and State Jurisdiction Impedes Growth of Web Rx Biz, Korenchuk, 22 Nat'l L.J. B19 (2000).

State Sovereignty and the Tenth and Eleventh Amendments, Massey, 56 U. Chi. L. Rev. 61 (1989).

The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, Jackson, 98 Yale L.J. 1 (1988).

Collateral References

Process *key* 28; States *key* 1.

72 C.J.S. Process §11; 81A C.J.S. States §§16, 17.

2-1-102. Sovereignty and jurisdiction of the state.

Case Notes

Pursuit of Traffic Offender Onto Reservation Allowed — Good Faith Exception to Exclusionary Rule Applicable to Evidence Seized During Arrest of Tribal Member by Nontribal Officers on Reservation: Bird was observed by city police officer Olson driving recklessly in Cut Bank, but when Olson attempted to stop Bird, a chase ensued onto the Blackfeet Indian Reservation, where Bird was eventually stopped and held by the city police officer and an assisting county officer. When the officers were informed that Bird was an enrolled tribal member, they notified a tribal police officer, who arrested Bird and a passenger, and transported them off the reservation and back into Cut Bank in violation of the extradition provision of the Blackfeet Tribal Code. Bird was subsequently charged in City Court with reckless driving and was convicted. Bird appealed to District Court, moving to dismiss for lack of jurisdiction and to suppress evidence of activities and statements after the vehicle crossed onto the reservation. The District Court found that the city officer did not have jurisdiction to arrest Bird on the reservation and granted Bird's motion to suppress. The state appealed, and the Supreme Court reversed. Pursuant to U.S. v. Patch, 114 F3d 131 (9th Cir. 1997), under the doctrine of hot pursuit, once the officer observed an offense occur within his jurisdiction, he had authority to pursue the violator onto the reservation in order to make an arrest. Further, the evidence was erroneously suppressed because the good faith exception to the exclusionary rule, discussed in St. v. Nahee, 745 P2d 172 (Ariz. App. 1987), applied. The city and county officers acted in good faith reliance that the tribal officer would carry out the arrest and extradition in a manner conforming to tribal code procedures, and it was the tribal officer who neglected to follow the tribal code. The primary purpose of the exclusionary rule—to ensure that law enforcement is not rewarded by violating a defendant's constitutional rights and to deter such conduct in the future—would not be served by sanctioning the city and county officers for a mistake in which they had no part. Failure to follow tribal extradition procedures did not warrant exclusion of the evidence in this case. Cut Bank v. Bird, 2001 MT 296, 307 M 460, 38 P3d 804 (2001). See also State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1394 (1976).

Gambling — Non-Indian Defendants for Crimes Committed on Reservation — Criminal Law Jurisdiction — Standing: The state has jurisdiction over non-Indian defendants for crimes committed on the reservation when there is no Indian victim. Non-Indian defendants do not have

standing to raise the argument that the action of the state interferes with the self-government of the Blackfeet Reservation. The state has authority to regulate gambling by non-Indians on the Blackfeet Reservation. State ex rel. Poll v. District Court, 257 M 512, 851 P2d 405, 50 St. Rep. 387 (1993).

No Federal or Tribal Recognition as Indian — Not Indian for Purposes of Criminal Jurisdiction: Defendant who was adopted by an Indian parent but who failed to submit proof that his adoptive parent's tribe recognized him as an Indian and who is not an enrolled member of any Indian tribe and receives no federal benefits as an Indian is not an Indian for purposes of criminal jurisdiction. State ex rel. Poll v. District Court, 257 M 512, 851 P2d 405, 50 St. Rep. 387 (1993).

Two-Prong Test Adopted for Determining Indian Status: In a criminal case, the defendant argued that his conviction should be overturned on the basis that he was an Indian and the state did not have jurisdiction to prosecute him. The Supreme Court specifically adopted the two-prong test for determining Indian status established in U. S. v. Rogers, 45 US 567, 11 L Ed 1105 (1846), in ruling that the defendant was not an Indian. The test adopted by the court was: (1) the defendant must have a significant amount of Indian blood; and (2) the defendant must have federal or tribal recognition as an Indian. St. v. La Pier, 242 M 335, 790 P2d 983, 47 St. Rep. 760 (1990), followed in State ex rel. Poll v. District Court, 257 M 512, 851 P2d 405, 50 St. Rep. 387 (1993).

Federal Employers' Liability Act Suits Brought in State Court — Governed by Federal Decisions: The Supreme Court held that its decision in Anderson v. Burlington N., 218 M 456, 709 P2d 641 (1985), concerning a federal employer's right to an offset for sickness payments to an employee was no longer controlling in light of the federal court of appeals decision in Folkestead v. Burlington N., 813 F2d 1377 (9th Cir. 1987). The court stated that although a FELA suit may be brought in either state or federal court, federal court decisions control with respect to the interpretation of federal laws. Kalanick v. Burlington N. RR Co., 242 M 45, 788 P2d 901, 47 St. Rep. 532 (1990).

Tort Suits Against Production Credit Associations — Applicability of Federal Tort Claims Act: The District Court properly dismissed a tort claim against a production credit association (PCA) for lack of subject matter jurisdiction. A PCA is properly considered an instrumentality under 12 U.S.C. 2091, and tort claims against instrumentalities acting primarily as agents of the United States must be pursued under the Federal Tort Claims Act according to 28 U.S.C. 2679. Tooke v. Miles City Prod. Credit Ass'n, 234 M 387, 763 P2d 1111, 45 St. Rep. 1993 (1988), citing In re Sparkman, 703 F2d 1097 (9th Cir. 1983).

Crow Tribal Court — Exclusive Jurisdiction Over Divorces: The Crow tribal court exercises exclusive jurisdiction over divorce actions between tribal members living on the reservation by virtue of the duly enacted Crow tribal code. State ex rel. Stewart v. District Court, 187 M 209, 609 P2d 290 (1980). See also In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Arrest of Indian on the Reservation Valid if Crime Committed off the Reservation: Petitioner, a Crow Indian, was arrested within the exterior boundaries of the Crow Reservation for a crime committed off the Reservation. The court followed State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1394 (1976), which held that the arrest of an Indian on a reservation for a crime committed off the reservation was a valid arrest. In re Little Light, 183 M 52, 598 P2d 572 (1979).

U.S. Sovereignty Over Airspace: The Airborne Hunting Act, 16 U.S.C. §742 j-1 is a constitutional exercise of Congressional authority over national airspace. The United States exercises complete and exclusive national sovereignty in the airspace of the United States under the commerce clause of the United States Constitution and implementing legislation. U.S. v. Helsley, 615 F2d 784 (9th Cir. 1979), reversing U.S. v. Helsley, 463 F. Supp. 1111 (D.C. Mont. 1979).

Arrest Within Boundaries of Reservation: When a Sheriff arrested a member of the Crow Tribe within the boundaries of the Crow Indian Reservation under authority of a warrant issued by a Justice of the Peace of the state and the tribal judge refused to authorize an arrest, the arrest was valid and not an interference with the right to self-government of the Tribe because the Tribe had not adopted an extradition procedure. State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1394 (1976).

Attorney General's Opinions

Canadian Indians: The state has jurisdiction over the prosecution of offenses committed by Canadian Indians within the Fort Peck Indian Reservation when those offenses are committed against a non-Indian. 37 A.G. Op. 7 (1977).

Law Review Articles

Developing Theories of State Jurisdiction Over Indians: The Dominance of the Preemption Analysis, Lynaugh, 38 Mont. L. Rev. 63 (1977).

State Criminal Jurisdiction Over Tribal Indians—A Re-examination, Guthals, 35 Mont. L. Rev. 340 (1974).

Criminal Jurisdiction Over Indians and Post-Conviction Remedies, Dowling, 22 Mont. L. Rev. 165 (1961).

Modern Problems of Criminal Jurisdiction in Indian Country, Meisner, 17 Am. Indian L. Rev. 175 (1992).

Collateral References

81A C.J.S. States §16.

What constitutes "state action" under rule exempting state and local governmental action from antitrust laws—federal cases. 70 L. Ed. 2d 973.

Part 2
Cession and Retrocession of Jurisdiction

Part Case Notes

Offense on Federal Forest Property — No Reservation of Exclusive Federal Jurisdiction or Preemption by Federal Law: Wagner was observed by federal officials while he was trying to collect marijuana grown in the Kootenai National Forest and was subsequently arrested and convicted under state law for attempted sale of the drug. After conviction, his counsel filed a petition for postconviction relief, alleging that Wagner's former counsel was ineffective for failing to raise a lack of subject matter jurisdiction. Citing section 4 of The Enabling Act and 16 U.S.C. 480, the Supreme Court found that there was no intent by Congress to reserve exclusive federal jurisdiction over national forest property. Citing 21 U.S.C. 903, 21 U.S.C. 841, and cases from other jurisdictions, the Supreme Court also held that there is no conflict between federal drug laws and 45-9-103. The Supreme Court therefore concluded that the state courts had jurisdiction over the offense and that Wagner's counsel was not ineffective for failing to raise the issue of lack of jurisdiction. Wagner v. St., 270 M 26, 889 P2d 1189, 52 St. Rep. 61 (1995).

2-1-201. Jurisdiction in federal enclaves.

Case Notes

Imposition of Corporate License Tax on Tribally Chartered Corporation Conducting Business Entirely on Indian Reservation Considered Infringement of Tribal Sovereignty and Self-Government Authority: The Department of Revenue sought to impose the state corporate license tax on Flat Center Farms, Inc. (Flat Center). The District Court found that the tax may not be imposed on an Indian-owned corporation that does business entirely within the boundaries of an Indian reservation. The state appealed, but the Supreme Court affirmed. Flat Center was incorporated pursuant to the laws of Montana and chartered by the Fort Peck Tribe as a tribal corporation, with its sole business activity consisting of farming located entirely within the exterior boundaries of the Fort Peck Reservation. The corporation was wholly Indian owned, the beneficiaries of the corporate income were ultimately Indians, and the assets generating the income were Indian trust lands. The longstanding rule set out in Mescalero Apache Tribe v. Jones, 411 US 145 (1973), is that a state is without power to tax reservation lands and Indian income generated from on-reservation activities without the express authorization of Congress. Further, under Williams v. Lee, 358 US 217 (1959), the exercise of state jurisdiction over activities occurring entirely on Indian lands is an infringement on inherent tribal authority and is contrary to principles of self-government and tribal sovereignty. Nevertheless, the state contended that, as a nontribal member with a corporate identity distinct from its stockholders, Flat Center did not enjoy the shield from state taxation afforded to tribes and tribal members. However, under LaRoque v. St., 178 M 315, 583 P2d 1059 (1978), tribal membership is not essential to a determination of whether income earned on a reservation is taxable. Flat Center did not "carry on business in the state" because all of its activities were conducted in Indian country, so its income was not earned in Montana. The state's taxation authority is statutorily limited based on the situs of the activity from which income is earned. Thus, the District Court correctly concluded that the corporation license tax may not be imposed on a tribally chartered corporation that does business entirely within a reservation. Flat Center Farms, Inc. v. Dept. of Revenue, 2002 MT 140, 310 M 206, 49 P3d 578 (2002).

Pursuit of Traffic Offender Onto Reservation Allowed — Good Faith Exception to Exclusionary Rule Applicable to Evidence Seized During Arrest of Tribal Member by Nontribal

Officers on Reservation: Bird was observed by city police officer Olson driving recklessly in Cut Bank, but when Olson attempted to stop Bird, a chase ensued onto the Blackfeet Indian Reservation, where Bird was eventually stopped and held by the city police officer and an assisting county officer. When the officers were informed that Bird was an enrolled tribal member, they notified a tribal police officer, who arrested Bird and a passenger, and transported them off the reservation and back into Cut Bank in violation of the extradition provision of the Blackfeet Tribal Code. Bird was subsequently charged in City Court with reckless driving and was convicted. Bird appealed to District Court, moving to dismiss for lack of jurisdiction and to suppress evidence of activities and statements after the vehicle crossed onto the reservation. The District Court found that the city officer did not have jurisdiction to arrest Bird on the reservation and granted Bird's motion to suppress. The state appealed, and the Supreme Court reversed. Pursuant to U.S. v. Patch, 114 F3d 131 (9th Cir. 1997), under the doctrine of hot pursuit, once the officer observed an offense occur within his jurisdiction, he had authority to pursue the violator onto the reservation in order to make an arrest. Further, the evidence was erroneously suppressed because the good faith exception to the exclusionary rule, discussed in St. v. Nahee, 745 P2d 172 (Ariz. App. 1987), applied. The city and county officers acted in good faith reliance that the tribal officer would carry out the arrest and extradition in a manner conforming to tribal code procedures, and it was the tribal officer who neglected to follow the tribal code. The primary purpose of the exclusionary rule—to ensure that law enforcement is not rewarded by violating a defendant's constitutional rights and to deter such conduct in the future—would not be served by sanctioning the city and county officers for a mistake in which they had no part. Failure to follow tribal extradition procedures did not warrant exclusion of the evidence in this case. Cut Bank v. Bird, 2001 MT 296, 307 M 460, 38 P3d 804 (2001). See also State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1394 (1976).

Indians — Subject Matter Jurisdiction Over Dissolution of Marriage — Different Residences of Parties — Factors to Be Considered — Bertelson Followed: Stacey, an enrolled member of the Fort Peck Tribes, married Shane, a non-Indian. After the marriage ceremony, Stacey returned to the Fort Peck Indian Reservation and Shane went to Forsyth, where his parents lived and where he worked. Some time later, Stacey had a child who also became an enrolled member and lived with Stacey on the Fort Peck Indian Reservation. Still later, Shane filed a dissolution action in a state District Court. The District Court ordered joint custody and ordered that Shane would be the primary residential custodian. Approximately 1 month later, the Fort Peck Tribal Court awarded temporary custody to Stacey. She then filed a motion in District Court under Rules 12(h) and 60, M.R.Civ.P. (Title 25, ch. 20), to dismiss Shane's dissolution action for lack of subject matter jurisdiction. The District Court held that it had subject matter jurisdiction over the case and issued a final decree of dissolution. In that decree, the District Court held that the parties' child had significant contacts both off and on the reservation, held that the District Court shared concurrent jurisdiction with the tribal court, and therefore denied Stacey's motion to dismiss. The Supreme Court reviewed its previous holdings regarding tribal jurisdiction and child custody jurisdiction under the Uniform Child Custody Jurisdiction Act. The Supreme Court also reviewed the purposes of the Indian Child Welfare Act, which, while not strictly applicable to the case before it, cautions that state courts should be careful not to erode the sovereignty of tribes and tribal courts. In reliance upon In re Bertelson, 189 M 524, 617 P2d 121 (1980), the Supreme Court held that the best interests of the child should be determined and followed in deciding whether a state or tribal court has jurisdiction for the purposes of awarding custody but that when an Indian child resides off the reservation, state courts and tribal courts share concurrent jurisdiction. The Supreme Court then held, in further reliance upon Bertelson, that even when jurisdiction is concurrent, it does not mean that states courts should exercise jurisdiction and that in deciding whether to exercise concurrent jurisdiction, the state courts should consider: (1) 40-4-102, 40-4-107, 40-4-211, and 40-7-108; (2) certain policy issues; and (3) the residence of the parties pursuant to 1-1-215. For this reason, the Supreme Court remanded the case to the District Court for a determination of the residence of Stacey and her child, saying that if the District Court determines that both reside on the reservation, the District Court must dismiss the case. However, if the District Court finds that Stacey's child is not a resident of the reservation and that the District Court shares jurisdiction with the tribal court, the District Court must then consider factors from Bertelson, previously discussed by the Supreme Court, to determine whether the District Court or the tribal court is better able to determine the best interests of the child. In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Sale of Trust Lands Within Flathead Reservation — No Jurisdiction Found for Purposes of Breach of Contract, Fraud, and Negligent Misrepresentation: Neuman, an enrolled member of

the Confederated Salish and Kootenai Tribes, sought assistance from the Bureau of Indian Affairs (BIA) to clear the title to trust land within the Flathead Reservation so that Neuman could sell it. He also engaged a real estate broker. Both Neuman and prospective buyers, the Krauses, made considerable efforts to consummate the sale, but Neuman was informed by the BIA that there was a substantial cloud on the title. Neuman therefore terminated the listing agreement, and the Krauses sued for damages, alleging breach of contract, fraud, constructive fraud, fraud in the inducement, and negligent misrepresentation. The District Court, on the recommendation of a special master and after applying the test laid out in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), found a lack of subject matter jurisdiction. The Supreme Court held that 25 U.S.C. 345 and 28 U.S.C. 1353 vest exclusive jurisdiction in the federal courts over disputes involving allotted lands within Indian reservations and that 28 U.S.C. 1360 preempted its jurisdiction. The Supreme Court also held that the Krauses' lawsuit was a dispute involving title to allotted lands even though the action was a tort claim and breach of contract claim because all of the Krauses' claims could not be separated from questions of title to Indian trust lands. Noting that it had already held in In re Marriage of Wellman, 258 M 131, 852 P2d 559 (1993), that an attempt by state courts to adjudicate rights in Indian trust land for the purpose of money damages was precluded by federal law, the Supreme Court held that it made no difference that the Krauses had deleted from their complaint a prayer for specific performance. The claims could still not be separated from the issue of title to Indian lands. Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997).

Previous Assumption of Jurisdiction by Tribal Court — Jurisdiction Improperly Sustained by State District Court: It was error for a state District Court to continue to exercise jurisdiction when a tribal court had previously assumed jurisdiction over the parties and the subject matter by issuing a temporary restraining order against plaintiff. Abstention, as a matter of comity, was exercised by the Supreme Court in holding that jurisdiction was retained in the tribal court. Agri W. v. Koyama Farms, Inc., 281 M 167, 933 P2d 808, 54 St. Rep. 118 (1997), following State ex rel. Stewart v. District Court, 187 M 209, 609 P2d 290 (1980), In re Marriage of Limpy, 195 M 314, 636 P2d 266 (1981), and In re Marriage of Wellman, 258 M 131, 852 P2d 559 (1993).

Marriage Dissolution Brought by Tribal Member Against Non-Indian Spouse — Jurisdiction to Apportion Indian Trust Land: Wife who was a member of the Blackfeet Tribe sought a marriage dissolution in state court from her husband who was a non-Indian. The District Court granted the dissolution but held it did not have jurisdiction to apportion the parties' marital estate, which consisted of about 4,000 acres of Indian trust land on the Blackfeet Reservation, and granted wife's motion to dismiss. On appeal, husband contended that the state court had jurisdiction, relying on a provision in the Blackfeet Tribal Law and Order Code that all divorces must be consummated in accordance with Montana law. However, that provision did not cede jurisdiction to the state but merely governed the tribal court's choice of law. While the state has an interest in ensuring the existence of a forum in which marital property within its borders may be apportioned upon a dissolution, that interest is met by the availability of an alternative forum in the Blackfeet Tribal Court. The state's interest in the property and proceedings is inconsequential compared with the federal and tribal interests at stake. Therefore, the District Court did not err in concluding that it lacked jurisdiction to adjudicate the disposition of the Indian trust land that was the parties' only significant marital asset. In re Marriage of Wellman, 258 M 131, 852 P2d 559, 50 St. Rep. 462 (1993), following White Mtn. Apache v. Bracker, 448 US 136, 65 L Ed 2d 665, 100 S Ct 2578 (1980), and N. Mex. v. Mescalero Apache Tribe, 462 US 324, 76 L Ed 2d 611, 103 S Ct 2375 (1983), and distinguishing Sheppard v. Sheppard, 655 P2d 895 (Idaho 1982). In re Marriage of Wellman was followed as to lack of jurisdiction over trust lands, in context of sale of real property, in Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997).

Subsurface Minerals in Crow "Ceded Strip" — Part of Crow Reservation — State Coal Tax Prohibited: The subsurface minerals in the "ceded strip" adjoining the Crow Reservation are legally a part of the Crow Reservation, and state taxation derived from the "ceded strip" is prohibited because the state lacks congressional consent and because the taxes interfere with tribal development and self-government and autonomy. Crow Tribe v. Mont., 819 F2d 895 (1987), affirmed, 108 S Ct 685 (1988).

Crow Tribal Court — Exclusive Jurisdiction Over Divorces: The Crow tribal court exercises exclusive jurisdiction over divorce actions between tribal members living on the reservation by virtue of the duly enacted Crow tribal code. State ex rel. Stewart v. District Court, 187 M 209, 609 P2d 290 (1980).

Arrest of Indian on the Reservation Valid if Crime Committed off the Reservation: Petitioner, a Crow Indian, was arrested within the exterior boundaries of the Crow Reservation for a crime

committed off the Reservation. The court followed State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1394 (1976), which held that the arrest of an Indian on a reservation for a crime committed off the reservation was a valid arrest. In re Little Light, 183 M 52, 598 P2d 572 (1979).

Arrest Within Boundaries of Reservation: When a Sheriff arrested a member of the Crow Tribe within the boundaries of the Crow Indian Reservation under authority of a warrant issued by a Justice of the Peace of the state and the tribal judge refused to authorize an arrest, the arrest was valid and not an interference with the right to self-government of the Tribe because the Tribe had not adopted an extradition procedure. State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1394 (1976).

Jurisdiction Over Indian Divorce:

State court had jurisdiction over petition for divorce filed by one Indian against another where Indian tribal court had not attempted to exercise jurisdiction over marriage and divorce; the courts of this state are open to all Indian citizens, and they are entitled to the protection of the state laws and utilization of state courts. Bad Horse v. Bad Horse, 163 M 445, 517 P2d 893 (1974), overruled in In re Marriage of Limpy, 195 M 314, 636 P2d 266, 38 St. Rep. 1885 (1981). See also In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

State has jurisdiction over divorce action brought by an Indian plaintiff against an Indian defendant, both residing on reservation, since the power to grant a divorce has not been preempted by the federal government and does not interfere with reservation self-government. State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973). See also Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997), and In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Extent of Jurisdiction Qualified by Terms of Cession: Section 83-102, R.C.M. 1947 (now 2-1-102 and 2-1-201), recognizes the power of the state to qualify its cession of federal jurisdiction. St. v. Rindal, 146 M 64, 404 P2d 327 (1965).

Territory Under Control of United States: Under section 40, Pol. C. 1895 (now 2-1-102 and 2-1-201), the state consents to the purchase, condemnation, or acquisition of lands by the United States. Where, however, the United States still retains its original ownership of the land, neither purchase, condemnation, nor acquisition is necessary, but actual occupation for any purpose indicated in these sections stands in lieu thereof. Mere occupancy of government land by the military for any purpose not indicated in the law or the United States Constitution would not of itself be sufficient to divest the state of the sovereignty granted to it by Congress, nor does the right reserved to serve state process on these reservations infringe on the exclusive jurisdiction of the United States. St. v. Tully, 31 M 365, 78 P 760 (1904).

Attorney General's Opinions

Canadian Indians: The state has jurisdiction over the prosecution of offenses committed by Canadian Indians within the Fort Peck Indian Reservation when those offenses are committed against a non-Indian. 37 A.G. Op. 7 (1977).

Law Review Articles

After the Federalization Binge: A Civil Liberties Hangover, Hollon, 31 Harv. C.R.-C.L. L. Rev. 4 (1996).

Federal Preemption of State and Local Government Activities, Zimmerman, 13 Seton Hall Legis. J. 25 (1989).

Preemption and Federalism: The Missing Link, Wolfson, 16 Hastings Const. L.Q. 69 (1988).

Collateral References

81A C.J.S. States §20.

2-1-202. Jurisdiction over lands purchased by United States — reservation of rights to state.

Compiler's Comments

1995 Amendment: Chapter 418 in sixth sentence substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Case Notes

Crime Committed on Air Force Base: There is nothing in the language of this section indicating legislative intent to restrict jurisdiction this state had previously exercised over

crimes committed on land purchased by the federal government. St. v. Stewart, 175 M 286, 573 P2d 1138 (1977).

Criminal Jurisdiction: Montana has retained criminal jurisdiction over crimes committed on land purchased by federal government for missile site. St. v. Rindal, 146 M 64, 404 P2d 327 (1965).

Ceding Statutes to Be Strictly Construed: The filing of the map and description of the land taken is a condition precedent to transfer of jurisdiction to the United States. The mere fact that sections 24, R.C.M. 1935 (since repealed), and 83-108, R.C.M. 1947 (now 2-1-202 and 2-1-203), consent to the purchase of state land for governmental purposes does not imply that the state ipso facto is divested of sovereignty, and exclusive control over the area is assumed by the federal government; jurisdiction does not pass until notice of assumption is given and other conditions required by the ceding statutes have been performed. Valley County v. Thomas, 109 M 345, 97 P2d 345 (1939).

General Ceding Statutes Not Applicable to Fort Peck Dam Project: The general cession statutes, found within this part, have no application to the Fort Peck Dam project, the purposes of which are flood control and improvement of navigation, and therefore do not fall within the provision of the federal Constitution relative to cession of jurisdiction over lands purchased by it "for the erection of forts, arsenals, etc., and other needful buildings", the earthfill dam in course of construction not being a "building", though buildings are incidentally necessary for the work. Valley County v. Thomas, 109 M 345, 97 P2d 345 (1939).

Constitutionality: The failure of this section to reserve to the state the right to tax the personal property of persons and private corporations located upon lands acquired by the federal government as provided therein does not render the statute unconstitutional as violative of Art. XII, sec. 1, 2, and 11, 1889 Mont. Const., providing for the levy of uniform taxes upon all property within the state except such as is exempted. State ex rel. Bd. of County Comm'rs of Valley County v. Bruce, 106 M 322, 77 P2d 403 (1938), overruled on another point in Valley County v. Thomas, 109 M 345, 97 P2d 345 (1939).

Exclusive Jurisdiction of United States: By section 43, Pol. C. 1895 (now 2-1-202 and 2-1-203), the state gives its consent to the purchase, and exclusive jurisdiction is ceded to the United States over and with respect to any lands within the limits of the state that shall be acquired by the United States for the purposes described in the federal Constitution. St. v. Tully, 31 M 365, 78 P 760 (1904).

Attorney General's Opinions

Malmstrom Air Force Base — Enforcement of Plumbers' Licensing Law: The plumbers' licensing law, Title 37, ch. 69, may be enforced on Malmstrom Air Force Base as to nonfederal entities, so long as application of the state law does not interfere with the U.S. government's use of the property for military purposes. 38 A.G. Op. 64 (1980).

Collateral References

Criminal Law *key* 97(4); Taxation *key* 20; United States *key* 3.

22 C.J.S. Criminal Law §165; 84 C.J.S. Taxation §12; 91 C.J.S. United States §§9 through 15.

77 Am. Jur. 2d United States §35, et seq.

Supreme Court's views as to validity of federal legislation under Tenth Amendment providing that powers not delegated to United States by constitution nor prohibited by it to the states are reserved to the states or to the people. 72 L. Ed. 2d 956.

2-1-204. Military reservations — service of process.

Case Notes

Sovereignty of United States: The 1889 Montana Constitution and this section acknowledge absolute sovereignty in the United States over the places named or referred to therein. St. v. Tully, 31 M 365, 78 P 760 (1904).

Collateral References

Criminal Law *key* 97(4); United States *key* 3.

22 C.J.S. Criminal Law §165; 91 C.J.S. United States §7.

77 Am. Jur. 2d United States §§100 through 106.

Domicile or residence of person in the armed forces. 148 ALR 1413, supplemented by 149 ALR 1471, 150 ALR 1468, 151 ALR 1468, 152 ALR 1471, 153 ALR 1442, 155 ALR 1466, 156 ALR 1465, 157 ALR 1462, and 158 ALR 1474.

State or municipal regulations as applicable to work on military reservations. 115 ALR 371, supplemented by 127 ALR 827.

2-1-205. Glacier national park.

Compiler's Comments

Boundaries of Glacier National Park: The boundaries of Glacier National Park, as defined in the act of Congress of May 11, 1910, referred to in this section, compiled in the United States Code as Title 16, sec. 161, 162, are as follows: Commencing at a point on the international boundary, between the United States and the Dominion of Canada, at the middle of the Flathead River; thence following southerly along and with the middle of the Flathead River to its confluence with the middle fork of the Flathead River; thence following the north bank of said middle fork of the Flathead River to where it is crossed by the north boundary of the right-of-way of the Great Northern Railroad; thence following the said right-of-way to where it intersects the west boundary of the Blackfeet Indian Reservation; thence northerly along said west boundary to its intersection with the international boundary; thence along said international boundary to the place of beginning.

Case Notes

Federal Jurisdiction: Although the agreement of September 26, 1895, allowed Indians to cut wood for certain enumerated purposes, the defendant, a Blackfeet Indian who cut wood in Glacier National Park for the express purpose of testing the Indian rights had no defense based upon the purposes in the agreement. U.S. v. Momberg, 378 F. Supp. 1152 (D.C. Mont. 1974).

Jurisdiction of State: There are no words in this section which can be interpreted as excluding the Glacier National Park lands from the state or terminating the state's sovereignty or jurisdiction over them, and any such intent is negatived by the reservation of certain powers. State ex rel. St. Bd. of Equalization v. Glacier Park Co., 118 M 205, 164 P2d 366 (1945).

Workers' Compensation: Workers' compensation law was applicable to injuries sustained in construction work on road extending from point in the state to a point in Glacier National Park. State ex rel. Loney v. Indus. Accident Bd., 87 M 191, 286 P 408 (1930).

Collateral References

Criminal Law *key* 97(4); Taxation *key* 20; United States *key* 3.

22 C.J.S. Criminal Law §165; 84 C.J.S. Taxation §12; 91 C.J.S. United States §§9 through 15.

2-1-206. Cession and retrocession of jurisdiction over Blackfeet highway.

Compiler's Comments

Internal Reference to Federal Act: Public Law 85-343, referred to in this section, is not compiled in the United States Code.

2-1-207. Yellowstone national park.

Case Notes

State Taxing Jurisdiction Acquired Through 1940 Federal Act — Applicable to Montana Portion of Yellowstone Park: The Supreme Court affirmed a District Court finding that the right to tax persons living in the Montana portion of Yellowstone Park was acquired by Montana in 1940 by virtue of the federal Buck Act, specifically 4 U.S.C. 106(a). The court further found no requirement of any formal state legislative action to reclaim jurisdiction over the former federal area before taxation could begin. Olson v. Dept. of Revenue, 223 M 464, 726 P2d 1162, 43 St. Rep. 1916 (1986).

State Tax Laws: The tax laws of Montana do not apply to Yellowstone National Park. Yellowstone Park Transp. Co. v. Gallatin County, 31 F2d 644 (9th Cir. 1929), reversing 27 F2d 410 (D.C. Mont. 1928).

Collateral References

Criminal Law *key* 97(4); Taxation *key* 20; United States *key* 3.

22 C.J.S. Criminal Law §165; 84 C.J.S. Taxation §12; 91 C.J.S. United States §§9 through 15.

2-1-208. Withdrawal of consent to purchase additional state lands for national park.

Collateral References

United States *key* 3.

91 C.J.S. United States §§9 through 15.

2-1-209. Concurrent jurisdiction over Fort Peck Dam ceded to United States — reservation of rights to state.

Compiler's Comments

1995 Amendment: Chapter 418 in fifth sentence substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Case Notes

County Entitled to License Automobiles Owned by Residents of Fort Peck Townsite: Where motor vehicle's owner resided on Fort Peck townsite, Valley County sought to enjoin McCone County and the Treasurer thereof from issuing automobile license upon car owned and taxable within Valley County and to cancel such license already issued or to recover from McCone County the sums Valley County would have received if the license had been issued by it. If the motor vehicle's owner resides on Fort Peck townsite, its situs for license and tax purposes is ordinarily in the county of its owner's actual residence or domicile. Its owner's voting residence or place of habitual or permanent keeping of the motor vehicle is immaterial. Valley County v. Thomas, 109 M 345, 97 P2d 345 (1939).

Statute Applicable to Fort Peck Dam Reservation: Sections 24, R.C.M. 1935 (since repealed), and 83-108, R.C.M. 1947 (now 2-1-202 and 2-1-203), are inapplicable to the Fort Peck Dam reservation. This section, specially providing for cession for that project, is controlling and the powers reserved to the state by this section, including the taxing power, continue to reside in the state and in the respective counties in which the ceded lands are situated. Valley County v. Thomas, 109 M 345, 97 P2d 345 (1939), overruling State ex rel. Bd. of County Comm'rs of Valley County v. Bruce, 104 M 500, 69 P2d 97 (1937), and 106 M 322, 77 P2d 403 (1938).

Collateral References

Criminal Law *key* 97(4); Taxation *key* 20; United States *key* 3.

22 C.J.S. Criminal Law §165; 84 C.J.S. Taxation §12; 91 C.J.S. United States §§9 through 15.

Supreme Court's views as to concurrent jurisdiction of state court over federal civil cause of action in absence of express congressional provision. 69 L. Ed. 2d 1136.

2-1-210. Consent to purchase of lands by United States for national forest purposes — jurisdiction.

Collateral References

Criminal Law *key* 97(4); Woods and Forests *key* 8.

22 C.J.S. Criminal Law §165; 98 C.J.S. Woods and Forests §11.

77 Am. Jur. 2d United States §77, et seq.

2-1-212. Acceptance of concurrent jurisdiction over veterans center.

Compiler's Comments

1997 Amendment: Chapter 42 near end substituted reference to 88 Stat. 48 for reference to 83 Stat. 48. Amendment effective March 12, 1997.

1993 Amendment: Chapter 10 near middle, after "veterans", deleted "administration"; and made minor changes in style.

Effective Date: Section 2, Ch. 157, L. 1971, provided the act should be in effect from and after its passage and approval. Approved March 1, 1971.

2-1-215. Acceptance of jurisdiction over federal lands.

Case Notes

Provisions Not Applicable to Jurisdiction Acquired Through 1940 Federal Act: The provisions of this section requiring acceptance by the Governor before retrocession of jurisdiction is effective are not applicable to the Montana portion of Yellowstone Park since Montana acquired taxing jurisdiction of the area in 1940 by virtue of the federal Buck Act, U.S.C. 106(a), and there was no apparent legislative intent in the 1979 passage of this section to deprive the state of taxing jurisdiction in the absence of formal acceptance. Olson v. Dept. of Revenue, 223 M 464, 726 P2d 1162, 43 St. Rep. 1916 (1986).

Collateral References

Acquisition of title to land by adverse possession by state or other governmental unit or agency. 18 ALR 3d 678.

2-1-216. Filing of acceptance of jurisdiction over federal lands.

Compiler's Comments

Filed Acceptance of Retrocession of Jurisdiction: As of October 20, 1987, two documents accepting retrocession of jurisdiction have been filed with the Secretary of State:

(1) A document signed April 29, 1980, by Governor Judge that relates to:
(a) Big Horn National Battlefield;
(b) Fort Union Trading Post National Historic Site;
(c) Grant Kohrs Ranch National Historic Site; and
(d) Bighorn Canyon National Recreation Area.
(2) A document signed November 11, 1980, by Governor Judge that relates to:
(a) Big Hole National Battlefield;
(b) Custer Battlefield National Monument; and
(c) Glacier National Park.

Case Notes

Provisions Not Applicable to Jurisdiction Acquired Through 1940 Federal Act: The provisions of this section requiring acceptance by the Governor before retrocession of jurisdiction is effective are not applicable to the Montana portion of Yellowstone Park since Montana acquired taxing jurisdiction of the area in 1940 by virtue of the federal Buck Act, U.S.C. 106(a), and there was no apparent legislative intent in the 1979 passage of this section to deprive the state of taxing jurisdiction in the absence of formal acceptance. Olson v. Dept. of Revenue, 223 M 464, 726 P2d 1162, 43 St. Rep. 1916 (1986).

Part 3
Jurisdiction on Indian Lands

Part Case Notes

General 10
Criminal Actions 13
Domestic Relations 15
Taxation 18

GENERAL

Land Below High-Water Mark of Flathead Lake Tribal Property Not Subject to Distribution by Estate: When she died, Hobbs owned property on the south shore of Flathead Lake. Her will designated that three nieces divide one parcel of about 1 acre above the high-water mark and that a fourth niece and her husband, the Conrads, receive an adjacent 1.9-acre parcel from the high-water mark inland. A survey established the boundary between the parcels, but did not include any land below the high-water mark to the meander line of the lake. The District Court approved the survey, distributed the property, and closed the estate. The parties later became involved in a dispute over zoning and building regulations. The personal representative petitioned to reopen the estate for the purpose of filing a corrected survey and to distribute the portion of land lying below the high-water mark to the meander line, thereby increasing the acreage of both lots. The personal representative presented exhibits and affidavits verifying that Hobbs had paid taxes on the land out to the meander line. The Conrads objected on grounds that Hobbs's will specifically left land above the high-water mark and that because the estate did not own the land below the high-water mark, it could not be distributed to anyone. Nevertheless, the District Court approved the corrected survey and distributed the land below the high-water mark to the meander line between the heirs. The Supreme Court noted that the bed and banks of Flathead Lake within Indian reservation boundaries are held by the United States in trust for the tribes, and that any private title to Flathead Lake shore property extends only to the high-water mark. The District Court erroneously distributed the land below the high-water mark to the meander line, because the court did not have jurisdiction to distribute the tribal trust property. The estate could not distribute property that it did not own. In re Estate of Hobbs, 2002 MT 85, 309 M 308, 46 P3d 594 (2002), following Mont. Power Co. v. Rochester, 127 F2d 189 (9th Cir. 1942), and Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F2d 951 (9th Cir. 1982).

Jurisdiction Over Nonmember in Tort on Railroad Right-of-Way on Reservation Land: Beverly Nadine Red Wolf and Regina Bull Tail were killed when a Burlington Northern Railroad Company ("Railroad") train car collided with their automobile at a railroad grade crossing south of Lodge Grass, Montana, within the exterior boundaries of the Crow Reservation. The train was traveling along a right-of-way, extending 75 feet on either side from the center of the tracks, granted to the Railroad's predecessor by Congress in 1889. The court held that a tribal court does not have civil jurisdiction over a nonmember in a tort claim arising from an accident on a right-of-way granted to a railroad by Congress over reservation land. Burlington N. RR Co. v. Red Wolf, 196 F3d 1059 (9th Cir. 1999).

Tribal Court Jurisdiction Unclear — Exhaustion of Tribal Court Remedies Before Proceeding in Federal Court: A dispute arose between the estates of deceased members of an Indian tribe and an off-reservation insurer over the insurer's allegedly bad faith denial of insurance coverage for a fatal automobile accident. The accident occurred on a road maintained by the tribe and located on tribal land. The insurer, Allstate, filed a declaratory judgment action in District Court to challenge tribal court jurisdiction over the estates' suit against Allstate for failure to settle. The District Court held that the tribal court had jurisdiction and entered judgment for the defendant estates. The Ninth Circuit Court held that there was a genuine dispute over whether the estates' claim arose on the reservation, where the accident occurred and the insureds resided, or off the reservation, where the insurer was located. Because it was not plain that the tribal court lacked jurisdiction, the Ninth Circuit Court concluded that the insurer was required to exhaust its remedies in tribal court before challenging tribal jurisdiction in federal court. Allstate Indem. Co. v. Stump, 191 F3d 1071 (9th Cir. 1999).

Indian Juvenile — Jurisdiction Not Precluded by Lack of Specific Mention of Juvenile Offenses and Cession and Partial Retrocession of Jurisdiction: After pleading guilty in District Court to several offenses, Spotted Blanket, a juvenile member of the Confederated Salish and Kootenai Tribes, argued that the District Court did not have jurisdiction over him because Pub. L. No. 280, pursuant to which the state exercises partial jurisdiction over criminal offenses within the Flathead Reservation, made no specific mention of "juveniles" as a class of persons committing offenses. Citing Wash. v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 US 463 (1979), the Supreme Court held that the state could assume partial jurisdiction over offenses upon the reservation, including offenses falling under the jurisdictional category of "juvenile delinquency", even though Pub. L. No. 280 makes no specific mention of that category of offenses. Further, the Supreme Court noted that the tribal ordinance extending jurisdiction to the state provided that jurisdiction included "Juvenile Delinquency and Youth Rehabilitation". St. v. Spotted Blanket, 1998 MT 59, 288 M 126, 955 P2d 1347, 55 St. Rep. 253 (1998).

Sale of Trust Lands Within Flathead Reservation — No Jurisdiction Found for Purposes of Breach of Contract, Fraud, and Negligent Misrepresentation: Neuman, an enrolled member of the Confederated Salish and Kootenai Tribes, sought assistance from the Bureau of Indian Affairs (BIA) to clear the title to trust land within the Flathead Reservation so that Neuman could sell it. He also engaged a real estate broker. Both Neuman and prospective buyers, the Krauses, made considerable efforts to consummate the sale, but Neuman was informed by the BIA that there was a substantial cloud on the title. Neuman therefore terminated the listing agreement, and the Krauses sued for damages, alleging breach of contract, fraud, constructive fraud, fraud in the inducement, and negligent misrepresentation. The District Court, on the recommendation of a special master and after applying the test laid out in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), found a lack of subject matter jurisdiction. The Supreme Court held that 25 U.S.C. 345 and 28 U.S.C. 1353 vest exclusive jurisdiction in the federal courts over disputes involving allotted lands within Indian reservations and that 28 U.S.C. 1360 preempted its jurisdiction. The Supreme Court also held that the Krauses' lawsuit was a dispute involving title to allotted lands even though the action was a tort claim and breach of contract claim because all of the Krauses' claims could not be separated from questions of title to Indian trust lands. Noting that it had already held in In re Marriage of Wellman, 258 M 131, 852 P2d 559 (1993), that an attempt by state courts to adjudicate rights in Indian trust land for the purpose of money damages was precluded by federal law, the Supreme Court held that it made no difference that the Krauses had deleted from their complaint a prayer for specific performance. The claims could still not be separated from the issue of title to Indian lands. Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997).

Previous Assumption of Jurisdiction by Tribal Court — Jurisdiction Improperly Sustained by State District Court: It was error for a state District Court to continue to exercise jurisdiction when a tribal court had previously assumed jurisdiction over the parties and the subject matter by issuing a temporary restraining order against plaintiff. Abstention, as a matter of comity, was

exercised by the Supreme Court in holding that jurisdiction was retained in the tribal court. Agri W. v. Koyama Farms, Inc., 281 M 67, 933 P2d 808, 54 St. Rep. 118 (1997), following State ex rel. Stewart v. District Court, 187 M 209, 609 P2d 290 (1980), In re Marriage of Limpy, 195 M 314, 636 P2d 266 (1981), and In re Marriage of Wellman, 258 M 131, 852 P2d 559 (1993).

On-Reservation Accident Involving Non-Indians — Jurisdiction Over Wrongful Death and Survivorship Claims: The tribal court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation had subject matter jurisdiction over wrongful death and survivorship claims arising from an on-reservation automobile accident involving nonmembers of the tribe and also had personal jurisdiction over the tortfeasor, a resident of the reservation who was not a member of the tribe. Hinshaw v. Mahler, 42 F3d 1178 (9th Cir. 1994).

Authority of Tribal Police to Investigate Violations of State and Federal Law — State Jurisdiction on Reservation Not to Preclude Power of Tribal Police: With respect to crimes committed by non-Indians in Indian country, prosecution must be accomplished by either the state or federal government and the state may assume criminal jurisdiction over such crimes with the consent of the affected tribe. However, simply because the state has jurisdiction over these cases does not mean that tribal police officers are precluded from investigating and gathering evidence of reservation offenses and then turning that evidence over to the proper jurisdiction with authority to prosecute the crime. Tribes have authority to enact ordinances regulating the conduct of their members and to employ officers to enforce those ordinances and to keep the peace. Tribal police officers have authority to restrain non-Indians who commit offenses within the exterior boundaries of the reservation and to eject them by turning them over to the proper authorities. Further, under Ortiz-Barraza v. U.S., 512 F2d 1176 (9th Cir. 1975), tribal police officers also have authority to investigate violations of state and federal law. As set out in St. v. Zackuse, 253 M 305, 833 P2d 143 (1992), the fact that a criminal investigation was conducted by a tribal law enforcement officer has no relevance in determining jurisdiction of the case. The fact that admissible evidence was gathered by peace officers employed by a jurisdiction without authority to prosecute does not render the evidence inadmissible per se for use by a jurisdiction that does have authority to prosecute. St. v. Haskins, 269 M 202, 887 P2d 1189, 51 St. Rep. 1474 (1994).

Marriage Dissolution Brought by Tribal Member Against Non-Indian Spouse — Jurisdiction to Apportion Indian Trust Land: Wife who was a member of the Blackfeet Tribe sought a marriage dissolution in state court from her husband who was a non-Indian. The District Court granted the dissolution but held it did not have jurisdiction to apportion the parties' marital estate, which consisted of about 4,000 acres of Indian trust land on the Blackfeet Reservation, and granted wife's motion to dismiss. On appeal, husband contended that the state court had jurisdiction, relying on a provision in the Blackfeet Tribal Law and Order Code that all divorces must be consummated in accordance with Montana law. However, that provision did not cede jurisdiction to the state but merely governed the tribal court's choice of law. While the state has an interest in ensuring the existence of a forum in which marital property within its borders may be apportioned upon a dissolution, that interest is met by the availability of an alternative forum in the Blackfeet Tribal Court. The state's interest in the property and proceedings is inconsequential compared with the federal and tribal interests at stake. Therefore, the District Court did not err in concluding that it lacked jurisdiction to adjudicate the disposition of the Indian trust land that was the parties' only significant marital asset. In re Marriage of Wellman, 258 M 131, 852 P2d 559, 50 St. Rep. 462 (1993), following White Mtn. Apache v. Bracker, 448 US 136, 65 L Ed 2d 665, 100 S Ct 2578 (1980), and N. Mex. v. Mescalero Apache Tribe, 462 US 324, 76 L Ed 2d 611, 103 S Ct 2375 (1983), and distinguishing Sheppard v. Sheppard, 655 P2d 895 (Idaho 1982). In re Marriage of Wellman was followed as to lack of jurisdiction over trust lands, in context of sale of real property, in Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997).

Lack of Jurisdiction in Civil Dispute Arising Between Indians on Reservation: In the absence of an express directive giving the state jurisdiction over tribal members, the state courts of Montana do not have subject matter jurisdiction over a civil dispute, brought by an Indian alleging tortious conduct by another Indian, arising on the reservation where both are members of the same tribe. Liberty v. Jones, 240 M 16, 782 P2d 369, 46 St. Rep. 1905 (1989).

State Regulation of Reservation Pawnshops: Montana has a substantial and important interest in protecting all of its citizens, Indian and non-Indian alike, from dishonest pawnbrokers, regardless of whether the pawnshop is located on or off the reservation. This purpose is effectuated by requiring accurate and detailed records of transactions in order to prevent the charging of excessive interest rates and to facilitate tracing of stolen merchandise. Because pawnshops are open to the entire public, the state has a substantial interest in

regulating these businesses, including those located within the exterior boundaries of an Indian reservation. St. v. Schaefer, 239 M 437, 781 P2d 264, 46 St. Rep. 1811 (1989), distinguishing St. v. Greenwalt, 204 M 196, 663 P2d 1178 (1983).

Authority of State to Regulate Railroads on Indian Reservation: The court, citing White Mountain Apache Tribe v. Bracker, 448 US 136, 65 L Ed 2d 665, 10 S Ct 2578 (1980), held that the proper test to determine whether the state had regulatory jurisdiction over a railroad operated by non-Indians on an Indian reservation involved balancing state versus federal/tribal interests in the particular circumstances. It found that the state of Montana had exercised comprehensive regulatory authority over all railroads in the state, including on-reservation lines, for over 70 years, whereas there had been no federal or tribal regulatory action for nearly 100 years. The court therefore held that the state's interest predominated and that the state Public Service Commission had jurisdiction. Burlington N. RR. v. Dept. of Pub. Serv. Regulation, 221 M 497, 720 P2d 267, 43 St. Rep. 1005 (1986).

State Not Tribal Court to Have Jurisdiction Over Non-Indians for Tortious Injury Not Occurring on Indian Land — Injunction Issued: Where the plaintiff, a minor and enrolled member of the Crow Indian Tribe, brought an action for damages for injuries he sustained in a motorcycle accident on the grounds of an off-reservation school, the tribal court had no jurisdiction over the defendant school district and therefore could not issue or enforce a default judgment against the district. The U.S. Congress has not delegated authority to the tribal court to exercise jurisdiction on a non-Indian, nor has the tribe, under the analysis suggested by the U.S. Supreme Court, in Mont. v. U.S., 450 US 544 (1981), retained inherent sovereign power to exercise jurisdiction in this case, as there is neither a consensual relationship between the plaintiff and defendant nor is the political or economic security or health of the tribe threatened. Nat'l Farmers Union Ins. Co. v. Crow Tribe, 560 F. Supp. 213, 40 St. Rep. 783 (D.C. Mont. 1983).

Separate Adjudication of Federal and Indian Water Rights: It was error to dismiss consolidated water actions brought to adjudicate federal and Indian water rights in favor of state court proceedings. N. Cheyenne v. Adsit, 668 F2d 1080 (9th Cir. 1981), certiorari granted, 103 S Ct 566 (1982).

Indian Control Over Southern Half of Flathead Lake: The Confederated Salish and Kootenai Tribes have beneficial title to and hence may regulate non-Indian use of the southern half of Flathead Lake. Namen v. Confederated Salish & Kootenai Tribes, 665 F2d 951 (9th Cir. 1982), certiorari denied (with dissenting opinion), 103 S Ct 314 (1982).

Big Horn River — No Indian Control: The treaty establishing the Crow Indian Reservation did not convey to the Indians beneficial ownership of the bed of the Big Horn River flowing through the reservation. Montana v. U.S., 450 US 544, 101 S Ct 1245, 67 L Ed 2d 493 (1981).

District Court Jurisdiction Over Probate of and Claim and Delivery Action by Estate of Enrolled Tribal Indian: Where, following the death of an enrolled member of an Indian tribe, the decedent's wife petitioned the District Court to probate her deceased husband's estate and estate property consisting of a road grader was later unlawfully sold by the deceased's wife to her brother, the District Court erred in holding that it did not have jurisdiction over the claim and delivery action instituted on behalf of the estate to recover the road grader or its value. The fact that there is no federal treaty or statute preempting the jurisdiction of the District Court and the fact that the tribal court has not had and is not exercising jurisdiction over the case properly resulted in the District Court's taking jurisdiction of the probate of the estate. Because the action for claim and delivery is the enforcement process to recover property within the jurisdiction of the probate court, the District Court should have exercised subject matter jurisdiction over the claim and delivery action as well. Estate of Standing Bear v. Belcourt, 193 M 174, 631 P2d 285, 38 St. Rep. 1064 (1981).

Scope of Part: The Northern Cheyenne Reservation was not within the scope of this part, and in the absence of action by the state and the tribe in strict compliance with congressional requirements for transfer of jurisdiction, the Tribal Council could not waive to the District Court jurisdiction of juvenile delinquency on the Reservation. Blackwolf v. District Court, 158 M 523, 493 P2d 1293 (1972), distinguished in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1972).

CRIMINAL ACTIONS

Federal Crime Defined by State Law Considered Federal Offense — Incorporation of State Law Definition: An Indian juvenile was charged with burglary under the federal Indian Major Crimes Act, 18 U.S.C. 1153, by reference to Montana's burglary statute only for the purpose of definition. The Act creates federal jurisdiction over 14 major offenses, including burglary, committed by Indians against Indians or any other person in Indian country, but does not define

residential burglary. However, under the Act, if an enumerated crime is not defined and punished in accordance with federal law, the offense is defined and punished in accordance with the laws of the state in which the crime occurred. The juvenile argued that because the burglary was determined by reference to substantive state law, the violation of 18 U.S.C. 1153 did not constitute a violation of federal law. The Ninth Circuit Court disagreed. The fact that no federal residential burglary statute exists, requiring incorporation of Montana's definition of burglary, does not strip the commission of burglary on an Indian reservation of its federal character. Therefore, offenses defined by state law are nevertheless treated as federal offenses under the federal Act. U.S. v. Male Juvenile, 280 F3d 1008 (9th Cir. 2002).

Pursuit of Traffic Offender Onto Reservation Allowed — Good Faith Exception to Exclusionary Rule Applicable to Evidence Seized During Arrest of Tribal Member by Nontribal Officers on Reservation: Bird was observed by city police officer Olson driving recklessly in Cut Bank, but when Olson attempted to stop Bird, a chase ensued onto the Blackfeet Indian Reservation, where Bird was eventually stopped and held by the city police officer and an assisting county officer. When the officers were informed that Bird was an enrolled tribal member, they notified a tribal police officer, who arrested Bird and a passenger, and transported them off the reservation and back into Cut Bank in violation of the extradition provision of the Blackfeet Tribal Code. Bird was subsequently charged in City Court with reckless driving and was convicted. Bird appealed to District Court, moving to dismiss for lack of jurisdiction and to suppress evidence of activities and statements after the vehicle crossed onto the reservation. The District Court found that the city officer did not have jurisdiction to arrest Bird on the reservation and granted Bird's motion to suppress. The state appealed, and the Supreme Court reversed. Pursuant to U.S. v. Patch, 114 F3d 131 (9th Cir. 1997), under the doctrine of hot pursuit, once the officer observed an offense occur within his jurisdiction, he had authority to pursue the violator onto the reservation in order to make an arrest. Further, the evidence was erroneously suppressed because the good faith exception to the exclusionary rule, discussed in St. v. Nahee, 745 P2d 172 (Ariz. App. 1987), applied. The city and county officers acted in good faith reliance that the tribal officer would carry out the arrest and extradition in a manner conforming to tribal code procedures, and it was the tribal officer who neglected to follow the tribal code. The primary purpose of the exclusionary rule—to ensure that law enforcement is not rewarded by violating a defendant's constitutional rights and to deter such conduct in the future—would not be served by sanctioning the city and county officers for a mistake in which they had no part. Failure to follow tribal extradition procedures did not warrant exclusion of the evidence in this case. Cut Bank v. Bird, 2001 MT 296, 307 M 460, 38 P3d 804 (2001). See also State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1394 (1976).

State Court Prosecution for Criminal Liquor Law Violations: Montana may maintain criminal prosecutions of Indians in state court for on-reservation violations of state liquor laws. Fort Belknap Indian Community v. Mazurek, 43 F3d 428 (9th Cir. 1994).

Necessity of Membership in Federally Recognized Tribe: A defendant whose only claim of Indian group membership or affiliation is with an Indian group that is not a federally recognized Indian tribe cannot be an Indian for criminal jurisdiction purposes. LaPier v. McCormick, 986 F2d 303 (9th Cir. 1993).

Gambling — Non-Indian Defendants for Crimes Committed on Reservation — Criminal Law Jurisdiction — Standing: The state has jurisdiction over non-Indian defendants for crimes committed on the reservation when there is no Indian victim. Non-Indian defendants do not have standing to raise the argument that the action of the state interferes with the self-government of the Blackfeet Reservation. The state has authority to regulate gambling by non-Indians on the Blackfeet Reservation. State ex rel. Poll v. District Court, 257 M 512, 851 P2d 405, 50 St. Rep. 387 (1993).

No Federal or Tribal Recognition as Indian — Not Indian for Purposes of Criminal Jurisdiction: Defendant who was adopted by an Indian parent but who failed to submit proof that his adoptive parent's tribe recognized him as an Indian and who is not an enrolled member of any Indian tribe and receives no federal benefits as an Indian is not an Indian for purposes of criminal jurisdiction. State ex rel. Poll v. District Court, 257 M 512, 851 P2d 405, 50 St. Rep. 387 (1993).

Two-Prong Test Adopted for Determining Indian Status: In a criminal case, the defendant argued that his conviction should be overturned on the basis that he was an Indian and the state did not have jurisdiction to prosecute him. The Supreme Court specifically adopted the two-prong test for determining Indian status established in U. S. v. Rogers, 45 US 567, 11 L Ed 1105 (1846), in ruling that the defendant was not an Indian. The test adopted by the court was: (1) the defendant must have a significant amount of Indian blood; and (2) the defendant must

have federal or tribal recognition as an Indian. St. v. La Pier, 242 M 335, 790 P2d 983, 47 St. Rep. 760 (1990), followed in State ex rel. Poll v. District Court, 257 M 512, 851 P2d 405, 50 St. Rep. 387 (1993).

No Jurisdiction by State Over Crimes Committed Against Indians by Non-Indians Within Reservation: Where the defendants, two non-Indians, were charged with the theft of a calf belonging to an enrolled member of the Crow Indian Tribe and the theft occurred on a reservation, the District Court did not err in dismissing the charges against the defendants. As expressed in the dicta in St. v. Youpee, 103 M 86, 61 P2d 832 (1936), the general rule, to be followed by this state, is that states have no jurisdiction over crimes against Indians by non-Indians committed within the reservations. This is true unless the enrolled Indians have accepted state jurisdiction, and as no tribal consent had been given in this case by the Crow Tribe, the charges arising from the theft of the Indian's calf were properly dismissed. St. v. Greenwalt, 204 M 196, 663 P2d 1178, 40 St. Rep. 767 (1983).

Tribal Courts Not to Issue "Federal" Search Warrant: Because of involvement of federal agents in a search on an Indian reservation, the search was a federal search governed by Rule 41(a), Federal Rules of Criminal Procedure, and hence a search warrant must be issued by a federal court or state court of record. A tribal court is neither a federal court nor a state court as enumerated in 3-1-102; thus the warrants were invalid and subsequent evidence seized pursuant to the warrants is inadmissible. U.S. v. Messerly, 530 F. Supp. 751, 39 St. Rep. 183 (D.C. Mont. 1982).

Arrest of Indian on the Reservation Valid if Crime Committed off the Reservation: Petitioner, a Crow Indian, was arrested within the exterior boundaries of the Crow Reservation for a crime committed off the Reservation. The court followed State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1394 (1976), which held that the arrest of an Indian on a reservation for a crime committed off the reservation was a valid arrest. In re Little Light, 183 M 52, 598 P2d 572 (1979).

DOMESTIC RELATIONS

Dismissal of Petition for Temporary Investigative Authority Without Review of Guardianship Action — Harmless Error in Light of Requirements of Indian Child Welfare Act: In compliance with 41-3-403 (renumbered 41-3-423), the District Court ordered a show cause hearing at which to consider a petition for temporary investigative authority (TIA) regarding two Indian children. At the hearing, the Deputy County Attorney offered an order and memorandum from a previously dismissed guardianship proceeding as evidence. The court did not admit the documentation as evidence, but took judicial notice of it. However, at the end of the hearing, the court dismissed the petition for TIA without reviewing any records from the guardianship proceeding and ordered the Department of Public Health and Human Services to immediately place the children with their father. The mother contended that it was error to dismiss the petition without reviewing the guardianship file. In order for courts to grant TIA petitions when Indian children are involved, the requirements of the Indian Child Welfare Act must be met. Under 25 U.S.C. 1912, active efforts must be made to provide remedial services and rehabilitation programs to prevent the breakup of the Indian family. In addition, any finding that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child must be based on the testimony of qualified expert witnesses. Because these requirements were not met, the court could not have granted TIA even if it had reviewed the guardianship file, so its failure to do so, if erroneous, was harmless. In re M.P.M. & A.R.M., 1999 MT 78, 294 M 87, 976 P2d 988, 56 St. Rep. 327 (1999).

Error in Placing Custody With One Parent Following Dismissal of Petition for Temporary Investigative Authority: In compliance with 41-3-403 (renumbered 41-3-423), the District Court ordered a show cause hearing at which to consider a petition for temporary investigative authority (TIA) regarding two Indian children. At the end of the hearing, the court dismissed the petition for TIA and ordered the Department of Public Health and Human Services to immediately place the children with their father. The Department argued on appeal that the court exceeded its authority in ordering transfer of custody to the father after the petition for TIA was dismissed. The Supreme Court held that when the District Court vacated the orders issued following filing of the petition for TIA, it did not have authority to place custody with the father because nothing in the statutory framework or legislative intent authorizes the placement of a child with one parent, as opposed to the other, following dismissal of a petition for TIA. The order transferring custody to the father was reversed. In re M.P.M. & A.R.M., 1999 MT 78, 294 M 87, 976 P2d 988, 56 St. Rep. 327 (1999).

Jurisdiction Over Indian Divorce:

Stacey, an enrolled member of the Fort Peck Tribes, married Shane, a non-Indian. After the marriage ceremony, Stacey returned to the Fort Peck Indian Reservation and Shane went to Forsyth, where his parents lived and where he worked. Some time later, Stacey had a child who also became an enrolled member and lived with Stacey on the Fort Peck Indian Reservation. Still later, Shane filed a dissolution action in a state District Court. The District Court ordered joint custody and ordered that Shane would be the primary residential custodian. Approximately 1 month later, the Fort Peck Tribal Court awarded temporary custody to Stacey. She then filed a motion in District Court under Rules 12(h) and 60, M.R.Civ.P. (Title 25, ch. 20), to dismiss Shane's dissolution action for lack of subject matter jurisdiction. The District Court held that it had subject matter jurisdiction over the case and issued a final decree of dissolution. In that decree, the District Court held that the parties' child had significant contacts both off and on the reservation, held that the District Court shared concurrent jurisdiction with the tribal court, and therefore denied Stacey's motion to dismiss. The Supreme Court reviewed its previous holdings regarding tribal jurisdiction and child custody jurisdiction under the Uniform Child Custody Jurisdiction Act. The Supreme Court also reviewed the purposes of the Indian Child Welfare Act, which, while not strictly applicable to the case before it, cautions that state courts should be careful not to erode the sovereignty of tribes and tribal courts. In reliance upon In re Bertelson, 189 M 524, 617 P2d 121 (1980), the Supreme Court held that the best interests of the child should be determined and followed in deciding whether a state or tribal court has jurisdiction for the purposes of awarding custody but that when an Indian child resides off the reservation, state courts and tribal courts share concurrent jurisdiction. The Supreme Court then held, in further reliance upon Bertelson, that even when jurisdiction is concurrent, it does not mean that states courts should exercise jurisdiction and that in deciding whether to exercise concurrent jurisdiction, the state courts should consider: (1) 40-4-102, 40-4-107, 40-4-211, and 40-7-108; (2) certain policy issues; and (3) the residence of the parties pursuant to 1-1-215. For this reason, the Supreme Court remanded the case to the District Court for a determination of the residence of Stacey and her child, saying that if the District Court determines that both reside on the reservation, the District Court must dismiss the case. However, if the District Court finds that Stacey's child is not a resident of the reservation and that the District Court shares jurisdiction with the tribal court, the District Court must then consider factors from Bertelson, previously discussed by the Supreme Court, to determine whether the District Court or the tribal court is better able to determine the best interests of the child. In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

In 1979, the Northern Cheyenne appellate court issued an advisory opinion holding that the tribal court has exclusive jurisdiction over dissolution of marriage actions arising between members of the tribe residing within the reservation. The Supreme Court applied the doctrine of abstention as a matter of comity with the Northern Cheyenne Tribe. It held that there is no basis for the state to assume jurisdiction that would interfere with tribal self-government. The Supreme Court expressly overruled Bad Horse v. Bad Horse, 163 M 445, 517 P2d 893 (1974), because of the interpretation of tribal law in the advisory opinion. In re Marriage of Limpy, 195 M 314, 636 P2d 266, 38 St. Rep. 1885 (1981). See also In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

State had jurisdiction over divorce action brought by an Indian plaintiff against an Indian defendant, both residing on an Indian reservation, since federal law has not preempted state activities in the area of marriage and divorce and the tribe had determined not to exercise jurisdiction in that area by virtue of a tribal enactment. State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), distinguished in Fisher v. District Court, 424 US 382, 47 L Ed 2d 106, 96 S Ct 943 (1976), and overruled in In re Marriage of Limpy, 195 M 314, 636 P2d 266, 38 St. Rep. 1885 (1981). See also In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Applicability of Indian Child Welfare Act to Adoption Anonymity Considerations — Conformity With Act Required: Baby Girl Jane Doe was born at the Northern Montana Hospital in Havre. She was of Indian descent and eligible for membership in the Chippewa Cree Tribe on the Rocky Boy's Reservation. After the child's birth, her mother refused to sign the birth certificate, indicated her intent to relinquish the child to the Hill County Department of Family Services (now Department of Public Health and Human Services), and left the hospital. The Department filed for an order terminating parental rights and giving the Department the right to consent to the child's adoption. The tribe intervened and moved for disclosure of the mother's identity in order to ensure that any child placement conformed to the preferences provided in the federal Indian Child Welfare Act of 1978 (ICWA). The District Court denied the motion based on

the mother's stated preference for anonymity. On appeal, the tribe asserted that its right to intervene and advocate enforcement of the ICWA was meaningless when the first preference under the ICWA is for placement with the child's extended family, yet the court would not reveal the identity of the natural parent. The Supreme Court cited Miss. Band of Choctaw Indians v. Holyfield, 490 US 30, 104 L Ed 2d 29, 109 S Ct 1597 (1989), in holding that, absent good cause to the contrary, the ICWA mandates that adoptive placements be made preferentially with: (1) members of the child's extended family; (2) other members of the same tribe; or (3) other Indian families. Permitting individual tribal members to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would to a large extent nullify the purpose of the ICWA. The Supreme Court reversed the District Court and ordered that the tribe be informed of the identity of the mother and her extended family, respecting her right to privacy to the extent possible without interfering with the tribe's rights under the ICWA. In re Baby Girl Jane Doe, 262 M 380, 865 P2d 1090, 50 St. Rep. 1555 (1993).

Right to Intervene in Adoption of Indian Child — State Commitment to Indian Child Welfare Act: Prior to birth, Nellie Silk, paternal aunt of M.E.M., expressed an interest in caring for the child because she was aware of the parents' problems with parenting; however, after the child was born he was placed in foster care by the Hill County Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). Upon learning of the placement, Silk wrote to the Department requesting custody. The Department responded that placement with Silk would be inappropriate because of Department efforts to reintegrate the family, but that Silk would be considered if adoption were to occur. After parental rights were terminated (see In re M.E.M., 209 M 192, 679 P2d 1241, 41 St. Rep. 636 (1984)), Silk was not informed of the proceedings, of M.E.M.'s availability for adoption, or of M.E.M.'s preadoptive placement with a non-Indian family. Silk's subsequent petition for adoption and motion to intervene were denied by the District Court. On appeal, the Supreme Court found that Silk had an interest in adoption stemming from the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901, et seq., and that the state had a strong and independent commitment to the principles embodied in the ICWA. Silk also had a right to intervene under Rule 24(a), M.R.Civ.P. (Title 25, ch. 20), and although the District Court had ruled that her motion was not timely, the Supreme Court held that the motion must be granted in light of the fact that she was kept in ignorance and could not have been more diligent or earlier in her petition or motion. In re M.E.M., 223 M 234, 725 P2d 212, 43 St. Rep. 1684 (1986). See also In re K.H. & K.L.E., 1999 MT 128, 294 M 466, 981 P2d 1190, 56 St. Rep. 515 (1999).

Federal Indian Child Welfare Act — Temporary Custody Not in Compliance With Act — Otherwise Valid Parental Termination Not Invalidated: Child of Indian parents was placed in the temporary custody of the state in proceedings that may not have complied with the federal Indian Child Welfare Act (25 U.S.C. §1901, et seq.). Later, in proceedings that complied with the Act and before a different judge with different witnesses, the parents' rights were terminated and permanent custody was granted the state. The Supreme Court held that any failure to comply with the Act in the temporary proceedings would not invalidate the later termination because the proceedings are separate actions involving separate petitions and statutory guidelines. In re M.E.M., 209 M 192, 679 P2d 1241, 41 St. Rep. 636 (1984).

URESA Action — Personal Jurisdiction Over Tribal Member — Motion to Dismiss Improperly Denied:

Where the respondent had previously married the appellant, an enrolled member of the Crow Indian Tribe living on the Crow Indian Reservation in Colorado, and had been separated from him there and brought a URESA action in Colorado for enforcement of child support payments, the District Court erred in denying the appellant's motion to dismiss for lack of personal jurisdiction over the appellant. All of the appellant's off-reservation contacts are with Colorado, not with Montana. Under the reasoning of State ex rel. Flammond v. Flammond, 190 M 350, 621 P2d 471, 37 St. Rep. 1991 (1980), the court had neither subject matter nor personal jurisdiction. State ex rel. Three Irons v. Three Irons, 190 M 360, 621 P2d 476, 37 St. Rep. 2016 (1980).

The wife appealed the dismissal of her action seeking to enforce child support payments under URESA. The District Court ruled it had no jurisdiction, and the Supreme Court agreed there was neither subject matter jurisdiction nor personal jurisdiction. The husband was a Blackfeet Indian living on the reservation in Montana. Jurisdiction could not be found in federal enabling statutes because neither the tribe nor the state complied with them; there were no off-reservation acts in Montana sufficient to vest state courts with jurisdiction over the husband; and a reservation Indian's domicile on the reservation is not an in-state contact that grants jurisdiction to state courts. The father had not acquiesced in state jurisdiction and has challenged state court jurisdiction from the outset. The fact that there was no appeal from the

tribal court, the only avenue open to the wife, to the federal court system was not an argument in favor of state court jurisdiction. There must be a legal basis supporting state jurisdiction. State ex rel. Flammond v. Flammond, 190 M 350, 621 P2d 471, 37 St. Rep. 1991 (1980).

TAXATION

Imposition of Corporate License Tax on Tribally Chartered Corporation Conducting Business Entirely on Indian Reservation Considered Infringement of Tribal Sovereignty and Self-Government Authority: The Department of Revenue sought to impose the state corporate license tax on Flat Center Farms, Inc. (Flat Center). The District Court found that the tax may not be imposed on an Indian-owned corporation that does business entirely within the boundaries of an Indian reservation. The state appealed, but the Supreme Court affirmed. Flat Center was incorporated pursuant to the laws of Montana and chartered by the Fort Peck Tribe as a tribal corporation, with its sole business activity consisting of farming located entirely within the exterior boundaries of the Fort Peck Reservation. The corporation was wholly Indian owned, the beneficiaries of the corporate income were ultimately Indians, and the assets generating the income were Indian trust lands. The longstanding rule set out in Mescalero Apache Tribe v. Jones, 411 US 145 (1973), is that a state is without power to tax reservation lands and Indian income generated from on-reservation activities without the express authorization of Congress. Further, under Williams v. Lee, 358 US 217 (1959), the exercise of state jurisdiction over activities occurring entirely on Indian lands is an infringement on inherent tribal authority and is contrary to principles of self-government and tribal sovereignty. Nevertheless, the state contended that, as a nontribal member with a corporate identity distinct from its stockholders, Flat Center did not enjoy the shield from state taxation afforded to tribes and tribal members. However, under LaRoque v. St., 178 M 315, 583 P2d 1059 (1978), tribal membership is not essential to a determination of whether income earned on a reservation is taxable. Flat Center did not "carry on business in the state" because all of its activities were conducted in Indian country, so its income was not earned in Montana. The state's taxation authority is statutorily limited based on the situs of the activity from which income is earned. Thus, the District Court correctly concluded that the corporation license tax may not be imposed on a tribally chartered corporation that does business entirely within a reservation. Flat Center Farms, Inc. v. Dept. of Revenue, 2002 MT 140, 310 M 206, 49 P3d 578 (2002).

Non-Indian Owner of Pipeline Located on Reservation Without Standing to Raise Federal Preemption Issue of Tribal Self-Government: A non-Indian company that owned a pipeline on a reservation argued that the state's tax interfered with the tribes' rights of self-government and was therefore preempted by the federal constitution. The Supreme Court ruled that while the company had standing by virtue of its taxpayer status to challenge the property tax, it did not have a sufficient personal stake in the self-government interests of the tribes to argue the federal preemption issue of tribal self-government. N. Border Pipeline Co. v. St., 237 M 117, 772 P2d 829, 46 St. Rep. 668 (1989), followed in Hagener v. Wallace, 2002 MT 109, 309 M 473, 47 P3d 847 (2002).

Preemption Clause Not Violated by State Tax on Pipeline Located on Reservation and Owned by Non-Indian Company: The state sought to collect property tax from a non-Indian company that owned a pipeline located on a reservation. The pipeline was on trust property held by the federal government for the benefit of several tribes. The Supreme Court found that the specific federal regulations cited by the company represented only slight federal and tribal interests and did not of themselves preempt the state's tax. The court also found that much of the revenue generated by the tax was used by the state to fund education of tribal members, to maintain roads, and to undertake certain law enforcement duties for some crimes by non-Indians on the reservation and for any vandalism to the pipeline. The court ruled that the state's interest in funding the school districts and in providing local services outweighed the federal or tribal interests asserted by the company. N. Border Pipeline Co. v. St., 237 M 117, 772 P2d 829, 46 St. Rep. 668 (1989).

Property Tax on Pipeline Owned by Non-Indians and Located on Reservation Not in Violation of Federal Due Process Clause or Indian Commerce Clause: The Supreme Court ruled that the property tax at issue was assessed based on the value of the pipeline found within the state and that the revenue obtained was used to provide governmental services to the tribes and the pipeline owner, thus creating a sufficient nexus to withstand a due process challenge. The court went on to find that the allegations of the pipeline owner that the tax would create future injury to tribal revenue did not rise to the level of undue discrimination or burden on Indian enterprise and therefore did not render the tax void under the Indian commerce clause. N. Border Pipeline Co. v. St., 237 M 117, 772 P2d 829, 46 St. Rep. 668 (1989).

Subsurface Minerals in Crow "Ceded Strip" — Part of Crow Reservation — State Coal Tax Prohibited: The subsurface minerals in the "ceded strip" adjoining the Crow Reservation are legally a part of the Crow Reservation, and state taxation derived from the "ceded strip" is prohibited because the state lacks congressional consent and because the taxes interfere with tribal development and self-government and autonomy. Crow Tribe v. Mont., 819 F2d 895 (1987), affirmed, 108 S Ct 685 (1988).

Application of New Car Tax and Personal Property Tax to Indian Tribes and Individuals: The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the enrolled members of those tribes residing on that reservation are exempt from payment of the new car sales tax imposed by 61-3-502 (now repealed) and the personal property tax imposed by 61-3-503. Indians residing on that reservation and not enrolled in either of the tribes are subject to the taxes. The Assiniboine & Sioux Tribes v. Mont., 568 F. Supp. 269, 40 St. Rep. 1318 (D.C. Mont. 1983).

Coal Severance Taxes — Indian-Owned Coal: It was error for the District Court to dismiss action by tribe challenging Montana's severance tax on coal owned although not extracted by them. The severance tax may infringe upon a tribe's right to govern itself if the taxes substantially affect its ability to offer governmental services or its ability to regulate development of tribal resources. Crow Tribe v. St., 650 F2d 1104 (1981), opinion amended and rehearings denied, 665 F2d 1390 (9th Cir. 1981), certiorari denied, 103 S Ct 230 (1982).

State Taxation of Indian Trust Properties Valid — No Repeal by Implication Found: Where the plaintiff Indian tribe sought declaratory and injunctive relief against the levy and collection of certain taxes by the state and several counties on the production of oil and gas owned by the United States in trust for the plaintiff by non-Indian lessees within the boundaries of the plaintiff's reservation, the court held that the provisions of 25 U.S.C. §398 specifically authorized state taxation of oil and gas on tribal lands and that the provisions of the statute had not been impliedly repealed by 25 U.S.C. §396. The sovereign right asserted by the plaintiff to be free from state taxation has been controlled by Congress, and the plaintiff has not shown that there is such a repugnancy between the two federal statutes as to satisfy their burden of proving a congressional intent to repeal the former by enactment of the latter or that there is an ambiguity in the law which should be construed in favor of the plaintiff. Blackfeet Tribe v. St., 507 F. Supp. 446, 38 St. Rep. 238 (D.C. Mont. 1981).

Jurisdiction for Purpose of State Income Tax: The state lacks jurisdiction to tax income derived on a reservation by an Indian, even though the Indian is not an enrolled member of the tribe on whose reservation he is living. LaRoque v. St., 178 M 315, 583 P2d 1059 (1978), followed in St. v. Bird, 252 M 438, 829 P2d 941, 49 St. Rep. 339 (1992), with regard to lack of state authority to impose individual income taxes on enrolled tribal member residing within reservation who was employed mining coal in "ceded strip", and Crow Tribe v. Mont., 650 F2d 1104 (9th Cir. 1981), in accord with Crow Tribe v. Mont., 819 F2d 895 (9th Cir. 1987).

Part Law Review Articles

The End (of This Discussion) of Tribal Sovereignty, Jensen, 60 Mont. L. Rev. 35 (1999).

The Constitution of the United States Applies to Indian Tribes: A Reply to Professor Jensen, Poore, 60 Mont. L. Rev. 17 (1999).

The Continuing Vitality of Tribal Sovereignty Under the Constitution, Jensen, 60 Mont. L. Rev. 3 (1999).

Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy, Pommersheim, 58 Mont. L. Rev. 313 (1997).

The Indian Child Welfare Act of 1978: A Montana Analysis, DuMontier-Pierre, 56 Mont. L. Rev. 505 (1995).

Freedom of Religion in Indian Country, O'Brien, 56 Mont. L. Rev. 451 (1995).

Sovereignty and the Sacred: The Establishment Clause in Indian Country, Smith, 56 Mont. L. Rev. 295 (1995).

Criminal Jurisdiction in Montana Indian Country, Wilson, 47 Mont. L. Rev. 513 (1986).

Harmony Among the People: Torts and Indian Courts, Zion, 45 Mont. L. Rev. 265 (1984).

Limitations on State Power to Tax Natural Resource Development on Indian Reservations, Dockings, 43 Mont. L. Rev. 217 (1982).

Adjudication of Indian Water Rights: Implementation of the 1979 Amendments to the Montana Water Use Act, Lamb, 41 Mont. L. Rev. 73 (1980).

Comments on Indian Water Rights, Morrison, 41 Mont. L. Rev. 39 (1980).

Developing Theories of State Jurisdiction Over Indians: The Dominance of the Preemption Analysis, Lynaugh, 38 Mont. L. Rev. 63 (1977).

State Civil Jurisdiction Over Tribal Indians—A Re-examination, Guthals, 35 Mont. L. Rev. 340 (1974).

Montana Indian Law Symposium, Vol. 33, No. 2, Mont. L. Rev. (1972).

Criminal Jurisdiction Over Indians and Post-Conviction Remedies, Dowling, 22 Mont. L. Rev. 165 (1961).

Modern Problems of Criminal Jurisdiction in Indian Country, Meisner, 17 Am. Indian L. Rev. 175 (1992).

Validity, under federal constitution, statutes, and treaties, of state or local tax as affected by its imposition on Indians, their property or activities, or in connection with an Indian reservation—Supreme Court cases. 73 L. Ed. 2d 1506.

Part Collateral References

Validity, under federal constitution, statutes, and treaties, of state or local tax as affected by its imposition on Indians, their property or activities, or in connection with an Indian reservation—Supreme Court cases. 73 L. Ed. 2d 1506.

Handbook of Federal Indian Law, F. Cohen (1982 ed.).

2-1-301. Assumption of criminal jurisdiction of Flathead Indian country.

Case Notes

Criminal Jurisdiction Over Tribal and Nontribal Indians: Campbell petitioned the federal court for a Writ of Habeas Corpus on the grounds that he is an Indian and therefore the state has no criminal jurisdiction over him. This contention fails for two reasons. First, Campbell is not a member of the Confederated Salish and Kootenai Tribes. Second, the United States permitted the assumption of jurisdiction by the state, and the Montana Supreme Court has held that jurisdiction was properly assumed. Writ denied. Campbell v. Crist, 491 F. Supp. 586, 37 St. Rep. 1328 (D.C. Mont. 1980).

Indians — Habeas Corpus — Exhaustion of State Remedies: Federal habeas corpus relief was denied where petitioner, an Indian residing on the Flathead Reservation, claiming constitutional violations failed to exhaust state remedies in accordance with 28 U.S.C. §2254(b). Since a lack of state jurisdiction over the petitioner could also have been tested by state habeas corpus proceedings but was not, the habeas corpus complaint for lack of state jurisdiction was also denied. Campbell v. Crist, 36 St. Rep. 1690 (1979) (apparently not reported in Federal Supplement).

Effect of Section: This section constitutes valid and binding consent of people of Montana pursuant to federal statute to assume jurisdiction over crimes committed by or against Indians on Indian territory. State ex rel. McDonald v. District Court, 159 M 156, 496 P2d 78 (1972), followed in St. v. Haskins, 269 M 202, 887 P2d 1189, 51 St. Rep. 1474 (1994). See also St. v. Spotted Blanket, 1998 MT 59, 288 M 126, 955 P2d 1347, 55 St. Rep. 253 (1998).

Legislative Action Sufficient to Establish Jurisdiction: Federal statute providing for state jurisdiction over offenses committed by or against Indians on Indian reservations did not require constitutional amendment for valid and binding consent of people of Montana to assume jurisdiction; where Congress retained power to reassume federal jurisdiction through repeal of same statute, state legislative action was sufficient to establish jurisdiction. State ex rel. McDonald v. District Court, 159 M 156, 496 P2d 78 (1972). See also St. v. Spotted Blanket, 1998 MT 59, 288 M 126, 955 P2d 1347, 55 St. Rep. 253 (1998).

Tribal Council Action: Failure of Legislature to take affirmative legislative action concerning either civil or criminal jurisdiction over Indians on Blackfeet Reservation, as permitted under 28 U.S.C. §1360, was not remedied by unilateral Tribal Council action, which provided that tribal and state courts have concurrent jurisdiction in all civil suits against members of Blackfeet tribe. Kennerly v. District Court, 400 US 423, 27 L Ed 2d 507, 91 S Ct 480 (1971), distinguished in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973).

Attorney General's Opinions

State Nepotism Law Applicable to School Districts on Reservations — Prosecution of Tribal Members — Contracts Voidable: Montana's nepotism statutes apply to members of public school boards for districts lying wholly or partially within an Indian reservation. Criminal prosecution of Indian members for nepotism law violations with respect to decisions made and implemented wholly on-reservation may be initiated only in federal court by the United States pursuant to 18 U.S.C. 13, except for violations occurring on the Flathead Indian Reservation. Furthermore, contracts entered into in contravention of the nepotism statutes are voidable. 43 A.G. Op. 23 (1989).

Collateral References

42 C.J.S. Indians §§5, 54, 56 through 59, 63, 64.

2-1-302. Resolution of Indian tribes requesting state jurisdiction — governor's proclamation — consent of county commissioners.

Case Notes

No Jurisdiction by State Over Crimes Committed Against Indians by Non-Indians Within Reservation: Where the defendants, two non-Indians, were charged with the theft of a calf belonging to an enrolled member of the Crow Indian Tribe and the theft occurred on a reservation, the District Court did not err in dismissing the charges against the defendants. As expressed in the dicta in St. v. Youpee, 103 M 86, 61 P2d 832 (1936), the general rule, to be followed by this state, is that states have no jurisdiction over crimes against Indians by non-Indians committed within the reservations. This is true unless the enrolled Indians have accepted state jurisdiction, and as no tribal consent had been given in this case by the Crow Tribe, the charges arising from the theft of the Indian's calf were properly dismissed. St. v. Greenwalt, 204 M 196, 663 P2d 1178, 40 St. Rep. 767 (1983).

Jurisdiction — Highway Tort Cases: A vehicle driven by Larrivee, a non-Indian, collided with a vehicle driven by Morigeau, a member of the Confederated Salish and Kootenai Tribes. The accident occurred on Montana 200 located within the exterior boundaries of the Flathead Indian Reservation. Larrivee brought an action against Morigeau in state District Court. Morigeau argued that the state court lacked subject matter jurisdiction. The court found that Montana assumed partial jurisdiction over the Flathead Reservation pursuant to Public Law 280. Tribal Ordinance 40-A consented to the assumption by the state of jurisdiction over certain subjects, including jurisdiction over the "operation of motor vehicles upon . . . highways". The court found this to include civil jurisdiction in highway tort cases. Larrivee v. Morigeau, 184 M 187, 602 P2d 563 (1979), certiorari denied, 445 US 964, 64 L Ed 2d 240, 100 S Ct 1653 (1980).

2-1-304. Rights, privileges, and immunities reserved to Indians.

Case Notes

Land Below High-Water Mark of Flathead Lake Tribal Property Not Subject to Distribution by Estate: When she died, Hobbs owned property on the south shore of Flathead Lake. Her will designated that three nieces divide one parcel of about 1 acre above the high-water mark and that a fourth niece and her husband, the Conrads, receive an adjacent 1.9-acre parcel from the high-water mark inland. A survey established the boundary between the parcels, but did not include any land below the high-water mark to the meander line of the lake. The District Court approved the survey, distributed the property, and closed the estate. The parties later became involved in a dispute over zoning and building regulations. The personal representative petitioned to reopen the estate for the purpose of filing a corrected survey and to distribute the portion of land lying below the high-water mark to the meander line, thereby increasing the acreage of both lots. The personal representative presented exhibits and affidavits verifying that Hobbs had paid taxes on the land out to the meander line. The Conrads objected on grounds that Hobbs's will specifically left land above the high-water mark and that because the estate did not own the land below the high-water mark, it could not be distributed to anyone. Nevertheless, the District Court approved the corrected survey and distributed the land below the high-water mark to the meander line between the heirs. The Supreme Court noted that the bed and banks of Flathead Lake within Indian reservation boundaries are held by the United States in trust for the tribes, and that any private title to Flathead Lake shore property extends only to the high-water mark. The District Court erroneously distributed the land below the high-water mark to the meander line, because the court did not have jurisdiction to distribute the tribal trust property. The estate could not distribute property that it did not own. In re Estate of Hobbs, 2002 MT 85, 309 M 308, 46 P3d 594 (2002), following Mont. Power Co. v. Rochester, 127 F2d 189 (9th Cir. 1942), and Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F2d 951 (9th Cir. 1982).

Non-Indian Owner of Pipeline Located on Reservation Without Standing to Raise Federal Preemption Issue of Tribal Self-Government: A non-Indian company that owned a pipeline on a reservation argued that the state's tax interfered with the tribes' rights of self-government and was therefore preempted by the federal constitution. The Supreme Court ruled that while the company had standing by virtue of its taxpayer status to challenge the property tax, it did not have a sufficient personal stake in the self-government interests of the tribes to argue the federal preemption issue of tribal self-government. N. Border Pipeline Co. v. St., 237 M 117, 772 P2d

829, 46 St. Rep. 668 (1989), followed in Hagener v. Wallace, 2002 MT 109, 309 M 473, 47 P3d 847 (2002).

Preemption Clause Not Violated by State Tax on Pipeline Located on Reservation and Owned by Non-Indian Company: The state sought to collect property tax from a non-Indian company that owned a pipeline located on a reservation. The pipeline was on trust property held by the federal government for the benefit of several tribes. The Supreme Court found that the specific federal regulations cited by the company represented only slight federal and tribal interests and did not of themselves preempt the state's tax. The court also found that much of the revenue generated by the tax was used by the state to fund education of tribal members, to maintain roads, and to undertake certain law enforcement duties for some crimes by non-Indians on the reservation and for any vandalism to the pipeline. The court ruled that the state's interest in funding the school districts and in providing local services outweighed the federal or tribal interests asserted by the company. N. Border Pipeline Co. v. St., 237 M 117, 772 P2d 829, 46 St. Rep. 668 (1989).

Property Tax on Pipeline Owned by Non-Indians and Located on Reservation Not in Violation of Federal Due Process Clause or Indian Commerce Clause: The Supreme Court ruled that the property tax at issue was assessed based on the value of the pipeline found within the state and that the revenue obtained was used to provide governmental services to the tribes and the pipeline owner, thus creating a sufficient nexus to withstand a due process challenge. The court went on to find that the allegations of the pipeline owner that the tax would create future injury to tribal revenue did not rise to the level of undue discrimination or burden on Indian enterprise and therefore did not render the tax void under the Indian commerce clause. N. Border Pipeline Co. v. St., 237 M 117, 772 P2d 829, 46 St. Rep. 668 (1989).

Right to Intervene in Adoption of Indian Child — State Commitment to Indian Child Welfare Act: Prior to birth, Nellie Silk, paternal aunt of M.E.M., expressed an interest in caring for the child because she was aware of the parents' problems with parenting; however, after the child was born he was placed in foster care by the Hill County Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). Upon learning of the placement, Silk wrote to the Department requesting custody. The Department responded that placement with Silk would be inappropriate because of Department efforts to reintegrate the family, but that Silk would be considered if adoption were to occur. After parental rights were terminated (see In re M.E.M., 209 M 192, 679 P2d 1241, 41 St. Rep. 636 (1984)), Silk was not informed of the proceedings, of M.E.M.'s availability for adoption, or of M.E.M.'s preadoptive placement with a non-Indian family. Silk's subsequent petition for adoption and motion to intervene were denied by the District Court. On appeal, the Supreme Court found that Silk had an interest in adoption stemming from the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §1901, et seq., and that the state had a strong and independent commitment to the principles embodied in the ICWA. Silk also had a right to intervene under Rule 24(a), M.R.Civ.P. (Title 25, ch. 20), and although the District Court had ruled that her motion was not timely, the Supreme Court held that the motion must be granted in light of the fact that she was kept in ignorance and could not have been more diligent or earlier in her petition or motion. In re M.E.M., 223 M 234, 725 P2d 212, 43 St. Rep. 1684 (1986). See also In re K.H. & K.L.E., 1999 MT 128, 294 M 466, 981 P2d 1190, 56 St. Rep. 515 (1999).

Determination of Heirs of Intestate Indian Decedent: A determination, pursuant to 25 U.S.C. §372, by the Secretary of the Interior of the legal heirs of an Indian who dies intestate while holding an allotment of land before the expiration of the trust period is final and conclusive. Crawford v. Andrus, 472 F. Supp. 853 (D.C. Mont. 1979).

Jurisdiction for Purpose of State Income Tax: The state lacks jurisdiction to tax income derived on a reservation by an Indian, even though the Indian is not an enrolled member of the tribe on whose reservation he is living. LaRoque v. St., 178 M 315, 583 P2d 1059 (1978), followed in St. v. Bird, 252 M 438, 829 P2d 941, 49 St. Rep. 339 (1992), with regard to lack of state authority to impose individual income taxes on enrolled tribal member residing within reservation who was employed mining coal in "ceded strip", and Crow Tribe v. Mont., 650 F2d 1104 (9th Cir. 1981), in accord with Crow Tribe v. Mont., 819 F2d 895 (9th Cir. 1987).

Collateral References

42 C.J.S. Indians §§49, 51.

Aboriginal title to Indian lands, proof and extinguishment. 41 ALR Fed. 425.

2-1-305. Indian culture protected.

Law Review Articles

An American Tradition: The Religious Persecution of Native Americans, Rhodes, 52 Mont. L. Rev. 13 (1991).

Indian Culture and Spirituality: Some Reflections on the Shaping and Sharing of Cultural Values, Burr, 7 St. Thomas L. Rev. 473 (1995).

2-1-306. Withdrawal of consent to state jurisdiction.

Compiler's Comments

1993 Amendment: Chapter 542 substituted present section regarding withdrawal of consent to state jurisdiction for former section that read: "Any Indian tribe, community, band, or group of Indians that may consent to come within the provisions of this part may within 2 years from the date of the governor's proclamation withdraw their consent to be subject to the criminal and/or civil jurisdiction of the state of Montana, by appropriate resolution, and within 60 days after receipt of such resolution, the governor shall issue a proclamation to that effect." Amendment effective April 24, 1993.

Preamble: The preamble attached to Ch. 542, L. 1993, provided: "WHEREAS, the Confederated Salish and Kootenai Tribes seek state approval to withdraw tribal consent and to partially retrocede from Public Law 280 jurisdiction on the Flathead Reservation in certain defined areas; and

WHEREAS, the State of Montana finds it appropriate at this time to consent to the resumption by the Confederated Salish and Kootenai Tribes of jurisdiction in those areas specifically provided for in this legislation.

THEREFORE, the Legislature of the State of Montana does hereby adopt this legislation to approve partial retrocession by the Confederated Salish and Kootenai Tribes."

2-1-307. Service of process.

Case Notes

Arrest of Indian on the Reservation Valid if Crime Committed off the Reservation: Petitioner, a Crow Indian, was arrested within the exterior boundaries of the Crow Reservation for a crime committed off the Reservation. The court followed State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1394 (1976), which held that the arrest of an Indian on a reservation for a crime committed off the reservation was a valid arrest. In re Little Light, 183 M 52, 598 P2d 572 (1979).

Part 4
Federal Mandates Act

Part Compiler's Comments

Severability: Section 9, Ch. 385, L. 1995, was a severability clause.

Effective Date: Section 10, Ch. 385, L. 1995, provided: "[This act] [2-1-401 through 2-1-408] is effective on passage and approval." Approved April 12, 1995.

Source: Part 4 is based on Title 24, Article 78, Colorado Revised Statutes.

CHAPTER 2
STANDARDS OF CONDUCT

Part 1
Code of Ethics

Part Case Notes

State Auditor as Member of Hail Board — No Conflict of Interest: The State Auditor as ex officio Commissioner of Insurance is required to approve the form of all hail insurance policies issued in Montana and at the same time is required by law to sit as a member of the Board of Hail Insurance (Hail Board). The State Auditor is not compensated for service on the Hail Board, nor is there any compensation from any source for such duties. Thus, the Supreme Court held that the State Auditor as ex officio Commissioner of Insurance is not financially interested in the Hail Board within the meaning of 2-2-102. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

Part Attorney General's Opinions

Public School District Trustee as Private School Employee — No Conflict of Interest: There is no direct link between being employed by a private school and acting as a trustee for a public school district. The mere fact that a school trustee is employed by a private school located in the public school district results in no inherent conflict of interest, ethical problem, or breach of fiduciary duty. 42 A.G. Op. 44 (1987).

City Employee as Councilman — No Conflict of Interest: There is no inherent conflict of interest when a city employee is also an elected city councilman in a council-mayor form of municipal government. The opportunity to commit the breach of a fiduciary duty does not constitute a conflict of interest. 41 A.G. Op. 81 (1986).

Prohibitions and Penalties Not Exclusive: The prohibitions and penalties of this part do not preempt prior statutory provisions that may make other activity by public employees unlawful such as 2-2-201, regarding public contracts, and the criminal provisions for official misconduct, 45-7-401, especially the provisions for knowingly performing an act prohibited by law. 37 A.G. Op. 104 (1978).

Part Law Review Articles

Ethics in Government, Adams, Barber, & Herrera, 30 Am. Crim. L. Rev. 617 (1993).

Conflicts of Interest, Bledsoe, Greenlees, Hoover, & Sullivan, 28 Am. Crim. L. Rev. 407 (1991).

A Model Ethical Code for Appointed Municipal Officials, Larsen, 9 Hamline J. Pub. L. & Pol'y 395 (1989).

A Symposium on Ethics in Government, 16 Hofstra L. Rev. 287 (1988).

Part Collateral References

Incompatibility, under common-law doctrine, of office of state legislator and position or post in local political subdivision. 89 ALR 2d 632.

2-2-102. Definitions.

Compiler's Comments

2001 Amendment: Chapter 122 inserted definitions of local government and special district; in definition of public employee at end of (a) deleted "or any subdivision of the state" and inserted (b) relating to local government employees; in definition of public officer substituted reference to elected officer of a local government for elected officer of any subdivision of the state; and made minor changes in style. Amendment effective October 1, 2001.

1995 Amendments: Chapter 18 in definition of public officer substituted "The term includes an" for "or any"; and made minor changes in style.

Chapter 562 in definition of compensation, after "money", deleted "thing of value"; deleted definitions of employee and financial interest (see 1995 Session Law for text); inserted definitions of gift of substantial value, private interest, and public employee; in definition of public officer, after "state officer", deleted "except a legislator or member of the judiciary"; in definition of state agency, in (a)(v) after "state government", deleted "except the courts" and inserted (b) excluding the Judicial Branch; and made minor changes in style. Amendment effective July 1, 1995.

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

Case Notes

Communications to Parole Officer Not Privileged: After his arrest for burglary, the defendant called his parole officer and told him of the crime. The defendant's motion to suppress the parole officer's testimony was denied on the basis that the parole officer was not an elected officer or director and therefore communications made to him were not subject to a statutory privilege. The Supreme Court also held that the probative value of the evidence outweighed the relatively slight prejudicial impact the evidence carried in showing the jury that the defendant had been convicted of a prior crime. St. v. Higareda, 238 M 130, 777 P2d 302, 46 St. Rep. 1146 (1989).

State Auditor as Member of Hail Board — No Conflict of Interest: The State Auditor as ex officio Commissioner of Insurance is required to approve the form of all hail insurance policies issued in Montana and at the same time is required by law to sit as a member of the Board of Hail Insurance (Hail Board). The State Auditor is not compensated for service on the Hail Board, nor is there any compensation from any source for such duties. Thus, the Supreme Court held that

the State Auditor as ex officio Commissioner of Insurance is not financially interested in the Hail Board within the meaning of 2-2-102. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

Attorney General's Opinions

Sheriff Authorized to Accept Compensation From Federal Agency for Performance of Services Outside Official Duties: A Sheriff may receive compensation from a federal agency under the terms of a cooperative law enforcement agreement without violating any Montana statutory or constitutional provision, so long as the services rendered by the Sheriff fall outside the scope of the Sheriff's official duties. 49 A.G. Op. 12 (2001).

Disclosure Voluntary: Disclosure of a potential conflict of interest by a local government official is purely voluntary and may be done prior to taking any official action, as defined in 2-2-102. 40 A.G. Op. 28 (1983).

Elected City Council Member — Public Officer: The definition of "public officer" in this section includes an elected member of a City Council. 38 A.G. Op. 103 (1980).

County Commissioners — Fiduciary Duty: A County Commissioner who is a voting member of the board of an organization that actually receives county contract funds does not have a prohibited conflict of interest under 7-5-2106 unless the Commissioner receives a personal pecuniary or proprietary benefit from the contract. He does, however, breach his fiduciary duty under 2-2-125 (now repealed) by acting officially to award county contracts to the organization unless he complies with the voluntary disclosure requirements of 2-2-125 (now repealed). 38 A.G. Op. 55 (1979).

County Commissioners — Prohibited Interests: A County Commissioner who is a voting member of a board that channels county contract funds to other organizations but does not itself derive any economic benefit from the contract does not have a prohibited interest in the contract under 7-5-2106 and does not breach his fiduciary duty under 2-2-125 (now repealed) by acting officially to allocate funds to that board for subsequent disbursement. 38 A.G. Op. 55 (1979).

Discretionary Acts of Coroner/Mortician: A County Coroner who is also a mortician violates the provisions of 2-2-125 (now repealed) if he directs that a body be taken to a funeral parlor in which he has a substantial financial interest, unless he has no discretion to select the funeral parlor. 37 A.G. Op. 104 (1978), overruling 35 A.G. Op. 92 (1974).

Collateral References

Abstention from voting of member of municipal council present at session as affecting requisite voting majority. 63 ALR 3d 1072.

2-2-103. Public trust — public duty.

Compiler's Comments

2001 Amendment: Chapter 122 at end of (4)(a)(i) and (4)(a)(ii) deleted reference to 2-2-137; and made minor changes in style. Amendment effective October 1, 2001.

1995 Amendment: Chapter 562 in (1) and (2), before "employees" or "employee", inserted "public"; in (2) substituted "the person's public" for "his fiduciary", after "of the state" deleted "as a trustee of property, is liable to a beneficiary under 72-34-105", and substituted "is subject to the penalties provided in this part" for "shall suffer such other liabilities as a private fiduciary would suffer" and deleted last two sentences that read: "The county attorney of the county where the trust is violated may bring appropriate judicial proceedings on behalf of the people. Any moneys collected in such actions shall be paid to the general fund of the aggrieved agency"; in (3) substituted "public duty" for "fiduciary duty" and substituted "must be avoided" for "is not, as such, a violation of fiduciary duty"; inserted (4) regarding enforcement; and made minor changes in style. Amendment effective July 1, 1995.

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

1989 Amendment: In first sentence of (2) substituted "72-34-105" for "72-20-203(2)".

2-2-104. Rules of conduct for public officers, legislators, and public employees.

Compiler's Comments

1997 Amendment: Chapter 243 inserted (3)(b)(ii) providing exception for payment for supervision by public school teacher; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 562 in (1), in introductory clause, substituted "the actor's public" for "his fiduciary" and before "employee" inserted "public"; inserted (3) regarding receipt of salaries from two positions; and made minor changes in style. Amendment effective July 1, 1995.

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

Attorney General's Opinions

Sheriff Authorized to Accept Compensation From Federal Agency for Performance of Services Outside Official Duties: A Sheriff may receive compensation from a federal agency under the terms of a cooperative law enforcement agreement without violating any Montana statutory or constitutional provision, so long as the services rendered by the Sheriff fall outside the scope of the Sheriff's official duties. 49 A.G. Op. 12 (2001).

Acceptance of Severance Pay by Public Service Commissioner Not Breach of Ethics: Severance pay negotiated as part of a negotiated union contract agreement and supported by consideration, such as surrender of accrued seniority and entitlement to reemployment, does not constitute a gift within the meaning of this section, nor does the termination of employment and acceptance of severance pay constitute a substantial financial transaction for private business purposes within the meaning of 2-2-121. Therefore, a Public Service Commissioner did not violate the code of ethics for public officials and employees by temporarily reactivating and then terminating his employment with a railroad company in order to become eligible to receive severance pay negotiated between the railroad and the collective bargaining unit to which the Commissioner belonged. Notice to the other Commissioners was adequate to meet the terms of 2-2-121(2)(f). The action did not constitute the kind of private relationship contemplated by the code of ethics that would threaten the integrity of the position because the situation presented no opportunity to use the influence of the official position to further personal gain. 45 A.G. Op. 10 (1993).

County Property — Acquisition by Employee: The code of ethics prohibits a county employee from using confidential information acquired in the course of his official duties to further his economic interest, but it does not prohibit him from bidding on county property being sold at public auction or limit the employee's ability to purchase tax deeds. 37 A.G. Op. 104 (1978).

2-2-105. Ethical requirements for public officers and public employees.

Compiler's Comments

1995 Amendment: Chapter 562 throughout section, before "employee", inserted "public" and substituted "may not" for "should not"; in (1) substituted "requirements" for "principles", after "rules of conduct, and" deleted "do not constitute", substituted "constitute a breach" for "as such", and inserted "and public duty"; in (2), at beginning, inserted exception clause; in (3), after "within", inserted "12"; inserted (4) regarding disclosure of conflict of interest; in (5), near end, substituted "personal" for "financial"; and made minor changes in style. Amendment effective July 1, 1995.

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

Case Notes

Showing of Irrevocably Closed Mind as Proof of Prejudice by Administrative Decisionmaker: Madison River R.V. Ltd. (RV) sought to build a recreational vehicle park in Ennis. Prior to a hearing before the Ennis Town Council, RV requested in writing that one of the council members recuse himself, based on his alleged bias against the project. The request was denied without objection by the other council members, and RV's application for the park was also denied. On appeal, RV contended that the council member's participation in the council's deliberations was error, citing the principle that one who makes decisions in a judicial or quasi-judicial capacity must be free from bias. However, no authority was cited that the principle applies to elected members of a city council. Pursuant to Fed. Trade Comm'n v. Cement Institute, 333 US 683, 92 L Ed 1010, 68 S Ct 793 (1948), in order to prevail on a claim of prejudice or bias against an administrative decisionmaker, the petitioner must show that the decisionmaker had an irrevocably closed mind on the subject under investigation or adjudication. Here, RV failed to establish that the council member's mind was irrevocable closed. The District Court's

determination that the town council was not required to disqualify the member from voting and that the council's decision should not be vacated because of its failure to disqualify the member in question was affirmed. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

Attorney General's Opinions

Secretarial Services for Private Practice of County Attorney: A secretary employed by the county to assist a County Attorney may work on the County Attorney's private business during time when the secretary's services are not needed on county business. The County Attorney must account for the time that the secretary spends on private business and reimburse the county for any county-compensated time spent on the County Attorney's private business. A claim by a County Attorney for secretarial services reasonably required for the conduct of the County Attorney's official duties is a legitimate claim against the county. The reasonableness of the claim is a question of fact vested in the sound discretion of the county governing body. 46 A.G. Op. 10 (1995). See also 46 A.G. Op. 20 (1996), in which the Attorney General held that a County Attorney may not compel the County Commissioners to authorize the hiring as a county employee of a legal secretary for the County Attorney absent a showing that any other arrangement would prevent the County Attorney from performing the minimum statutory duties.

2-2-106. Disclosure.

Compiler's Comments

2003 Amendment: Chapter 114 in (1)(a), (1)(b), and (4) after "commissioner" inserted "of political practices". Amendment effective October 1, 2003.

1995 Amendment: Chapter 562 in (1)(a), in first sentence, substituted "department director" for "official elect" and inserted second sentence regarding filing under subsection (1)(b) or (1)(c); inserted (1)(b) and (1)(c) requiring business disclosure statements; in (2)(a), after "the individual", deleted "and each member of such individual's immediate family"; inserted (2)(b) through (2)(e) regarding information contained in business disclosure statement; at end of (2)(e) deleted sentence that read: "For this purpose "immediate family" includes the individual's spouse and minor children only"; in (3) inserted "as provided in subsection (1)"; and made minor changes in style. Amendment effective July 1, 1995.

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

Administrative Rules

ARM 44.10.109 Financial disclosure by elected officials.

2-2-111. Rules of conduct for legislators.

Compiler's Comments

2003 Amendment: Chapter 327 inserted (3) relating to fees from state agencies or political subdivisions; and made minor changes in style. Amendment effective April 15, 2003.

1995 Amendment: Chapter 562 in introductory clause substituted "the legislator's public" for "his fiduciary"; and made minor changes in style. Amendment effective July 1, 1995.

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

2-2-112. Ethical requirements for legislators.

Compiler's Comments

1995 Amendment: Chapter 562 in (1) substituted "requirements" for "principles", substituted "rules for" for "guides to", after "conduct, an" deleted "do not constitute", and substituted "constitute a breach" for "as such"; inserted (2) regarding participation by legislators and disclosure of conflicts; in (3), near beginning of first sentence, substituted "private" for "financial", substituted "give rise to an appearance of impropriety as to the legislator's influence, benefit, or detriment in regard to" for "and substantially affected by", substituted "the legislator shall disclose" for "he should consider disclosing or eliminating", substituted "prior to

participating in" for "or abstaining from", and inserted "as provided in subsections (2) and (5) and the rules of the legislature" and in second sentence substituted "shall" for "should"; inserted (3)(d) regarding pecuniary interest or other benefit; in (4), after "legislation", inserted "or legislative duties" and substituted "membership of a profession, occupation, or class" for "entire membership of a class"; in (5) amended first sentence to require rather than allow disclosure of interest creating a conflict and before "rules" deleted "joint" and inserted last two sentences regarding disclosure by legislator who is member of profession, occupation, or class; and made minor changes in style. Amendment effective July 1, 1995.

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

2-2-121. Rules of conduct for public officers and public employees.

Compiler's Comments

2003 Amendment: Chapter 58 in (4) near middle of introductory clause and in (5) near middle of first sentence after "organization" inserted "other than an organization or association of local government officials"; and made minor changes in style. Amendment effective February 28, 2003.

2001 Amendment: Chapter 122 in (3)(a) substituted "to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue" for "for any campaign activity persuading or affecting a political decision"; in (3)(a)(ii) substituted references to an officer for references to an official; inserted (3)(b) relating to what is properly incidental to another activity required or authorized by law; inserted (3)(c) allowing expression of personal political views; in (4) at beginning substituted "public officer or public employee" for "state employee" and throughout subsection substituted references to public officer or public employee for references to employee; in (4)(a) after "employing" deleted "state"; at end of (4)(b) after "state" inserted "or local government"; in (5) at beginning substituted "public officer or public employee" for "state officer or state employee" and throughout subsection substituted references to public officer or public employee for references to officer or employee; inserted (8) concerning local governing body member's official action and disclosure; deleted former (8) that read: "(8) A person who purposely or knowingly violates this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $50 or more than $1,000, by imprisonment in the county jail for not more than 6 months, or by both. A civil proceeding under 2-2-136 or 2-2-144 does not preclude an action under this subsection"; and made minor changes in style. Amendment effective October 1, 2001.

1997 Amendment: Chapter 42 in (4)(a), after "employing", inserted "state". Amendment effective March 12, 1997.

1995 Amendment: Chapter 562 in (1) substituted "subsection (2)" for "this section" and substituted "a public" for "his fiduciary"; in (2), in two places in introductory clause, in (2)(a), and in (7) substituted "public" for "state"; in (2)(a) inserted "supplies, personnel, or funds"; inserted (3), (4), and (5) regarding rules of conduct for public or state officers or employees; in (6), after "complies with the", deleted "voluntary"; inserted (8) providing penalties; and made minor changes in style. Amendment effective July 1, 1995.

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

1991 Amendment: Inserted (2)(f) requiring a state officer or employee soliciting or accepting employment or engaging in negotiations or meetings regarding employment with a person whom he regulates to first notify his supervisor and Director in writing.

Case Notes

Conspiracy Claim Against Lawyer Representing Supreme Court — The "Justinhoard" Thesis: Plaintiff sued a state government executive branch attorney because the attorney had represented four state Supreme Court Justices in another action in which plaintiff sued the Justices. Plaintiff claimed the attorney was guilty of conspiracy, improper official action, and abuse of the principle of "justinhoard" (a principle of justice apparently developed by and unique to plaintiff). The court found the complaint and appeal from its dismissal fruitless, weightless,

needless, and senseless, stating that the cause is another of a series of proceedings by plaintiff in the state and federal courts in which he has imputed incompetence, bias, and conspiracy to judges and parties involved in his court actions, and has subjected the judicial process to denigration. The appeal was dismissed. Lussy v. Young, 215 M 50, 695 P2d 455, 42 St. Rep. 173 (1985).

Attorney General's Opinions

Sheriff Authorized to Accept Compensation From Federal Agency for Performance of Services Outside Official Duties: A Sheriff may receive compensation from a federal agency under the terms of a cooperative law enforcement agreement without violating any Montana statutory or constitutional provision, so long as the services rendered by the Sheriff fall outside the scope of the Sheriff's official duties. 49 A.G. Op. 12 (2001).

Provision of Office Space and Equipment by County for Part-Time County Attorney: A county governing body may satisfy its obligation to provide office space for a part-time County Attorney by providing space in a county building or, if no suitable space is available, by renting office space. Use of the space for the County Attorney's private practice is allowed only through a written agreement between the county and the County Attorney leasing the use of the space for private business purposes. Alternatively, the governing body may allow a claim by the County Attorney for the rental of office space needed to conduct the county's business if suitable office space is not available in county buildings. A county governing body may satisfy its obligation to provide necessary equipment for a part-time County Attorney by providing the use of the equipment owned by the county or, if no suitable equipment is available, by renting equipment. Use of the equipment for the County Attorney's private practice is allowed only through a written agreement between the county and the County Attorney leasing the use of the equipment for private business purposes. 46 A.G. Op. 10 (1995), followed in 46 A.G. Op. 20 (1996).

Secretarial Services for Private Practice of County Attorney: A secretary employed by the county to assist a County Attorney may work on the County Attorney's private business during time when the secretary's services are not needed on county business. The County Attorney must account for the time that the secretary spends on private business and reimburse the county for any county-compensated time spent on the County Attorney's private business. A claim by a County Attorney for secretarial services reasonably required for the conduct of the County Attorney's official duties is a legitimate claim against the county. The reasonableness of the claim is a question of fact vested in the sound discretion of the county governing body. 46 A.G. Op. 10 (1995). See also 46 A.G. Op. 20 (1996), in which the Attorney General held that a County Attorney may not compel the County Commissioners to authorize the hiring as a county employee of a legal secretary for the County Attorney absent a showing that any other arrangement would prevent the County Attorney from performing the minimum statutory duties.

Acceptance of Severance Pay by Public Service Commissioner Not Breach of Ethics: Severance pay negotiated as part of a negotiated union contract agreement and supported by consideration, such as surrender of accrued seniority and entitlement to reemployment, does not constitute a gift within the meaning of 2-2-104, nor does the termination of employment and acceptance of severance pay constitute a substantial financial transaction for private business purposes within the meaning of this section. Therefore, a Public Service Commissioner did not violate the code of ethics for public officials and employees by temporarily reactivating and then terminating his employment with a railroad company in order to become eligible to receive severance pay negotiated between the railroad and the collective bargaining unit to which the Commissioner belonged. Notice to the other Commissioners was adequate to meet the terms of subsection (2)(f) of this section. The action did not constitute the kind of private relationship contemplated by the code of ethics that would threaten the integrity of the position because the situation presented no opportunity to use the influence of the official position to further personal gain. 45 A.G. Op. 10 (1993).

Dual Trusteeship in Volunteer Fire District and Fire Service Area — Not Conflict of Interest: Trusteeship in a volunteer fire department is not incompatible with simultaneous trusteeship in a fire service area. Volunteer fire departments and fire service areas are separate governmental entities. Neither owes its creation or continued existence to the other, and each lacks any form of supervisory authority with respect to the personnel of the other. There is no indication that dual trusteeship imposes an insurmountable obstacle to the proper discharge of the duties attendant in trusteeship; therefore, concurrent trusteeship of both a volunteer fire department and a fire service area does not constitute a conflict of interest. 43 A.G. Op. 47 (1989).

County Commissioners — Prohibited Interests: A County Commissioner who is a voting member of a board that channels county contract funds to other organizations but does not itself derive any economic benefit from the contract does not have a prohibited interest in the contract under 7-5-2106 and does not breach his fiduciary duty under 2-2-125 (now repealed) by acting officially to allocate funds to that board for subsequent disbursement. 38 A.G. Op. 55 (1979).

Coroner Who Is a Mortician:

A County Coroner who is also a mortician or an employee of a funeral home is not automatically in violation of 2-2-125 (now repealed). However, the mortuary with which he is affiliated may not receive compensation for any services related to the County Coroner's official duties. This does not apply if the mortuary is the only mortuary in the county. 37 A.G. Op. 179 (1978).

A County Coroner who is also a mortician violates the provisions of 2-2-125 (now repealed) if he directs that a body be taken to a funeral parlor in which he has a substantial financial interest, unless he has no discretion to select the funeral parlor. 37 A.G. Op. 104 (1978), overruling 35 A.G. Op. 92 (1974).

Deputy Sheriff: A Deputy Sheriff may accept employment as a security guard without violating 2-2-125 (now repealed) because the latter position does not involve a financial transaction with a person he inspects or supervises. 37 A.G. Op. 104 (1978).

Personal Transaction With Person Inspected: A member of a county board breaches a fiduciary duty if he enters into a substantial financial transaction for personal business with a person he inspects or supervises in the course of his official duties. 37 A.G. Op. 104 (1978).

Who Voluntary Disclosure Excuses: The voluntary disclosure provisions of this section serve to excuse an act that would otherwise be a violation of the code of ethics only if the individual involved is a member of the local governing body, a state department head, or a member of a state quasi-judicial or rulemaking board. 37 A.G. Op. 104 (1978).

2-2-131. Disclosure.

Compiler's Comments

1995 Amendment: Chapter 562 near beginning of first sentence, before "employee", inserted "public", substituted "shall" for "may", substituted "public" for "his fiduciary", and inserted "including the award of a permit, contract, or license" and in second sentence substituted "private" for "his financial"; and made minor changes in style. Amendment effective July 1, 1995.

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

Attorney General's Opinions

Disclosure — Abstinence From Voting — When Contract Voidable: Where a local government official has a conflict of interest, such as a substantial interest in a business bidding on a local government contract, the official must comply with the disclosure and abstinence from voting provisions of 2-2-125 (now repealed) and 2-2-131, even though the interest may be permissible under the exceptions contained in 2-2-201. If the interest is not permissible under the exceptions listed in 2-2-201, the contract is voidable and abstinence from voting will not exonerate the official. 40 A.G. Op. 28 (1983).

Disclosure Voluntary: Disclosure of a potential conflict of interest by a local government official is purely voluntary and may be done prior to taking any official action, as defined in 2-2-102. 40 A.G. Op. 28 (1983).

County Commissioners — Fiduciary Duty: A County Commissioner who is a voting member of the board of an organization that actually receives county contract funds does not have a prohibited conflict of interest under 7-5-2106 unless the Commissioner receives a personal pecuniary or proprietary benefit from the contract. He does, however, breach his fiduciary duty under 2-2-125 (now repealed) by acting officially to award county contracts to the organization unless he complies with the voluntary disclosure requirements of 2-2-125 (now repealed). 38 A.G. Op. 55 (1979).

Who Voluntary Disclosure Excuses: The voluntary disclosure provisions of this section serve to excuse an act that otherwise would be a violation of the code of ethics only if the individual involved is a member of the local governing body, a state department head, or a member of a state quasi-judicial or rulemaking board as permitted by 2-2-121 and 2-2-125 (now repealed). Except in those two instances, this section does not relieve a public officer or employee of his obligations

of breach of fiduciary duty other than to show good faith on the part of the person disclosing. 37 A.G. Op. 104 (1978).

Collateral References

Validity and construction of enactments requiring public officers or candidates for office to disclose financial condition and relationships. 37 ALR 3d 1338.

2-2-135. Ethics committees.

Compiler's Comments

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

Effective Date: Section 26, Ch. 562, L. 1995, provided that this section is effective July 1, 1995.

2-2-136. Enforcement for state officers, legislators, and state employees — referral of complaint involving county attorney.

Compiler's Comments

2001 Amendment: Chapter 122 in (1)(a) inserted third sentence relating to jurisdiction over complaints against a county attorney and at end substituted last sentence allowing commission to request additional information to make an initial determination for "The commissioner shall request any information necessary to make a determination from the complainant or the person who is the subject of the complaint and may issue subpoenas"; inserted (1)(b) relating to dismissals and summary decisions; in (1)(c) at beginning substituted exception clause and phrase relating to commissioner determination of potential violation for "Unless the complaint is referred to the county attorney under subsection (1)(c)"; deleted former (1)(c) that read: "(c) If it appears to the commissioner that a complaint alleges criminal conduct, the commissioner shall stay the proceedings under this section and refer the matter to the appropriate county attorney"; in (2) inserted second sentence relating to disciplinary action; in (3) substituted present language relating to a judicial review for "The decision of the commissioner may be appealed to the ethics commission as provided in 2-2-137"; in (4) in first sentence after "hearing" inserted "held under subsection (1) and records that are open for public inspection pursuant to Montana law" and near end inserted "are confidential documents and" and inserted second and third sentences relating to maintaining and waiving confidentiality; inserted (5) relating to scope of commissioner statements; and made minor changes in style. Amendment effective October 1, 2001.

1997 Amendment: Chapter 42 in (2), in first sentence after "employing", inserted "state". Amendment effective March 12, 1997.

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

Effective Date: Section 26, Ch. 562, L. 1995, provided that this section is effective July 1, 1995.

2-2-144. Enforcement for local government.

Compiler's Comments

2001 Amendment: Chapter 122 in (1) at beginning inserted reference to subsection (6); in (5)(a) inserted last sentence relating to a complaint against the county attorney; deleted former (6) that defined local government; inserted (6) relating to complaints against a county attorney if a local government review panel has not been established; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

Effective Date: Section 26, Ch. 562, L. 1995, provided that this section is effective July 1, 1995.

Part 2
Proscribed Acts Related to Contracts and Claims

2-2-201. Public officers, employees, and former employees not to have interest in contracts.

Compiler's Comments

2001 Amendment: Chapter 181 in (1) at end of first sentence inserted "if they are involved with the contract"; in definition of contract in (2)(b)(i) after "awarded" deleted "to the lowest responsible bidder or proposer" and after "competitive" substituted "procurement procedures conducted after the date of employment termination" for "bidding procedures"; inserted (2)(c) defining directly involved; deleted former (2) that read "(2) The governing body of a city, town, or county may waive the application of the prohibition contained in subsection (1) for a present or former city, town, or county officer or employee who in an official capacity does not influence the decisionmaking process or supervise a function regarding the contract in question. A governing body may grant a waiver under this subsection only after publicly disclosing the nature of the conflict at an advertised public hearing held for that purpose. In determining whether to grant a waiver, the governing body shall consider the following factors, where applicable:

(a) whether the waiver would provide to a program or project a significant benefit or an essential skill or expertise that would otherwise not be available;

(b) whether an opportunity was provided for open competitive bidding or negotiation;

(c) whether the person affected is a member of a clearly identified group of persons that is the intended beneficiary of the program or project involved in the contract; and

(d) whether the hardship imposed on the affected person or the governmental entity by prohibiting the conflict will outweigh the public interest served by avoiding the conflict"; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 28, Ch. 181, L. 2001, provided: "[This act] applies to contracts for which the contracting government entity begins the contracting process after October 1, 2001."

1993 Amendment: Chapter 322 inserted (2) establishing a process whereby a local government governing body can waive the conflict of interest provision for certain officers and employees; and made minor changes in style.

1991 Amendment: In (2)(a), after "bidder", inserted "or proposer"; and inserted (3) excluding a person involuntarily terminated from being considered a former employee. Amendment effective February 27, 1991.

1981 Amendment: Inserted exception for geographical considerations in definition of contract.

Case Notes

Goods Bought and Consumed in City: Contracts for purchase of goods by city from corporation of which members of City Council were employees or officials are voidable rather than void and thus cannot be avoided without restoring the consideration or otherwise doing equity. Grady v. Livingston, 115 M 47, 141 P2d 346 (1943).

Suit to Recover Purchase Price of Goods Bought and Consumed: City which kept and consumed goods purchased by it in face of fact that they were purchased under voidable contract was obligated to return the merchandise or pay reasonable value thereof, and it could not, after consuming the goods and being unable to restore them, sue and recover money paid for them. Grady v. Livingston, 115 M 47, 141 P2d 346 (1943).

Attorney General's Opinions

Contracts — Definition: As used in this section, "contract" includes only those contracts to which public entities are parties and does not include contractual undertakings entered into between nonpublic entities or persons such as construction subcontracts. This is so even if a state or local official is a major shareholder of a corporation subcontracting with a prime contractor on a government project. 40 A.G. Op. 32 (1984).

Disclosure — Abstinence From Voting — When Contract Voidable: Where a local government official has a conflict of interest, such as a substantial interest in a business bidding on a local government contract, the official must comply with the disclosure and abstinence from voting provisions of 2-2-125 (now repealed) and 2-2-131, even though the interest may be permissible under the exceptions contained in 2-2-201. If the interest is not permissible under the exceptions

listed in 2-2-201, the contract is voidable and abstinence from voting will not exonerate the official. 40 A.G. Op. 28 (1983).

Definitions — Incorporation: Since the Legislature is presumed not to perform useless acts, the definitions of "be interested in" and "contract" contained in 2-2-201 are incorporated into and are applicable to 7-5-2106 and 7-5-4109, which relate to the same subject matter, conflicts of interest for local government officials. 40 A.G. Op. 28 (1983).

Commissioner Eligibility: A tenant in a housing authority is ineligible to serve as a commissioner of the housing authority. 37 A.G. Op. 110 (1978).

County Property — Acquisition by Employees: The code of ethics (Title 2, ch. 2, part 1) prohibits a county employee from using confidential information acquired in the course of his official duties to further his economic interest, but it does not prohibit him from bidding on county property being sold at public auction or limit the employees' ability to purchase tax deeds. 37 A.G. Op. 104 (1978).

Discretionary Acts of Coroner/Mortician: A County Coroner who is also a mortician violates the provisions of 2-2-125 (now repealed) if he directs that a body be taken to a funeral parlor in which he has a substantial financial interest, unless he has no discretion to select the funeral parlor. 37 A.G. Op. 104 (1978), overruling 35 A.G. Op. 92 (1974).

School Trustees — Conflict of Interest: It is unlawful for a corporate business in which a school board trustee is a minor stockholder to furnish supplies for the operation and maintenance of the school. 37 A.G. Op. 78 (1977).

Board of Housing — Conflicts of Interest: Although no violation of this section was found, members of Board of Housing (who were also bank officers) would come within this section's prohibitions if the Board were to contract with the institutions the members were associated with. 37 A.G. Op. 2 (1977).

Scope of Prohibition: All state officers, employees, and members of government may enter into contracts with the state if the contract does not conflict with the prohibitions of this section or prohibitions of similar sections relating to contracts with a particular agency, board, or department. 34 A.G. Op. 46 (1972).

General Prohibition — Not Applicable When Specific Prohibition Applies: This section is a general statute applying to contracting in all levels of government except when a special statute has been enacted, such as that regulating state procurement in 18-4-141. 34 A.G. Op. 36 (1972).

Collateral References

Counties *key* 122(2); Municipal Corporations *key* 231; Officers and Public Employees *key* 110; States *key* 95.

20 C.J.S. Counties §153; 64 C.J.S. Municipal Corporations §906; 67 C.J.S. Officers and Public Employees §§244, 245; 81A C.J.S. States §155.

Relationship as disqualifying interest within statute making it unlawful for an officer to be interested in a public contract. 74 ALR 792.

Relation as creditor of contracting party as constituting interest within statute against public officer being interested in public contract. 73 ALR 1352.

Construction and application of statute (18 USC §434) making interest in private business bar to acting for government—federal cases. 5 L. Ed. 2d 954.

2-2-202. Public officers not to have interest in sales or purchases.

Attorney General's Opinions

County Property — Acquisition by Employee: The code of ethics (Title 2, ch. 2, part 1) prohibits a county employee from using confidential information acquired in the course of his official duties to further his economic interest, but it does not prohibit him from bidding on county property being sold at public auction or limit the employees' ability to purchase tax deeds. 37 A.G. Op. 104 (1978).

Law Review Articles

Contracting the Employment of Civil Servants—a Transparent Exercise?, Freedland, Pub. L., Summer, p. 224 (1995).

Conflicts of Interest in Government, Dahl, 18 Colo. Law. 595 (1989).

Collateral References

Counties *key* 122(2); Municipal Corporations *key* 231; Officers and Public Employees *key* 110; States *key* 95.

20 C.J.S. Counties §153; 64 C.J.S. Municipal Corporations §906; 67 C.J.S. Officers and Public Employees §§244, 245; 81A C.J.S. States §124.

2-2-203. Voidable contracts.

Case Notes

Construction: This section is so plain that it interprets and construes itself, and it is not allowable to go elsewhere in search of conjecture in order to restrict or extend its meaning. Grady v. Livingston, 115 M 47, 141 P2d 346 (1943).

Contracts Voidable: Contracts made in violation of this section are not absolutely void but only voidable; they cannot be set aside until decreed void by court. Grady v. Livingston, 115 M 47, 141 P2d 346 (1943).

Purpose: Purpose of this section is to leave city free to accept or reject contracts made by city officers with corporations in which they have an interest; intent of sections 2-2-201 through 2-2-203 is to purge public service of persons who betray their public trust, not to penalize the selling corporation or to confiscate property of business concerns whose employees happen to be serving the municipality. Grady v. Livingston, 115 M 47, 141 P2d 346 (1943).

Attorney General's Opinions

Disclosure — Abstinence From Voting — When Contract Voidable: Where a local government official has a conflict of interest, such as a substantial interest in a business bidding on a local government contract, the official must comply with the disclosure and abstinence from voting provisions of 2-2-125 (now repealed) and 2-2-131, even though the interest may be permissible under the exceptions contained in 2-2-201. If the interest is not permissible under the exceptions listed in 2-2-201, the contract is voidable and abstinence from voting will not exonerate the official. 40 A.G. Op. 28 (1983).

Collateral References

Counties *key* 122(2); Municipal Corporations *key* 231; States *key* 95.

20 C.J.S. Counties §153; 64 C.J.S. Municipal Corporations §906; 81A C.J.S. States §124.

2-2-204. Dealings in warrants and other claims prohibited.

Case Notes

Officers: Police captain was an "officer" within this section and section 94-3907, R.C.M. 1947 (since repealed; replaced by 45-7-401), and fact that accused bought warrant for brother officer was no defense. State ex rel. O'Brien v. Butte, 54 M 533, 172 P 134 (1918).

Defective Information Charging Violation: Information, which charged defendant with being accessory to county official in purchasing evidence of indebtedness against a county, contrary to this section and section 94-3907, R.C.M. 1947 (since repealed; replaced by 45-7-401), was defective for failure to state that defendant knew that alleged principal was a county officer. St. v. Danzer, 35 M 269, 88 P 952 (1907).

Attorney General's Opinions

Purchase of Sidewalk, Curb, or Gutter Warrants by City Officials Prohibited: An elected or appointed city official may not purchase a sidewalk, curb, or gutter warrant without violating the prohibition against city officers' purchasing city warrants. These warrants are not covered by the exceptions of 2-2-204, nor are they held by a city officer for services rendered or evidence of the funded indebtedness of the city. Therefore, purchase of these warrants by city officials is prohibited. 38 A.G. Op. 79 (1980).

Collateral References

Officers and Public Employees *key* 110.

67 C.J.S. Officers and Public Employees §§244, 245.

2-2-205. Affidavit to be required by auditing officers.

Collateral References

Counties *key* 94; Municipal Corporations *key* 172; States *key* 76; Towns *key* 32.

20 C.J.S. Counties §§135, 151; 62 C.J.S. Municipal Corporations §406, et seq.; 81A C.J.S. States §229; 87 C.J.S. Towns §§126, 128.

2-2-206. Officers not to pay illegal warrant.

Collateral References

Counties *key* 168; Municipal Corporations *key* 904; States *key* 142; Towns *key* 50.

20 C.J.S. Counties §212; 64A C.J.S. Municipal Corporations §1643, et seq.; 81A C.J.S. States §248; 87 C.J.S. Towns §119, et seq.

2-2-207. Settlements to be withheld on affidavit.

Collateral References

Counties *key* 158; Municipal Corporations *key* 883; States *key* 123; Towns *key* 48.

20 C.J.S. Counties §198; 64A C.J.S. Municipal Corporations §1626; 81A C.J.S. States §226; 87 C.J.S. Towns §§129 through 133.

Part 3
Nepotism

2-2-301. Nepotism defined.

Law Review Articles

A Model Anti-Nepotism Policy, Young & Chevalier, 42 Prac. Law. 75 (1996).

Collateral References

Officers and Public Employees *key* 29.

67 C.J.S. Officers and Public Employees §§31, 32.

Validity, construction, and effect of state constitutional or statutory provision regarding nepotism in the public service. 11 ALR 4th 826.

2-2-302. Appointment of relative to office of trust or emolument unlawful — exceptions — publication of notice.

Compiler's Comments

1995 Amendment: Chapter 562 inserted (2)(e) and (2)(f) regarding exceptions for election judges and temporary legislative staff; and made minor changes in style. Amendment effective July 1, 1995.

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

1991 Amendments: Chapter 55 inserted (2)(c) exempting a school district from the provisions of this section and 2-2-303, under certain circumstances, in the employment of a substitute teacher; and made minor changes in style.

Chapter 238 at beginning of (1) inserted exception clause; inserted (2)(b) exempting school district trustees under certain conditions; and inserted (3) requiring notice of trustees' intended action. Amendment effective March 29, 1991.

1987 Amendment: Inserted (2)(b) relating to renewal of employment contract made before the relative assumed office; and made minor changes in phraseology.

Applicability: Section 2, Ch. 117, L. 1987, provided: "This act applies retroactively, within the meaning of 1-2-109, to occurrences on or after October 1, 1985, and permits the rehiring of a person whose employment contract was not renewed because of nepotism."

Case Notes

Illegal Employment of Teacher: Where father, mother, and uncle of the only pupils attending school were the sole persons eligible to serve as trustees, the employment of mother who, though elected as trustee, preferred to act as teacher and did not qualify as trustee was illegal under this section. State ex rel. Hoagland v. School District, 116 M 294, 151 P2d 168 (1944).

Confirmation of Appointment of Son: This section does not preclude City Alderman from voting in confirmation of appointment of his son by Mayor to a subordinate city office, the statute making no provision for such a contingency. State ex rel. Kurth v. Grinde, 96 M 608, 32 P2d 15 (1934).

Attorney General's Opinions

State Nepotism Law Applicable to School Districts on Reservations — Prosecution of Tribal Members — Contracts Voidable: Montana's nepotism statutes apply to members of public school boards for districts lying wholly or partially within an Indian reservation. Criminal prosecution of Indian members for nepotism law violations with respect to decisions made and implemented wholly on-reservation may be initiated only in federal court by the United States pursuant to 18 U.S.C. 13, except for violations occurring on the Flathead Indian Reservation. Furthermore, contracts entered into in contravention of the nepotism statutes are voidable. 43 A.G. Op. 23 (1989).

Nepotism Statute Applicable to Reserve Officers: A reserve officer holds a position of public trust within the meaning of this section; therefore, the appointment of a reserve Deputy Sheriff is subject to the nepotism law prohibiting appointment of a relative within the fourth degree of consanguinity or second degree of affinity. 42 A.G. Op. 91 (1988).

Application of Nepotism Law to Rehiring of Tenured Teacher: The nepotism statutes (2-2-301 through 2-2-304) prohibit the rehiring of a tenured teacher if the teacher is within one of the prohibited relationships to a member of the school district board of trustees. The 1985 amendments of 49-2-303(3) and 49-3-201(5) overruled 39 A.G. Op. 67 (1982), insofar as it holds that the nepotism law does not apply to relationships by affinity. 41 A.G. Op. 57 (1986).

County Commission Meeting as "Meeting" Under Open Meetings Law: A regularly scheduled meeting between a Board of County Commissioners and its staff is a "meeting" within the terms of the open meetings law, Title 2, ch. 3, part 2. 41 A.G. Op. 38 (1985).

Impliedly Repealed Nepotism Statute Not Revived by 1983 Amendments: The Attorney General issued an opinion (39 A.G. Op. 67 (1982)) that 2-2-302 had been impliedly repealed by the Human Rights Act. The 1983 amendments to the Human Rights Act and the Governmental Code of Fair Practices (which amendments permit assertion of the "reasonable demands" or "bona fide occupational qualification" defense to marital status discrimination) did not revive the impliedly repealed portion of 2-2-302 restricting employment on the basis of affinity. (See, however, 1985 amendment notes to 49-2-303 and 49-3-201.) 40 A.G. Op. 40 (1984).

Contracts — Definition: As used in this section, "contract" includes only those contracts to which public entities are parties and does not include contractual undertakings entered into between nonpublic entities or persons such as construction subcontracts. This is so even if a state or local official is a major shareholder of a corporation subcontracting with a prime contractor on a government project. 40 A.G. Op. 32 (1984).

Nepotism Statute Subservient to Human Rights Law: The nepotism law clearly violates the intent of the human rights law because it permits discrimination in employment based solely on marital status. Applying the rule of construction that when two laws are in conflict, the later one supersedes the earlier, the human rights law must prevail. Thus, the Human Rights Act prohibits the Board of Trustees of a school district from enforcing the nepotism statute by refusing employment to a teacher solely on the basis of her relationship by affinity to a board member. 39 A.G. Op. 67 (1982), overruled by 1985 amendment of 49-2-303 and 49-3-201, as declared by 41 A.G. Op. 57 (1986).

Appointment of Son-in-Law by Mayor: The appointment of the son-in-law of an appointing Mayor to the position of Chief of Police would violate the nepotism prohibition of this section, even though he may be the most qualified applicant for the position. 37 A.G. Op. 49 (1977).

Ruse to Avoid Effect of Act Unlawful: It is unlawful for a school board to accept the resignation of a member, approve the promotion of the member's sister-in-law as an employee of the board, and then immediately reappoint the resigned member to fill the vacant position. 37 A.G. Op. 6 (1977).

Adoption — Effect on Consanguinity: Legal adoption does not terminate the relationship of consanguinity under this section, and an adopted person may not hire the wife of his natural brother in an administrative capacity. 36 A.G. Op. 83 (1976).

Reappointment of Related Tenured Teacher — Trustee Elected After Teacher's Appointment: If there is a contract of employment for a tenured teacher to be reviewed by the Board of Trustees and one of the Board members is a relative of the teacher but was elected after the teacher's appointment, there is no violation of nepotism laws. 34 A.G. Op. 3 (1971).

Liquor Vendor and Daughter Employed in Same Store — No Violation: A state liquor vendor and his daughter may both be employed in the same liquor store because the vendor had no power to hire and fire employees. Thus, there is no violation of nepotism laws. 27 A.G. Op. 21 (1957).

Collateral References

Nepotism: Validity, construction, and effect of state constitutional or statutory provision regarding nepotism in public service. 11 ALR 4th 826.

2-2-303. Agreements to appoint relative to office unlawful.

Attorney General's Opinions

Reappointment of Related Tenured Teacher — Trustee Elected After Teacher's Appointment: If there is a contract of employment for a tenured teacher to be reviewed by the Board of Trustees and one of the Board members is a relative of the teacher but was elected after the teacher's appointment, there is no violation of nepotism laws. 34 A.G. Op. 3 (1971).

Liquor Vendor and Daughter Employed in Same Store — No Violation: A state liquor vendor and his daughter may both be employed in the same liquor store because the vendor had no power to hire and fire employees. Thus, there is no violation of nepotism laws. 27 A.G. Op. 21 (1957).

2-2-304. Penalty for violation of nepotism law.

Compiler's Comments

1989 Amendment: Near end, before "than 6 months", substituted "more" for "less".

Attorney General's Opinions

State Nepotism Law Applicable to School Districts on Reservations — Prosecution of Tribal Members — Contracts Voidable: Montana's nepotism statutes apply to members of public school boards for districts lying wholly or partially within an Indian reservation. Criminal prosecution of Indian members for nepotism law violations with respect to decisions made and implemented wholly on-reservation may be initiated only in federal court by the United States pursuant to 18 U.S.C. 13, except for violations occurring on the Flathead Indian Reservation. Furthermore, contracts entered into in contravention of the nepotism statutes are voidable. 43 A.G. Op. 23 (1989).

CHAPTER 3
PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS

Part 1
Notice and Opportunity to Be Heard

2-3-102. Definitions.

Case Notes

Public or Governmental Bodies — Committee to Recommend Commissioner of Political Practices Appointees to Governor: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices is not a board, bureau, commission, or agency within the meaning of those terms as used in the open meeting law. However, the committee is a "public or governmental body" under the plain meaning of those terms as used in that law because it has a clear public and governmental purpose and was created for a specific governmental task and is thus subject to the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Meeting of City Employees and Private Contractors Not Subject to Open Meeting Law: The plaintiff television station argued that it had the right to have a reporter cover a meeting between the city engineer, the public works director, and representatives of a private construction company. The Supreme Court stated that the statutes require agencies to have open meetings and that the definition of "agencies" does not include individual employees. The Supreme Court, after examining the legislative history of Art. II, sec. 9, Mont. Const., concluded that the statutes, which limit the right to know to agencies, are consistent with the intent of the constitution and therefore the plaintiff was not entitled to have a reporter present at the meeting of individual employees and a private party. SJL of Mont. Associates Ltd. Partnership v. Billings, 263 M 142, 867 P2d 1084, 50 St. Rep. 1726 (1993).

Dismissal of Tenured Teacher — Procedure Within MAPA: The County Superintendent of Schools and the State Superintendent of Public Instruction come under the definition of "agency" within the Montana Administrative Procedure Act (MAPA), and the decision not to award a contract to a tenured teacher is a "contested case" under MAPA. Yanzick v. School District, 196 M 375, 641 P2d 431, 39 St. Rep. 191 (1982).

Attorney General's Opinions

Proceedings of Workers' Compensation Board of Directors Subject to Open Meeting Law: Because the Board of Directors of the Montana self-insurers guaranty fund fits the definition of "agency" in state law and is considered a public agency because of its legal authority to compel membership, assess its members, and exercise other regulatory powers in the conduct of the people's business, a broad construction of laws guaranteeing the public's right to know requires the Board to comply with the state open meeting law. 46 A.G. Op. 1 (1995).

Proceedings of Workers' Compensation Board of Directors Subject to Montana Administrative Procedure Act: The Board of Directors of the Montana self-insurers guaranty fund fits the definition of "agency" in state law. The fund is considered a public organization because it has a public purpose and because it has been granted statutory authority to adopt public rules and to enter public contracts. Therefore, when the Board adopts rules or resolves contested cases, it must comply with the provisions of the Montana Administrative Procedure Act. 46 A.G. Op. 1 (1995).

2-3-103. Public participation — governor to ensure guidelines adopted.

Compiler's Comments

2003 Amendment: Chapter 425 in (1)(a) inserted third through fifth sentences concerning meeting agendas; inserted (1)(b) defining public matter for purposes of this section; in (2) near middle of first sentence after "officer of the" inserted "executive branch of the"; and made minor changes in style. Amendment effective April 22, 2003.

Case Notes

Reversal of Conviction for Medicaid Fraud Based on Violation of Improperly Adopted Administrative Policy: Vainio, an optometrist, was charged with three counts of Medicaid fraud under 45-6-313. The jury found Vainio guilty, and the District Court concluded as a matter of law that a violation of the administrative policies at issue formed a criminal act. On appeal, Vainio argued that by criminalizing violations of administrative policies that were not formally promulgated as rules, 45-6-313 contravened the Montana Administrative Procedure Act (MAPA), Title 2, ch. 4, and that policies that were not promulgated according to MAPA lacked the force of law. The state contended that because 45-6-313 specifically refers to violations of "policies", it was not necessary for those policies to be embodied in a rule promulgated pursuant to MAPA. The Supreme Court agreed with Vainio. The use of the term "policies" in 45-6-313 is limited to those policies that have been formally adopted as rules pursuant to MAPA. The fact that 45-6-313 does not expressly reference MAPA does not mean that Medicaid providers can be criminally prosecuted for violating the state's informal policies. Further, 45-6-313 does not have to expressly reference MAPA for MAPA to apply; rather, MAPA must be followed because 45-6-313 does not expressly repudiate it. When the Legislature authorizes an agency to adopt rules, the procedures mandated by MAPA apply regardless of whether the authorizing statute refers to MAPA. The practices for which Vainio was convicted were not prohibited by rules adopted in compliance with MAPA and in effect at the time of the alleged offenses and thus were not illegal, so the convictions were reversed. St. v. Vainio, 2001 MT 220, 306 M 439, 35 P3d 948 (2001), following NW. Airlines, Inc. v. St. Tax Appeal Bd., 221 M 441, 720 P2d 676 (1986), and Rosebud County v. Dept. of Revenue, 257 M 306, 849 P2d 177 (1993), and distinguishing Huether v. District Court, 2000 MT 158, 300 M 212, 4 P3d 1193 (2000).

Advisory Body Meeting Without Notice — Mootness of Issues When Ultimate Action Becomes Final: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person. A suit was filed to void the appointment on the grounds that the submission of the list was void because there was no notice of the meeting. The committee was granted summary judgment in the District Court, and plaintiffs appealed. Before the appeal was heard, the Senate confirmed the appointment. That the confirmation vested the title to the office in the appointee did not make the appeal and issue moot because alleged violations of the state constitutional right to know and open meeting statutes could occur again, both in the context of this committee and similar advisory entities. To allow an alleged violation to escape judicial scrutiny simply because legal proceedings are not always swift would take away the people's constitutional right to know. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Appointment by Governor Not Voided by Failure of Recommending Committee to Give Notice of Meeting at Which Recommended Persons Chosen: The committee that recommends persons to the Governor, who appoints the Commissioner of Political Practices, violated the open meeting law when it met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person, and the Senate confirmed the appointment. Since the Governor is free to disregard the recommended persons, the Governor did not violate the law in appointing one of the recommended persons, and the appointment was not voided. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Failure to Give Notice of Meeting of Committee That Recommends Persons Governor May Appoint as Commissioner of Political Practices: When three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor and gave no public notice of the meeting, the committee violated the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Meeting Open Only in Theory When No Public Notice Given: The open meeting law requires public notice of a meeting subject to that law. Without public notice, a meeting is open to the public in theory only, not in practice. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Notice of Public Meeting Held Insufficient: Where two of three County Commissioners held a telephone meeting to discuss approval of a preliminary subdivision plat and were required to give notice of the meeting, the Board failed to comply in that a county newspaper article did not supply sufficient facts concerning the time and place of the meeting to permit further public comment, nor was a 2-days' posted public notice ever given. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

Telephone Conversation as Constituting a "Meeting" — Notice Required to Be Given: Where two of three County Commissioners discussed by telephone the approval of a preliminary plat of a subdivision, a "meeting" as defined in 2-3-202 took place, and the Commissioners were subject to the requirement that notice of the meeting be given in accordance with statute. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

Jurisdiction to Consider Right to Notice and Participation: The District Court lacked jurisdiction to consider plaintiffs' rights under this section since their complaint was filed more than 30 days after the date of decision. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

Attorney General's Opinions

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings — Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

Law Review Articles

Comments on Government Censorship and Secrecy, Elison & Elison, 55 Mont. L. Rev. 175 (1994).

Montana Supreme Court Survey: Administrative Law, Snyder, 41 Mont. L. Rev. 151 (1980).

Collateral References

Validity, construction, and application of statutes making public proceedings open to the public. 38 ALR 3d 1070.

What constitutes "agency" for purposes of Freedom of Information Act. 165 ALR Fed. 591.

2-3-104. Requirements for compliance with notice provisions.

Case Notes

Reversal of Conviction for Medicaid Fraud Based on Violation of Improperly Adopted Administrative Policy: Vainio, an optometrist, was charged with three counts of Medicaid fraud under 45-6-313. The jury found Vainio guilty, and the District Court concluded as a matter of law that a violation of the administrative policies at issue formed a criminal act. On appeal, Vainio argued that by criminalizing violations of administrative policies that were not formally promulgated as rules, 45-6-313 contravened the Montana Administrative Procedure Act (MAPA), Title 2, ch. 4, and that policies that were not promulgated according to MAPA lacked the force of law. The state contended that because 45-6-313 specifically refers to violations of "policies", it was not necessary for those policies to be embodied in a rule promulgated pursuant to MAPA. The Supreme Court agreed with Vainio. The use of the term "policies" in 45-6-313 is limited to those policies that have been formally adopted as rules pursuant to MAPA. The fact

that 45-6-313 does not expressly reference MAPA does not mean that Medicaid providers can be criminally prosecuted for violating the state's informal policies. Further, 45-6-313 does not have to expressly reference MAPA for MAPA to apply; rather, MAPA must be followed because 45-6-313 does not expressly repudiate it. When the Legislature authorizes an agency to adopt rules, the procedures mandated by MAPA apply regardless of whether the authorizing statute refers to MAPA. The practices for which Vainio was convicted were not prohibited by rules adopted in compliance with MAPA and in effect at the time of the alleged offenses and thus were not illegal, so the convictions were reversed. St. v. Vainio, 2001 MT 220, 306 M 439, 35 P3d 948 (2001), following NW. Airlines, Inc. v. St. Tax Appeal Bd., 221 M 441, 720 P2d 676 (1986), and Rosebud County v. Dept. of Revenue, 257 M 306, 849 P2d 177 (1993), and distinguishing Huether v. District Court, 2000 MT 158, 300 M 212, 4 P3d 1193 (2000).

Publication Not Mandated: At its regular meeting on March 10, 1981, the Board of Trustees announced that had until April 1 to issue tenure contracts but that had not yet made final decisions. On March 12, the chairman contacted the clerk to tell her there would be a special meeting at 9 a.m. on March 14. The clerk contacted the local radio stations, who announced the meeting. The Board met and went into executive session. When plaintiff's contract was not renewed, she claimed the Board had violated the notice provisions of the open meeting law. The court held that the Montana open meeting law does not specifically mandate notice by publication. Publication is a method of proving notice. The obligation of the Montana open meeting law is to ensure that the public has ample opportunity to participate in decisions before final action is taken. The evidence in this case indicated that the opportunity was given. Sonstelie v. Bd. of Trustees, 202 M 414, 658 P2d 413, 40 St. Rep. 179 (1983).

Notice of Public Meeting Held Insufficient: Where two of three County Commissioners held a telephone meeting to discuss approval of a preliminary subdivision plat and were required to give notice of the meeting, the Board failed to comply in that a county newspaper article did not supply sufficient facts concerning the time and place of the meeting to permit further public comment, nor was a 2-days' posted public notice ever given. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

Attorney General's Opinions

Constitutional Mandate: In the context of rulemaking, the Montana Administrative Procedure Act fulfills the mandate of Art. II, sec. 8, Mont. Const., requiring reasonable opportunity for citizen participation in agency operation, by providing notice and hearing. 38 A.G. Op. 69 (1980).

2-3-105. Supplemental notice by radio or television.

Case Notes

Publication Not Mandated: At its regular meeting on March 10, 1981, the Board of Trustees announced that had until April 1 to issue tenure contracts but that had not yet made final decisions. On March 12, the chairman contacted the clerk to tell her there would be a special meeting at 9 a.m. on March 14. The clerk contacted the local radio stations, who announced the meeting. The Board met and went into executive session. When plaintiff's contract was not renewed, she claimed the Board had violated the notice provisions of the open meeting law. The court held that the Montana open meeting law does not specifically mandate notice by publication. Publication is a method of proving notice. The obligation of the Montana open meeting law is to ensure that the public has ample opportunity to participate in decisions before final action is taken. The evidence in this case indicated that the opportunity was given. Sonstelie v. Bd. of Trustees, 202 M 414, 658 P2d 413, 40 St. Rep. 179 (1983).

2-3-111. Opportunity to submit views — public hearings.

Compiler's Comments

1997 Amendment: Chapter 487 inserted (2) requiring that public hearing be held in accessible facility in impacted community or area when agency action directly impacts community or area; and made minor changes in style.

Case Notes

Dissemination of Incomplete Document Used to Make Decision — Right to Participate Entails Complying With Right to Know: A school district assembled a group of people to research and advise the district on the closure of schools, and a member of the group summarized the closure research information on a computer-generated spreadsheet and delivered various versions of the spreadsheet to various people and groups. The version given the school district contained a system rating the schools and explaining the rating system, but the group of parents that

plaintiff belonged to was given a version not containing the rating system when a member of the group requested a copy. The school district told the group that a spreadsheet comparing the schools did not exist. The spreadsheet was a document of a public body subject to public inspection prior to the time that the school district's board met and used the spreadsheet to help determine which schools to close. The school district violated plaintiff's right to examine public documents. At a minimum, the "reasonable opportunity" standard articulated in Art. II, sec. 8, Mont. Const., and this section for the right to participate demands compliance with the right to know contained in Art. II, sec. 9, Mont. Const. When the school district violated plaintiff's right to know, it reduced what should have been a genuine interchange into a mere formality. Bryan could and did voice her opinion to the school district, but did so without the ratings information contained on the version of the spreadsheet used by the school district. Therefore, the school district also violated her Art. II, sec. 8, Mont. Const., right of participation. The Supreme Court stated that this violation tainted the entire process from start to finish and ruled that the school district's closure decision was void. The court stated that on remand, the school district should allow plaintiff an opportunity to rebut the closure decision and should then reexamine the decision and affirm or modify it. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

Attorney General's Opinions

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings — Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

2-3-112. Exceptions.

Attorney General's Opinions

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings — Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

2-3-114. Enforcement.

Case Notes

Lack of Notice of Public Meeting as Voiding Decision — Abuse of Discretion: Where County Commissioners failed to follow the statutory requirements for notice for a meeting of the Board of County Commissioners, the District Court had discretionary authority to void the results of the meeting, and where the Commissioners failed to fulfill their burden of proving the meeting legal, it was a clear abuse of discretion for the court not to void the results of the meeting. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

Use of Mandamus to Void Unlawfully Held Public Meeting: Where respondent County Commissioners failed to give public notice of a meeting so that the result was voidable by the court under 2-3-114 and 2-3-213, a Writ of Mandamus would be appropriate in this case to void the illegal meeting. In future cases, the remedy should take the form of a simple petition to void an action or a petition for declaratory judgment. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980), followed in Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).

Jurisdiction to Consider Right to Notice and Participation: The District Court lacked jurisdiction to consider plaintiffs' rights under 2-3-103 since their complaint was filed more than 30 days after the date of decision. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

Part 2
Open Meetings

Part Attorney General's Opinions

Tax Appeal Board Deliberations Regarding Application for Reduction in Valuation — Open to Public: The deliberations of a county tax appeal board regarding an application for a reduction in property valuation must be open to the public unless the presiding officer determines the discussion relates to a matter of individual privacy and the demands of individual privacy clearly exceed the merits of public disclosure. 42 A.G. Op. 61 (1988).

Part Law Review Articles

Comments on Government Censorship and Secrecy, Elison & Elison, 55 Mont. L. Rev. 175 (1994).

Is E-Mail Subject to the Open Meetings Act?, 90 Ill. B.J. 450 (2002).

Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under the Federal Sunshine Act, 66 Tex. L. Rev. 1195 (1988).

2-3-201. Legislative intent — liberal construction.

Case Notes

Meeting of City Employees and Private Contractors Not Subject to Open Meeting Law: The plaintiff television station argued that it had the right to have a reporter cover a meeting between the city engineer, the public works director, and representatives of a private construction company. The Supreme Court stated that the statutes require agencies to have open meetings and that the definition of "agencies" does not include individual employees. The Supreme Court, after examining the legislative history of Art. II, sec. 9, Mont. Const., concluded that the statutes, which limit the right to know to agencies, are consistent with the intent of the constitution and therefore the plaintiff was not entitled to have a reporter present at the meeting of individual employees and a private party. SJL of Mont. Associates Ltd. Partnership v. Billings, 263 M 142, 867 P2d 1084, 50 St. Rep. 1726 (1993).

Attorney General's Opinions

Deliberations of Human Rights Commission: The deliberations of the Human Rights Commission following a contested case hearing are subject to the Montana open meeting law. They must be open to the public unless the presiding officer determines that the discussion relates to a matter of individual privacy and that the demands of individual privacy clearly exceed the merits of public disclosure. 38 A.G. Op. 33 (1979).

Mechanical Recordings of Public Meetings: A member of the public may make a mechanical recording of the proceedings and deliberations of an open school board meeting. 38 A.G. Op. 8 (1979).

2-3-202. Meeting defined.

Compiler's Comments

1987 Amendment: Near middle of section, after "public agency", inserted "or association described in 2-3-203".

Severability Clause: Section 6, Ch. 567, L. 1977, was a severability clause.

Case Notes

"Meeting" Held When Three of Four Members Met to Select Recommended Persons for Position Appointed by Governor: A meeting was held within the meaning of the open meeting law when three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Official Misconduct Statute — Definition of Meeting Not Incorporated: In 1975 the official misconduct criminal statute (45-7-401) was expanded to include a violation of the open meeting law (2-3-203). In 1977 this section was enacted. In 1979 1-2-108 was amended, creating the presumption that a reference to a section encompasses subsequent changes. However, because 1-2-109 states that no law is retroactive unless expressly declared to be, 1-2-108 does not act to incorporate the 1977 definition of "meeting" into the 1975 criminal statute. St. v. Conrad, 197 M 406, 643 P2d 239, 39 St. Rep. 680 (1982). (Annotator's Note: Section 1-2-108 was amended in 1983 to make the "living reference" presumption retroactive as well as prospective.)

Open Meeting Law — Criminal Penalty Void for Vagueness: In 1975 the official misconduct criminal statute (45-7-401) was expanded to include a violation of the open meeting law (2-3-203). In 1977 this section was enacted. Because there was no express legislative intent to amend the criminal statute to encompass the expanded definition of "meeting" and because people of common intelligence could differ over this matter, it is not clear what constitutes prohibited conduct. Subsection (1)(e) of the criminal statute is void for vagueness. St. v. Conrad, 197 M 406, 643 P2d 239, 39 St. Rep. 680 (1982).

Telephone Conversation as Constituting a "Meeting" — Notice Required to Be Given: Where two of three County Commissioners discussed by telephone the approval of a preliminary plat of a subdivision, a "meeting" as defined in 2-3-202 took place, and the Commissioners were subject to the requirement that notice of the meeting be given in accordance with statute. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

Attorney General's Opinions

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings — Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

2-3-203. Meetings of public agencies and certain associations of public agencies to be open to public — exceptions.

Compiler's Comments

1993 Amendment: Chapter 123 at beginning of (4)(a) inserted exception clause, near middle, before "litigation", deleted "collective bargaining or", and near end, before "litigating", deleted "bargaining or"; inserted (4)(b) requiring open litigation strategy meetings when the parties involved are public bodies or associations; and made minor changes in style.

1987 Amendment: Inserted (2) relating to associations; near beginning of (5), after "public body", inserted "or an association described in subsection (2)"; and made minor change in phraseology.

Case Notes

School District Advisory Group as Public or Governmental Body: A school district assembled a group of people to research and advise the district on the closure of schools. The Legislature has given a school district the power to close schools. Therefore, the advisory group assumed the identity of the district with respect to the closure question and performed a legislatively designated governmental function that served a clear public and governmental purpose, and the advisory group was a public or governmental body subject to Art. II, sec. 9, Mont. Const. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

Standing of Parent Who Did Not Request Information on Proposed School Closure but Belonged to Group Another Member of Which Did: School district parents, including Bryan, worked in concert to rebut a school closure recommendation, delegating duties among themselves. Schroeder, but not Bryan, requested information from the school authorities, which was not received. Bryan sued as a result of the school closure. That Bryan did not personally request the information did not prevent her from having standing to claim a violation of Art. II, sec. 9, Mont. Const. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

Closed Meeting in Violation of Law, but No Action Taken — No Reversible Error Found: Goyen, the Chief of Police of Troy, was not notified of a meeting of the Troy City Council on May 10 at which an incident involving Goyen and a city gravel pile ("gravel-gate") was discussed. That meeting was closed at the request of the Mayor of Troy and at the request of a witness in order for the witness to testify regarding indiscretions with Goyen in a city police car. Later, Goyen was allowed to present a defense at an August 16 open hearing before the City Council. Subsequent to his discharge, Goyen filed a petition to void the City Council's decision to terminate his employment, and the District Court held that there was no violation of the open

meeting law. The Supreme Court held that Goyen was improperly not given notice of the May 10 meeting, but because the action taken by the City Council was based upon the results of the August 16 hearing and not the May 10 hearing, the District Court did not commit reversible error in holding that there was no violation of the open meeting law in regard to the May 10 meeting. Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).

Privacy Interest of Witness Held Sufficient for Closure of City Council Meeting — "Generally Known" Incident: Goyen, the Chief of Police of Troy, was not notified of a meeting of the Troy City Council on May 10 at which an incident involving Goyen and a city gravel pile ("gravel-gate") was discussed. That meeting was closed at the request of the Mayor of Troy and at the request of a witness, Denton, who testified regarding indiscretions with Goyen in a patrol car. Later, after Goyen was discharged, he brought an action arguing that Denton's privacy interest was not at issue and that, in any event, the facts of her indiscretions with him were well known in the community, so much so that the demands of Denton's privacy could not outweigh the merits of public disclosure. The Supreme Court held that the plain meaning of this section clearly allows a witness to assert the witness's privacy interest. Citing Missoulian v. Bd. of Regents of Higher Educ., 207 M 513, 675 P2d 962 (1984), the Supreme Court held that even harmless or generally known information is subject to constitutional protection and that Denton's relationship with Goyen, while known by others, was private in nature and Denton therefore had a reasonable expectation of privacy that society would recognize. Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).

Advisory Body Meeting Without Notice — Mootness of Issues When Ultimate Action Becomes Final: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person. A suit was filed to void the appointment on the grounds that the submission of the list was void because there was no notice of the meeting. The committee was granted summary judgment in the District Court, and plaintiffs appealed. Before the appeal was heard, the Senate confirmed the appointment. That the confirmation vested the title to the office in the appointee did not make the appeal and issue moot because alleged violations of the state constitutional right to know and open meeting statutes could occur again, both in the context of this committee and similar advisory entities. To allow an alleged violation to escape judicial scrutiny simply because legal proceedings are not always swift would take away the people's constitutional right to know. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Appointment by Governor Not Voided by Failure of Recommending Committee to Give Notice of Meeting at Which Recommended Persons Chosen: The committee that recommends persons to the Governor, who appoints the Commissioner of Political Practices, violated the open meeting law when it met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person, and the Senate confirmed the appointment. Since the Governor is free to disregard the recommended persons, the Governor did not violate the law in appointing one of the recommended persons, and the appointment was not voided. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Decision of Issues on Other Than Constitutional Grounds When Possible: If the open meeting statutes require a meeting of an advisory committee to be open to the public, the court did not have to determine whether the state constitutional right to know provision requires the meeting to be open. It is elementary that courts should avoid constitutional questions if an issue can be otherwise resolved. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Failure to Give Notice of Meeting of Committee That Recommends Persons Governor May Appoint as Commissioner of Political Practices: When three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor and gave no public notice of the meeting, the committee violated the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Meeting Open Only in Theory When No Public Notice Given: The open meeting law requires public notice of a meeting subject to that law. Without public notice, a meeting is open to the public in theory only, not in practice. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Public or Governmental Bodies — Committee to Recommend Commissioner of Political Practices Appointees to Governor: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices is not a board, bureau, commission, or agency within the meaning of those terms as used in the open meeting law. However, the committee is a "public or governmental body" under the plain meaning of those terms as used in that law because it has a clear public and governmental purpose and was created for a specific governmental task and is thus subject to the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Meeting of City Employees and Private Contractors Not Subject to Open Meeting Law: The plaintiff television station argued that it had the right to have a reporter cover a meeting between the city engineer, the public works director, and representatives of a private construction company. The Supreme Court stated that the statutes require agencies to have open meetings and that the definition of "agencies" does not include individual employees. The Supreme Court, after examining the legislative history of Art. II, sec. 9, Mont. Const., concluded that the statutes, which limit the right to know to agencies, are consistent with the intent of the constitution and therefore the plaintiff was not entitled to have a reporter present at the meeting of individual employees and a private party. SJL of Mont. Associates Ltd. Partnership v. Billings, 263 M 142, 867 P2d 1084, 50 St. Rep. 1726 (1993).

Collective Bargaining Strategy Exception Unconstitutional: The collective bargaining strategy exception to the open meeting law, as set out in subsection (4) of this section, is an unconstitutional violation of the right to know provision of Art. II, sec. 9, Mont. Const., and an impermissible legislative attempt to extend grounds upon which meetings may be closed. (See 1993 amendment.) Great Falls Tribune Co., Inc. v. Great Falls Public Schools, 255 M 125, 841 P2d 502, 49 St. Rep. 944 (1992).

Litigation Exception Unconstitutional Between Public Entities — Board's Closure of Meeting Violation of Public's Right to Know: The Board of Public Education closed its meeting to the public to discuss litigation strategy concerning a possible challenge of an executive order requiring it to submit rules to the Governor for prior review and approval. The Associated Press and its member news organizations filed a complaint, arguing that the statutory litigation exception unconstitutionally conflicted with the public's right to know. Affirming the District Court order, the Supreme Court ruled that the litigation exception allowing public agencies to close meetings when discussing litigation strategy violated the public's constitutional right to attend and observe the deliberations of a public body. The dispute between the Board and the Governor was essentially a turf battle that should be given public scrutiny. The holding was limited to litigation between public entities. (See 1993 amendment.) Assoc. Press v. Bd. of Pub. Educ., 246 M 386, 804 P2d 376, 48 St. Rep. 1 (1991).

University Presidents' Job Performance Evaluations — Right to Know Versus Right of Privacy: The Missoulian challenged the closure by the Board of Regents of a job performance evaluation of the university system's presidents. The challenge was based on the constitutional right to know. The right to know is not absolute but must be balanced against competing constitutional interests in the context of each case. In this case the demands of individual privacy of the university presidents and other university personnel in confidential job performance evaluations sessions of the Board of Regents clearly exceed the merits of public disclosure. Missoulian v. Bd. of Regents, 207 M 513, 675 P2d 962, 41 St. Rep. 110 (1984), followed in Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4, 47 St. Rep. 161 (1990), and Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).

Violation of Right to Know — Exhaustion of Remedies Not Applicable Under Separation of Powers: Plaintiff was negotiating his salary with the school board. The board closed their meeting to discuss plaintiff's salary request. Plaintiff contacted counsel and began proceedings against the board for violating the open meeting law. The board met at another closed meeting and withdrew its offer of employment. The board contended plaintiff was required to exhaust his administrative remedies before filing suit in District Court. The Supreme Court held that the exhaustion doctrine does not apply to constitutional issues. Plaintiff claimed violation of his constitutional right to observe deliberations of a public body under the constitution's right to know provisions. Constitutional questions are properly decided by a judicial body, not an administrative official, under the separation of powers doctrine. Jarussi v. Bd. of Trustees, 204 M 131, 664 P2d 316, 40 St. Rep. 720 (1983).

Collective Bargaining Exception Construed: Plaintiff was negotiating his salary with the school board. The board closed their meeting to discuss plaintiff's salary request. Plaintiff contacted counsel and began proceedings against the board for violating the open meeting law.

The board met at another closed meeting and withdrew its offer of employment. The board contended it closed the meetings to discuss collective bargaining strategy under 2-3-203(3). In construing the term "collective bargaining", the court relied on the identical technical and legal definitions of the phrase. Collective bargaining is an activity involving the settling of disputes by negotiation between the employer and the representative of the employees. The board improperly closed the meetings since plaintiff was not acting on behalf of anyone else and the board's decision would not affect anyone else. Plaintiff had the right to be present at deliberations regarding his future. (See 1993 amendment.) Jarussi v. Bd. of Trustees, 204 M 131, 664 P2d 316, 40 St. Rep. 720 (1983).

Official Misconduct Statute — Definition of Meeting Not Incorporated: In 1975 the official misconduct criminal statute (45-7-401) was expanded to include a violation of this section. In 1977 a broad definition of "meeting" was enacted (2-3-202). In 1979 1-2-108 was amended, creating the presumption that a reference to a section encompasses subsequent changes. However, because 1-2-109 states that no law is retroactive unless expressly declared to be, 1-2-108 does not act to incorporate the 1977 definition of "meeting" into the 1975 criminal statute. St. v. Conrad, 197 M 406, 643 P2d 239, 39 St. Rep. 680 (1982). (Annotator's note: Section 1-2-108 was amended in 1983 to make the "living reference" presumption retroactive as well as prospective.)

Criminal Penalty Void for Vagueness: In 1975 the official misconduct criminal statute (45-7-401) was expanded to include a violation of this section. In 1977 a broad definition of "meeting" was enacted (2-3-202). Because there was no express legislative intent to amend the criminal statute to encompass the expanded definition of "meeting" and because people of common intelligence could differ over this matter, it is not clear what constitutes prohibited conduct. Subsection (1)(e) of the criminal statute is void for vagueness. St. v. Conrad, 197 M 406, 643 P2d 239, 39 St. Rep. 680 (1982).

Termination of Employment: A decision to terminate a schoolteacher made in violation of this section does not involve rights guaranteed by federal law or the United States Constitution, and the remedy is found in state courts. Branch v. School District, 432 F. Supp. 608 (D.C. Mont. 1977).

Attorney General's Opinions

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings — Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

Applicability of Open Meeting Law to Montana Life and Health Insurance Guaranty Association Board of Directors: Noting that the constitutional right to know and open meeting laws are to be liberally construed, the Attorney General found the Montana Life and Health Insurance Guaranty Association to be a public body statutorily organized to protect insured members of the public from the extraordinary event of insurance company insolvency and found that, as such, the meetings of the Association's board of directors are subject to the open meeting law. The Association may close a meeting only when and to the extent that the demands of individual privacy clearly exceed the merits of public disclosure. 46 A.G. Op. 24 (1996).

Proceedings of Workers' Compensation Board of Directors Subject to Open Meeting Law: Because the Board of Directors of the Montana self-insurers guaranty fund fits the definition of "agency" in state law and is considered a public agency because of its legal authority to compel membership, assess its members, and exercise other regulatory powers in the conduct of the people's business, a broad construction of laws guaranteeing the public's right to know requires the Board to comply with the state open meeting law. 46 A.G. Op. 1 (1995).

Applicability of Open Meeting Law to Local Chamber of Commerce Receiving Bed Tax Funds: A local chamber of commerce, when acting as a nonprofit convention and visitor bureau, is an organization supported at least in part by public funds in the form of bed tax money. By accepting public funds and deciding how those funds are to be spent, the convention and visitor bureau takes on the responsibility of accounting to the public for those funds. Therefore,

meetings of a local chamber of commerce or other organization recognized and acting as a nonprofit convention and visitor bureau must be open to the public in accordance with the open meeting law unless the demands of individual privacy of the chamber clearly exceed the merits of public disclosure. 44 A.G. Op. 40 (1992).

Tax Appeal Board Deliberations Regarding Application for Reduction in Valuation — Open to Public: The deliberations of a county tax appeal board regarding an application for a reduction in property valuation must be open to the public unless the presiding officer determines the discussion relates to a matter of individual privacy and the demands of individual privacy clearly exceed the merits of public disclosure. 42 A.G. Op. 61 (1988).

Open Meeting Law Inapplicable to Departmental-Tribal Cooperative Agreement Negotiations: Negotiations between a Department Director and tribal representatives relating to establishment of a cooperative agreement authorized under 18-11-103 are not subject to Montana's open meeting law. Such discussions do not constitute a "meeting" under this section because the Director, when acting alone on behalf of the Department, does not fall within the scope of the term "quorum of the constituent membership" as used in this section. 42 A.G. Op. 51 (1988).

Meetings of Private Corporation Under State Contract to Be Open: A private, nonprofit corporation that contracted with the state to restore and preserve state-owned property was considered a public body within the meaning of the open meeting law because the corporation was performing a public function and was receiving funds generated by public property. As such, meetings of the corporation were subject to the public's right to know and the standards established in this section. 42 A.G. Op. 42 (1987).

Deliberations of Human Rights Commission: The deliberations of the Human Rights Commission following a contested case hearing are subject to the Montana open meeting law. They must be open to the public unless the presiding officer determines that the discussion relates to a matter of individual privacy and that the demands of individual privacy clearly exceed the merits of public disclosure. 38 A.G. Op. 33 (1979).

Public Disclosure — Right to Know Versus Individual Privacy: A public body may close a meeting under 2-3-203 when the matter discussed relates to individual privacy and the demand for individual privacy clearly exceeds the merits of public disclosure. 37 A.G. Op. 170 (1978).

Public Disclosure of Records: The Board of Real Estate (now Board of Realty Regulation), when requested, must disclose the status of any real estate licensee, whether any disciplinary action has been taken against that individual, and if so, the reason. Public access to information relating to complaints or to allegations and to other files on individual licensees is left to the discretion of the Board, within the guidelines of this opinion. All minutes, except those minutes of a meeting closed by the presiding officer pursuant to 2-3-203, must be open to public inspection. 37 A.G. Op. 107 (1978).

Collateral References

Pending or prospective litigation exception under state law making proceedings by public bodies open to the public. 35 ALR 5th 113.

Attorney-client exception under state law making proceedings by public bodies open to the public. 34 ALR 5th 591.

Emergency exception under state law making proceedings by public bodies open to the public. 33 ALR 5th 731.

Validity, construction, and application of statutes making public proceedings open to the public. 38 ALR 3d 1070.

2-3-211. Recording.

Attorney General's Opinions

Mechanical Recordings of Public Meetings: A member of the public may make a mechanical recording of the proceedings and deliberations of an open school board meeting. 38 A.G. Op. 8 (1979).

2-3-212. Minutes of meetings — public inspection.

Attorney General's Opinions

Public Disclosure of Records: The Board of Real Estate (now Board of Realty Regulation), when requested, must disclose the status of any real estate licensee, whether any disciplinary action has been taken against that individual, and if so, the reason. Public access to information relating to complaints or to allegations and to other files on individual licensees is left to the discretion of the Board, within the guidelines of this opinion. All minutes, except those minutes

of a meeting closed by the presiding officer pursuant to 2-3-203, must be open to public inspection. 37 A.G. Op. 107 (1978).

Public's Right to Know: The salaries of teachers and administrators of a public school district are subject to inspection by the public. 36 A.G. Op. 28 (1975).

2-3-213. Voidability.

Case Notes

Advisory Body Meeting Without Notice — Mootness of Issues When Ultimate Action Becomes Final: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person. A suit was filed to void the appointment on the grounds that the submission of the list was void because there was no notice of the meeting. The committee was granted summary judgment in the District Court, and plaintiffs appealed. Before the appeal was heard, the Senate confirmed the appointment. That the confirmation vested the title to the office in the appointee did not make the appeal and issue moot because alleged violations of the state constitutional right to know and open meeting statutes could occur again, both in the context of this committee and similar advisory entities. To allow an alleged violation to escape judicial scrutiny simply because legal proceedings are not always swift would take away the people's constitutional right to know. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Appointment by Governor Not Voided by Failure of Recommending Committee to Give Notice of Meeting at Which Recommended Persons Chosen: The committee that recommends persons to the Governor, who appoints the Commissioner of Political Practices, violated the open meeting law when it met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person, and the Senate confirmed the appointment. Since the Governor is free to disregard the recommended persons, the Governor did not violate the law in appointing one of the recommended persons, and the appointment was not voided. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Claim by Third-Party Plaintiffs Not Barred by Open Meeting Law Statute of Limitations: A citizens' group organized to recall Mayor Whitlock sought public disclosure of a report that was ruled to be confidential by a closed meeting of the City Council. In a counterclaim, the City Council sought a declaratory judgment directing disclosure of the report because it believed the public's right to know clearly exceeded Whitlock's privacy right. Whitlock asserted that because the citizens' group failed to file suit within 30 days of the City Council decision, the suit was statutorily barred under this section. However, the declaratory judgment requested by the City Council, as third-party plaintiffs, was not barred by statutory time limitations and because the court's ruling addressed the constitutional questions raised by the city rather than the statutory violation alleged by the citizens' group, the statute of limitations under this section did not control. Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74, 49 St. Rep. 1113 (1992).

Damages Not Available: Monetary damages are not available for holding an illegally closed meeting. Irving v. School District No. 1-1A, 248 M 460, 813 P2d 417, 48 St. Rep. 512 (1991).

Voiding of Meetings Not Sought — Lack of Standing or Justiciable Controversy: When plaintiff brought an action alleging improper closure of school board meetings, the District Court incorrectly relied on this section in granting summary judgment in favor of the school district for meetings that occurred more than 30 days prior to filing of the complaint. Because plaintiff did not seek to void the meetings, this section did not apply; however, summary judgment was affirmed on the grounds of lack of standing and lack of a justiciable controversy. Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4, 47 St. Rep. 161 (1990).

Violation of Right to Know — Exhaustion of Remedies Not Applicable Under Separation of Powers: Plaintiff was negotiating his salary with the school board. The board closed their meeting to discuss plaintiff's salary request. Plaintiff contacted counsel and began proceedings against the board for violating the open meeting law. The board met at another closed meeting and withdrew its offer of employment. The board contended plaintiff was required to exhaust his administrative remedies before filing suit in District Court. The Supreme Court held that the exhaustion doctrine does not apply to constitutional issues. Plaintiff claimed violation of his constitutional right to observe deliberations of a public body under the constitution's right to know provisions. Constitutional questions are properly decided by a judicial body, not an

administrative official, under the separation of powers doctrine. Jarussi v. Bd. of Trustees, 204 M 131, 664 P2d 316, 40 St. Rep. 720 (1983).

Lack of Notice of Public Meeting as Voiding Decision — Abuse of Discretion: Where County Commissioners failed to follow the statutory requirements for notice for a meeting of the Board of County Commissioners, the District Court had discretionary authority to void the results of the meeting, and where the Commissioners failed to fulfill their burden of proving the meeting legal, it was a clear abuse of discretion for the court not to void the results of the meeting. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

Use of Mandamus to Void Unlawfully Held Public Meeting: Where respondent County Commissioners failed to give public notice of a meeting so that the result was voidable by the court under 2-3-114 and 2-3-213, a Writ of Mandamus would be appropriate in this case to void the illegal meeting. In future cases, the remedy should take the form of a simple petition to void an action or a petition for declaratory judgment. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980), followed in Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).

Law Review Articles

Montana Supreme Court Survey: Administrative Law, Reep, 42 Mont. L. Rev. 329 (1981).

2-3-221. Costs to plaintiff in certain actions to enforce constitutional right to know.

Case Notes

Performance of Public Service in Enforcement of Constitutional Provisions Through Litigation — Costs and Attorney Fees Payable: Plaintiffs successfully contested the constitutional validity of a Department of Revenue administrative rule regarding the confidentiality of corporate tax information. In doing so, plaintiffs performed a public service by enforcing a portion of the Montana Constitution that would otherwise have been violated. Because of the public benefits gained through plaintiffs' efforts, the Supreme Court spread the cost of the litigation among its beneficiaries and awarded plaintiffs their costs and reasonable attorney fees, including those incurred on appeal. Assoc. Press, Inc. v. Dept. of Revenue, 2000 MT 160, 300 M 233, 4 P3d 5, 57 St. Rep. 657 (2000).

Water Rights Decree "Updated" Without Notice or Hearing — No Violation of Right to Know Found — Possible Due Process Violation — Attorney Fees Denied: Jones discovered that her water right set forth in a 1902 court decree had been "updated" by the judges of the Fourth Judicial District and the terms of the 1902 decree had been changed in the process, all without notice and hearing for Jones. The Supreme Court, distinguishing Assoc. Press v. St., 250 M 299, 820 P2d 421 (1991), and noting that the methods used by the Fourth Judicial District Court may be a violation of due process rights, held that since there was no court order, statute, or other action preventing access to documents or observance of deliberations, there was no violation of the right to know and therefore no attorney fees were awardable pursuant to this section. State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

Award of Attorney Fees Discretionary: It is within the discretion of the District Court to award attorney fees to a prevailing plaintiff, but the award is not mandatory. In this case, the court conscientiously balanced the competing rights and interests of the parties and carefully analyzed controlling case law before denying the award of attorney fees and thus did not exceed the bounds of reason or abuse its discretion in its decision. Gaustad v. Columbus, 272 M 486, 901 P2d 565, 52 St. Rep. 826 (1995), followed in Pengra v. St., 2000 MT 291, 302 M 276, 14 P3d 499, 57 St. Rep. 1231 (2000).

Award of Attorney Fees Discretionary — "May" Construed as Discretionary: Gaustad prevailed in a suit for the release of investigatory records brought under Art. II, sec. 9, Mont. Const., but the District Court denied awarding attorney fees. Citing Assoc. Press v. Bd. of Pub. Educ., 246 M 386, 804 P2d 376 (1991), and Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435 (1993), the Supreme Court held that the award of fees was discretionary with the District Court under this section. In response to Gaustad's argument that "may" should be construed as "shall", the Supreme Court reviewed the legislative history of this section and noted that the legislative history favored the construction of "may" as permissive. Because the District Court gave no rationale for its denial of the motion for fees, the Supreme Court remanded the case for inclusion of that rationale. In re Gaustad v. Columbus, 265 M 379, 877 P2d 470, 51 St. Rep. 544 (1994).

Newspaper Successfully Seeking Release of Criminal Justice Information Entitled to Attorney Fees: The Bozeman Daily Chronicle successfully sued the city of Bozeman's police department to obtain the name of an officer who had resigned after being investigated for sexual misconduct. The Supreme Court held that the newspaper had prevailed by relying on its rights under Art. II,

sec. 9, Mont. Const., and that therefore the lower court had the discretion to award attorney fees to the newspaper. Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435, 50 St. Rep. 1014 (1993). See also Pengra v. St., 2000 MT 291, 302 M 276, 14 P3d 499, 57 St. Rep. 1231 (2000).

Attorney Fees: Attorney fees are available to plaintiffs under 27-26-402. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

Part 3
Use of Electronic Mail Systems

2-3-301. Agency to accept public comment electronically — dissemination of electronic mail address and documents required — prohibiting fees.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 77 in (3) near middle of first sentence after "person" inserted "and subject to 2-6-102"; inserted (4) regarding retention of electronic mail; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 313 in (1) after "2-3-111 applies, shall" deleted "if the agency is capable of receiving electronic mail for the internet world wide web"; deleted former (2)(d) that referred to the state electronic bulletin board; in (3) near beginning after "An agency" deleted "that uses electronic mail and creates or receives electronic documents"; and made minor changes in style. Amendment effective July 1, 2001.

Effective Date: Section 2, Ch. 484, L. 1999, provided that this section is effective July 1, 2000.

CHAPTER 4
ADMINISTRATIVE PROCEDURE ACT

Chapter Compiler's Comments

Source — Explanation of Subcommittee Comments: The Montana Administrative Procedure Act is loosely structured on the 1961 Revised Model State Administrative Procedure Act (referred to as "1961 Revised Model Act" in these comments and the Subcommittee comments) adopted by the National Conference of Commissioners on Uniform State Laws in 1961. Pursuant to Senate Joint Resolution No. 12 (1969), the Administrative Procedures Subcommittee of the Montana Legislative Council, in conjunction with Professor John P. McCrory, University of Montana (now University of Montana-Missoula) School of Law, prepared a two-part report on a proposed administrative procedure act based upon the 1961 Revised Model Act. The second part of the report is entitled "Part II, Proposed Montana Administrative Procedure Act With Explanatory Comments". The proposed act was passed but vetoed during the 1971 regular legislative session. The bill was amended and passed again, becoming law during the 1971 first special session. Because the proposed act was substantially different from the 1961 Revised Model Act, the annotator has published comments from the Subcommittee report on the proposed act rather than the comments by the Commissioners on Uniform State Laws explaining the 1961 Revised Model Act. (The proposed act is designated by "[1971 proposed]" when referenced within Subcommittee comments.) By 1971, the comments by the Uniform Law Commissioners did not reflect the many alterations incorporated in the proposed act and were obsolete with regard to the federal administrative procedure act and relevant case law.

The Subcommittee comments have been consolidated in a chapter compiler's comment rather than printing relevant portions of the Subcommittee comments with individual sections because the Subcommittee comments also are rapidly becoming outdated as Title 2, chapter 4, MCA, is amended. The Subcommittee comments may have some bearing on a historical interpretation of a section, but often they no longer accurately reflect the substance of a section and can be very misleading upon casual reading. The bracketed material within the comments is the annotator's.

Uniform Law Commissioner comments relating to the 1961 Revised Model Act appear in the annotations of this chapter only if the Subcommittee comments quote or specifically make reference to them or if a portion of the 1961 Revised Model Act was not used in the proposed act but was incorporated into the final act as passed and approved.

The National Conference of Commissioners on Uniform State Laws has promulgated a complete revision of the 1961 Revised Model Act. The new Model Act is cited in annotations to this chapter as the "Model Administrative Procedure Act (1981)". Sections enacted from this

Model Act contain Commissioners' comments prepared by the National Conference of Commissioners on Uniform State Laws.

Subcommittee Comments

[This material is an introduction by the Uniform Law Commissioners that relates to the 1961 Revised Model Act. See explanatory comments above.]

"The act deals primarily with major principles, not with minor matters of detail. Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state. Each state and each agency must work out these details for itself according to the necessities of the situation. However, there are certain basic principles of common sense, justice, and fairness that can and should prevail universally. The proposed act incorporates these principles, with only enough elaboration of detail to support the essential major features.

The major principles embraced in the Act as adopted by the Conference are:

(1) Requirement that each agency shall adopt essential procedural rules, and, except in emergencies, that all rule-making, both procedural and substantive, shall be accompanied by notice to interested persons, and opportunity to submit views or information;

(2) Assurance of proper publicity for all administrative rules;

(3) Provision for advance determination of the validity of administrative rules, and for "declaratory rulings," affording advance determination of the applicability of administrative rules to particular cases;

(4) Assurance of fundamental fairness in administrative adjudicative hearings, particularly in regard to such matters as notice, rules of evidence, the taking of official notice, the exclusion of factual material not properly presented and made a part of the record, and proper separation of functions;

(5) Assurance of personal familiarity with the evidence on the part of the responsible deciding officers and agency heads in quasi-judicial cases;

(6) Provision for proper proceedings for and scope of judicial review of administrative orders, thus assuring correction of administrative errors.

There is no good reason why these general principles should not govern throughout the entire administrative structure. They are not details; they are essential safeguards of fairness in the administrative process. Yet too many state statutes are altogether deficient in regard to them.

Recent years have, however, been bringing forth in many quarters profound apprehension over the undisciplined growth of administrative powers, and this is the reason why the Congress and several state legislatures have been sufficiently concerned to take affirmative action.

The [1961] Model State Administrative Procedure Act is offered by the National Conference of Commissioners in the hope that it will serve a good purpose in states that may be considering the adoption of such legislation or the revision of acts already on the statute books. The Model Act will, of course, require careful adjustment to the special statutory conditions peculiar to the state under consideration but the general principles set forth are of universal applicability and the suggested language will also be found helpful."

[The following material, relating to the bracketed section(s), is from the report entitled "Part II, Proposed Montana Administrative Procedure Act With Explanatory Comments". See explanatory comments above.]

[Section 2-4-102:]

"[*"Agency":*] The definition of "agency" is important because it determines which governmental bodies, officials and functions are subject to the [1971 proposed] MAPA. In order for an agency to fall within the coverage of the act, it (he) must:

(1) be a board, bureau, commission, department, authority, or officer of state government; and

(2) have authority to make rules or determine contested cases.

The first requirement eliminates from coverage agencies of local government. The second requirement specifies the administrative functions which the [1971 proposed] MAPA covers. "Rules" and "contested cases" are defined in [2-4-102(10)] and [2-4-102(4)] respectively.

The wording of the definition is slightly different from that in the [1961] Revised Model Act, although the intended meaning is the same. The [1961] Revised Model Act defines "agency" as "each state [board, commission, department or officer] . . ." The wording in the [1971 proposed] MAPA was chosen because it is believed that it more strongly reflects an intent to exclude from coverage agencies of local government.

Under the [1961] Revised Model Act's definition of "agency" only the legislature and courts are exempt from coverage. The Commissioners have stated that it is desirable that the definition

of "agency" be "all inclusive." The author is in accord with this philosophy of coverage. An agency or administrative function should only be exempt where the purpose of the agency or function is inconsistent with coverage. Applying this principle, several additional exemptions have been included in [2-4-102(2)].

The governor, as head of the state's executive branch of government, has been excluded from coverage. However, the governor has been designated as a member of certain state agencies. An agency otherwise covered by the act is not exempt because the governor has been so designated.

The state's military establishment has been exempt from coverage because of its unique function and the impracticability of requiring that it comply with the procedures required in the [1971 proposed] MAPA. Excluded with the military establishment are closely related agencies dealing with civil defense and recovery from hostile attack.

The legislature has given the State Board of Pardons [now Board of Pardons and Parole] broad discretionary powers. The nature of these powers warrants an exemption from coverage. However, the highly discretionary nature of the Board's powers does not diminish the need for public information regarding its substantive and procedural rules. Accordingly, the Board's exemption is qualified by the requirement that it must comply with the provisions of the [1971 proposed] MAPA relating to rules describing agency organization and procedures, public inspection of rules, and filing and effective date of rules. The Board's rules must also be published in the Montana Administrative Code and Register [now the Administrative Rules of Montana and the Montana Administrative Register].

The supervision and administration of state institutions are exempt because, to a large degree, such matters are regulated by statute and directly involve basic constitutional rights. It is believed that determinations regarding such matters can be handled better by courts than by administrative bodies. In addition, it would not be practical for institution personnel to follow [1971 proposed] MAPA procedures for many determinations and judgments which they must make, particularly with regard to individual inmates, prisoners or patients.

The administration and supervision of educational institutions has been exempt from coverage for two reasons. First, state laws relating to education are presently under study and may be modified. Second, it is believed that the desirability and feasibility of placing educational institutions, in part or in whole, within the coverage of the [1971 proposed] MAPA should be the subject of an independent study. It is believed that the elimination or modification of the exemption should be considered at a later date when the state has had experience with an administrative procedure act and studies with regard to education statutes have been completed and implemented.

Functions relating to public works have been exempt because it is felt that it would not be practical if such functions were subject to procedures set forth in the [1971 proposed] MAPA and so as not to jeopardize construction schedules, financing plans or eligibility for financial aid programs.

[*"Contested Case":*] The definition of "contested case" is the same as that in the [1961] Revised Model Act, except that the order of words has been altered. The alteration is intended to clarify, not change, the definition.

The definition is broadly phrased so as to include all proceedings in which the basic concepts of due process should be applied to protect private rights and the public interest. Contested case hearings are "trial-type" hearings and due process safeguards are provided for in the [1971 proposed] MAPA.

In contrast to Senate Bill No. 179 [1959], price-fixing and rate-making proceedings are included within the definition of "contested cases" rather than "rule." This is done because such proceedings typically involve factual determinations which should be based upon a record where the parties are able to cross-examine, introduce rebuttal evidence and have available other protections which are available in contested case proceedings, but not required in rule-making proceedings.

The definition refers to determinations which are "required by law" to be made after an opportunity for hearing. This has broader meaning than merely a statutory requirement for an opportunity for hearing. It includes situations where a hearing is required as a matter of constitutional right. Thus, a hearing may be required even though an applicable statute does not provide for one. The words "required by law" have the same broad meaning when used in other sections of the [1971 proposed] MAPA.

The definition is not intended to include informal preliminary inquiries or investigations made to determine if formal "contested case" proceedings should be instituted.

[*"License":*] This definition is the same as that in the [1961] Revised Model Act. The provision regarding licenses "solely for revenue purposes" is intended to exclude from coverage licensing which is purely routine or ministerial in nature. [No comment under 1961 Revised Model Act.]

[*"Licensing":*] This definition is the same as that in the [1961] Revised Model Act, except that the word "limitation" is added. [No comment under 1961 Revised Model Act.]

[*"Party":*] The principle definition of "party" is the same as in the [1961] Revised Model Act. The additional phrase "but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes" has been added to permit agencies to allow interested persons or agencies, who are not sufficiently involved to be parties, to appear where a diversity of viewpoint is desirable in reaching a determination. It is comparable to procedures used by courts in permitting persons to appear as friends of the court.

[*"Person":*] This definition is as the one in the [1961] Revised Model Act. [No comment under 1961 Revised Model Act.]

[*"Rule":*] Except for the addition of the words "regulation, standard or" the basic definition of "rule" is the same as that found in the [1961] Revised Model Act. "Regulation" and "standard" are words which are used with some frequency in the various Montana statutes and it is felt that the incorporation of the terms in the definition of "rule" is desirable for that reason.

The definition includes substantive rules, procedural rules and rules which describe the organization of an agency. A rule may be of "general applicability" even though it is of immediate concern only to a single person or a small group, provided the form of the rule is general and others who fall within the regulated category in the future will come within its coverage.

The first three exceptions from the definition [(a) internal management; second clause of (b) on declaratory rulings; and interagency memoranda, since deleted] are only the exceptions contained in the [1961] Revised Model Act. They are included so that agencies will not be unduly restricted regarding internal matters and to encourage agencies to utilize the practice of issuing declaratory rulings. Four additional exemptions have been added.

Rules relating to the use of public works, facilities, streets and highways are exempt so that it will not be necessary to follow rule-making procedures to establish or change highway speed limits, hours when public facilities are open to the general public and similar regulations.

Seasonal rules relating to hunting, fishing, trapping and the recreational use of state owned or controlled lands and waters are exempt because such rules often must be adopted on short notice or under circumstances when it would be impractical to use rule-making procedures. In addition, they are normally in effect for a shorter period than the 120 days permitted for emergency rules which may be adopted without notice or hearing under [2-4-303].

It would not be practical to make rules relating to personnel standards, job classifications and salary ranges for agency personnel subject to rule-making procedures. To insure that they are not, a specific exemption has been included.

Finally, uniform rules adopted pursuant to interstate compact have been excepted from the definition of "rule." If the rule-making requirements contained in the [1971 proposed] MAPA were applied to such rules it would be inconsistent with the intent of interstate compacts to develop uniform rules in participating states. However, there is still a need for public information regarding these rules. The exception is qualified by the requirement that the interstate compact rules shall be filed with the secretary of state in the same manner as other rules and shall be published in the Montana Administrative Code and Register [now the Administrative Rules of Montana and the Montana Administrative Register].

Under Senate Bill No. 179 [1959], price-fixing and rate-making were included in the definition of rule. These proceedings are included within the definition of "contested case" in [2-4-102(4)].

[Sections 2-4-103, 2-4-201, 2-4-202:]

[Section 201 of the proposed Act, now 2-4-103, 2-4-201, and 2-4-202] is one of the most significant in the [1971 proposed] MAPA. It, together with the filing and publication requirements in [sections 2-4-306 and 2-4-307, 2-4-311 through 2-4-313], will correct two of the most serious deficiencies which exist in administrative practice in the state, lack of public information concerning the actual procedures and policies of state agencies, and lack of knowledge by agency personnel of procedures and policies which should be followed or have been followed in the past.

Section 201(a) [2-4-103 and 2-4-201] requires that each agency adopt rules which describe its organization, its method of operation, the method by which the public may communicate with the agency and state procedures for practice before the agency. It further requires that rules, as well as statements of policy or interpretations used by the agency, must be open to public inspection

and that the agency furnish copies of rules upon request. In order to prevent burdensome expense to agencies, they are authorized to charge the cost of rules so furnished.

The statutes for very few state agencies require the adoption of procedural rules. Some authorize, but do not require, their adoption. In most cases there is no express reference to procedural rules. However, many statutes give agencies general rule-making authority, such as authority to adopt rules to [e]ffectuate the purposes of the act, which is broad enough to authorize the adoption of procedural rules. Even where there is specific direction to adopt procedural rules there is generally an inadequate indication of what should be included. As a result of the foregoing, most agencies either have no procedural rules or rules which are incomplete and inadequate. Some agencies are operating under the incorrect assumption that they do not have authority to adopt procedural rules. [Section 2-4-201] will eliminate such confusion and insure that each agency adopts adequate procedural rules for the guidance of the public and agency personnel and will have the effect of stabilizing agency procedures.

[Section 2-4-103(3)] provides for a sanction where a person's rights have been "substantially prejudiced" by an agency's failure to comply with the public inspection requirement of [2-4-103 and 2-4-201]. Section 2(b) of the [1961] Revised Model Act contains a tougher sanction provision. It states that, in the absence of actual knowledge to the party involved, a rule shall not be valid or effective unless the public information requirements are met. This may be warranted under the provisions of the [1961] Revised Model Act, because a rule thereunder may be made effective 20 days after filing with the secretary of state and before there is any general publication of the rule (see [1961] Revised Model Act, sections 4(2) and 5(b)). Accordingly, there may be a period of time where the only place where a new rule can be seen is at the secretary of state's office or the place where the agency makes its rules available for public inspection. Under the [1971 proposed] MAPA, rules do not become effective until 10 days after publication [since deleted] in the Montana Administrative Register, which is distributed throughout the state (see [2-4-306 and 2-4-312]). Under the circumstances, it is felt that the less stringent sanction provision is warranted in the [1971 proposed] MAPA.

Many agencies, such as the smaller licensing boards, do not have personnel who are trained in administrative procedures and do not have the financial means to employ full-time legal counsel. Such agencies will need guidance in preparing procedural rules. [Section 2-4-202] is intended to meet this need. It is also intended to encourage uniformity in procedural rules adopted by the various agencies. [Section 2-4-202] is similar to section 201(a)(2) of Senate Bill No. 179 [1959]. There is no comparable provision in the [1961] Revised Model Act.

Section 2(4) of the [1961] Revised Model Act provides for public inspection of agency orders and decisions. A comparable provision is contained in [2-4-623], which relates to decisions and orders in contested cases.

[Section 2-4-104:]

[Section 2-4-104] gives the agency subpoena power in rule-making and contested case proceedings. In contested case proceedings, parties are entitled to subpoenas upon request.

[Section 2-4-104] provides a means for enforcement of subpoenas and to require witnesses to testify where their refusal is unjustified.

Many state agencies have subpoena power in contested cases. The power for some agencies extends to rule making as well. All state agencies should have this power if they are to adequately perform contested case and rule-making functions. There is no comparable provision in the [1961] Revised Model Act.

[Section 2-4-105:]

The statutes for some state agencies specifically provide for the right to counsel. It is felt that such a provision for all agencies is appropriate.

[Sections 2-4-302, 2-4-303, 2-4-304, 2-4-305, 2-4-314:]

The rule-making process is an important administrative function, yet few state agencies have rule-making procedures. The study of state administrative procedures revealed that the members of some agencies were not in office when current rules were adopted and/or are unfamiliar with the rule-making procedures that have been followed in the past or that should be followed in the future. Relatively few agencies permit participation by interested persons.

Section 202 [2-4-302 through 2-4-305, 2-4-314] describes the proceedings which must be followed by agencies in adopting rules and provides for public notice of rule-making so that interested persons can submit data, views and argument. The section applies to both procedural and substantive rules. Agency rules may have a substantial impact, and it is in accord with basic principles of fairness that interested persons should be given an opportunity to participate in the adoption process. Public participation also provides a means for an agency to obtain information about the areas to be regulated and possible deficiencies in its intended action. It has also been

suggested that the opportunity for such participation is good public relations which will lead to greater confidence in and more willing compliance with rules.

[Section 2-4-302] provides for notice of intended rule-making action. Much of the language is the same as that in section 3(a)(1) of the [1961] Revised Model Act. There are alterations in the structure and wording because the [1961] Revised Model Act's language is appropriate for newspaper or like publication. [Section 2-4-302] provides for publication in the Montana Administrative Register. Register will be widely circulated throughout the state and may be subscribed to by interested persons (see [2-4-312]). It is felt that this is the most expedient, reliable and economical method of providing general notice of rule-making proceedings. [Section 2-4-302] also provides for notice by mail to persons who make an appropriate request.

If an agency is otherwise required by statute to give notice by newspaper or other publication, such requirement must be complied with in addition to the requirement in the [1971 proposed] MAPA. In order to avoid conflict between the [1971 proposed] MAPA and other statutes regarding the notice period, a minimum 20 day period is established.

Section 202(a)(2) [2-4-302, 2-4-305(part)] describes the extent to which interested persons have a right to participate in rule-making proceedings and the agency's obligation to consider their submissions. Agencies need not conduct a hearing prior to the adoption of procedural rules. In the case of substantive rules, a hearing is required upon request of 10 per cent or 25 of the persons directly affected by the rule-making or an association representing at least 10 per cent or 25 persons directly affected or a governmental subdivision or agency. In the absence of such a request, no hearing is required prior to the adoption of substantive rules.

Section 202(a)(2) [2-4-302, 2-4-305(part)] follows section 3(a)(2) of the [1961] Revised Model Act with four exceptions. First, the [1961] Revised Model Act requires a substantive rule-making hearing when requested by 25 persons. The alternative ten per cent requirement has been added because some state agencies regulate comparatively small groups. This addition gives the hearing requirement greater flexibility and insures that there is not a disparity in treatment between small and large regulated groups. Second, the persons requesting the hearing must be "directly affected." This has been added to insure that agencies need not go through the trouble and expense of a hearing unless the parties requesting it have a substantial interest in the proceeding. Third, language is added which states that rule-making hearings are not subject to contested case procedures. Fourth, language has been added to insure that where hearings are otherwise required by statute, that requirement will not be changed. Some statutes require a hearing in rule-making proceedings.

[Section 2-4-303] provides for the adoption of emergency rules without notice or with abbreviated notice. It follows the wording of section 3(b) of the [1961] Revised Model Act, except a final sentence is added to make it clear that an agency's emergency findings will be subject to court review. There is no provision for renewal of emergency rules, because it is felt that the 120 day effective period is ample for completion of conventional rule-making procedures.

Section 202(c) [not enacted], which provides for a sanction for non-compliance with rule making procedures, is patterned after section 3(c) of the [1961] Revised Model Act. However, in section 3(c) the 2 year limitation period relates only to commencing actions to contest rules. Language has been added to extend the limitation period to situations where non-compliance is raised as a defense.

[Section 2-4-304] has been inserted to make it clear that the useful techniques described therein may be employed in the rule-making process, in addition to the formal requirements. These techniques are presently employed by some state agencies. There is no such provision in the [1961] Revised Model Act. Section 201(d) of Senate Bill No. 179 [1959] contains a similar provision.

The purpose of [2-4-305(part)] is to insure that agency rules will not merely restate statutory language. It should also be helpful in eliminating the apparent misconception of some agency personnel that statutes and agency rules are the same thing. There is no comparable provision in the [1961] Revised Model Act. Section [2-4-305(part)] is similar to section 201(e) of Senate Bill No. 179 [1959].

There is no provision like [2-4-314] in the [1961] Revised Model Act or in Senate Bill No. 179 [1959]. The study of administrative procedures revealed that many agencies have gone for long periods without review or needed modification of their rules. It is hoped that the requirement of annual review will correct this problem.

[Sections 2-4-306, 2-4-307, 2-4-311, 2-4-312, 2-4-313:]

At the present time there is no provision for central filing of the rules for all state agencies. Not all agencies have their business offices in the state capitol. Many are scattered throughout the state. In some instances the locations change with a change in agency personnel. As a result,

it is sometimes difficult to determine if a particular agency has adopted rules and, if it has, to obtain copies.

[Sections 2-4-306, 2-4-307, 2-4-311 through 2-4-313] are intended to alleviate the problems which are created by this situation by providing for central filing and statewide distribution of all agency rules.

[Section 2-4-306] states filing requirements for all rules. It contains specific filing requirements for rules in effect on the effective date of the [1971 proposed] MAPA and for rules adopted thereafter. Except in the case of emergency rules and rules where a later date is specified in the rule or required by statute, new rules are effective 10 days after publication [since deleted] in the Montana Administrative Register (see [2-4-311]). Under section 4(b) of the [1961] Revised Model Act, with the same two exceptions noted above, rules are effective 20 days after filing with the secretary of state. Under this scheme, a rule could be effective before it is published on a statewide basis in the Register (referred to as a bulletin in section 5(b) of the [1961] Revised Model Act), since the Register is published monthly [presently published bi-monthly]. Basic principles of fairness dictate that individuals should not be required to comply with a rule until a reasonable attempt has been made to give notice of its existence. It is felt that making rules effective 10 days after publication in the Register [since deleted], which provides statewide publication, is more consistent with these principles than the comparable provision in the [1961] Revised Model Act.

Under [2-4-306] an emergency rule may be effective upon filing with the secretary of state (before publication in the Register). However, in this case the agency is required to take appropriate measures to make the rule known to all affected persons.

Section 4(a) of the [1961] Revised Model Act requires the filing of rules in existence on the effective date of the act, but does not give a deadline. Section 203(a) [repealed, sec. 10, Ch. 285, L. 1977] specifies 60 day deadline. It is felt that a deadline is important because of the public interest in having central filing at an early date, to give specific instructions to agencies with regard to the filing requirement and so that the secretary of state will not be unduly delayed in compiling, indexing and publishing the Montana Administrative Code pursuant to section 204(a) [repealed, sec. 11, Ch. 285, L. 1977].

[Section 2-4-306] gives the secretary of state authority to prescribe a standard format, style and arrangement for rules. The study of state administrative procedures revealed that there is a substantial lack of uniformity in the form in which agencies adopt and publish rules. It will be a great assistance to the secretary of state, especially in the compiling and indexing of the Code and Register, if rules are filed in a uniform style and format. Any inconvenience to particular agencies will be relatively slight in comparison to the inconvenience to the secretary of state caused by a lack of uniformity. The [1961] Revised Model Act has no such provision. A comparable provision is found in section 203 of Senate Bill No. 179 [1959].

[Sections 2-4-307, 2-4-311 through 2-4-313:]

At the present time there is no means of providing statewide notice of the existence or content of administrative rules. As noted in the previous comment, it is often difficult to determine if an agency has adopted rules and to obtain copies. The rules of some agencies can be seen only by examining the minutes of their meetings. Although many agencies periodically publish their rules, copies are normally available only at their offices, which may or may not be in the state capitol. The published rules for some agencies are out of print and unavailable or are not current because they do not contain amendments.

Section 204 [2-4-307, 2-4-311 through 2-4-313] is designed to correct this situation. It provides for statewide distribution of complete, current copies of rules adopted by all agencies. It also provides for statewide distribution of rule-making notices.

[Section 2-4-311] directs the secretary of state to publish a compilation of the rules for all state agencies called the Montana Administrative Code [now the Administrative Rules of Montana]. The Code is to be published in loose-leaf form and will be distributed throughout the state (see [2-4-313]). Each county will have at least one current set of the Code available for public inspection. The Code will be supplemented monthly by the Montana Administrative Register with rules adopted after publication of the Code.

The loose-leaf form of publication is specified because it is believed that it will be the most convenient and expedient means of keeping the Code current. As rules are amended, replacement pages will be published as part of the Register and can be slipped into the Code in the place of superseded pages. New rules can also be slipped in at appropriate places. The Code will always be current without the need for resorting to awkward pocket parts which would otherwise have to be published periodically. The loose-leaf format for the Code and Register combines the features of monthly notice of rule changes and continual revision.

To ensure that current copies of the Code are available throughout the state, [2-4-313] specifies that the secretary of state, the clerks of the courts of record, the county clerks and the librarians for the state law library and the university of Montana [now university of Montana-Missoula] law library maintain complete, current sets of the Code. In addition, [2-4-313] directs the secretary of state to make subscriptions to the Code and Register available to any person at a charge to cover publication and mailing costs.

[Section 2-4-311] requires that the Code be arranged in such fashion that there may be separate printings of the rules for individual agencies. This coordination between the secretary of state and individual agencies should result in cost savings to agencies. [Section 2-4-103] requires that agencies provide copies of rules upon request.

In addition to a Rules Section of the Register, there is a Notice Section. This section is the official vehicle for publication of rule-making notices, although other methods of publication must also be used where required by statute (see [2-4-306]). The secretary of state, clerks of the courts of record, county clerks and law librarians are required to keep a file of such notices for the preceding two years. The two-year period is selected to correspond with the two-year limitation period set forth in Section 203(c) [not enacted] for challenging rules on the basis of irregularities in adoption procedures.

Where the publication of a rule in the Code or Register would be unduly burdensome, it may be omitted under [2-4-307], provided that it is available at the adopting agency and the Code or Register gives notice of its general contents.

Finally, [2-4-313] gives the secretary of state flexibility in establishing charges to be made for the Code and Register.

[Section 2-4-315:]

Since public participation in the rule-making process is desirable, it is appropriate that there should be a provision for interested persons to petition an agency requesting the adoption, amendment or repeal of rules. This section is the same as section 6 of the [1961] Revised Model Act with one exception. The [1961] Revised Model Act requires that the agency act on a petition within 30 days. [This section] specifies 60 days. Experience with a comparable provision in the Model Act, which set no limit, showed that agencies reacted slowly or not at all to petitions. Accordingly, a time limit is desirable. However, 60 days is more realistic for Montana in view of the fact that key personnel in many agencies are scattered around the state, making action within a 30-day period impractical.

[Section 2-4-501:]

It is not uncommon for an individual to be uncertain as to whether particular activity which he contemplates would violate a statute or an agency rule or order. A dilemma results; forego the activity and avoid the potential problem, or engage in the activity and risk the consequences of violating a statute, rule or order. [This section] is intended to eliminate the injustices created by such dilemmas by providing a procedure for agencies to make declaratory rulings.

[This section] embodies the declaratory ruling provisions of the [1961] Revised Model Act with one addition. The final sentence has been modified (and language added) to insure that agencies do not have unlimited discretion in refusing to make declaratory rulings. The drafters of the [1961] Revised Model Act considered a requirement that declaratory rulings be made upon request of an interested party. It was concluded that this would place an impractical burden upon agencies. It is felt that this conclusion is justified. However, it is believed that the modification of the final sentence in [this section] will insure that declaratory rulings will be issued where the circumstances warrant.

[Section 2-4-505:]

The state supreme court has not always been willing to take judicial notice of administrative rules. In view of the filing and publication requirements in the [1971 proposed] MAPA, this requirement, which will eliminate the necessity for submitting proof as to the existence and authenticity of rules, is warranted.

[Section 2-4-506:]

This section, like [2-4-501], provides a means for determining controversies where individuals must know where they stand before taking definitive action. Although the authority conferred by the section is probably available under the Uniform Declaratory Judgments Act, it is included to insure that the procedure is available.

This section is identical to Section 7 of the [1961] Revised Model Act, with one exception, the word "found" has been substituted for "alleged" in the second line. This change was made to require that the court's authority to act is based upon a finding rather than a mere allegation.

[Sections 2-4-601, 2-4-603(1), 2-4-612(1), 2-4-614, 2-4-623(2):]

A "contested case" is one in which a determination of legal rights, duties or privileges must by law be made after an opportunity for a "trial-type" hearing. The Montana supreme court has recognized the right to notice and hearing in such cases as a matter of constitutional right, even though none is provided for by statute. In such proceedings basic due process requirements must be met.

Many state agencies have the "contested case" function. However, the statutes vary greatly with regard to notice and hearing. Some statutes are silent. Others mention the right, but do not give specific directions as to the requirements. Still others conform, either substantially or in part, with the provisions of [2-4-601, 2-4-603(1), 2-4-612(1), 2-4-614, 2-4-623(2)]. In some instances, statutes make reference to notice and hearing for some of the agency's contested case functions, but not for others.

Similarly, statutes vary with regard to the record in contested cases. In many instances no mention is made of a record. In others, mention is made of a "record" or "minutes" of proceedings without giving specific directions as to the content. It is important that the content of the record be clearly specified and understood, because it is the basis for the agency's findings of fact and constitutes the record which is used for judicial review (see [2-4-704]).

Section 301 [2-4-601, 2-4-603(1), 2-4-612(1), 2-4-614, 2-4-623(2)] contains fundamental requirements which are applicable to and appropriate for all contested case proceedings. It provides guidelines and requirements for all agencies to insure that basic requirements of due process are met.

[Section 2-4-601] requires "reasonable notice" of hearing. The functions of state agencies and the requirements of areas which they regulate vary. What may be reasonable notice of hearing for one agency may be insufficient or unnecessarily long for another. Accordingly, a uniform notice period is not established.

[Section 2-4-601] describes the required content of a notice of hearing. It assures that parties will be fully apprised of the time and place of the hearing, the purpose for the hearing and charges or matters to be considered. [Section 2-4-612(1)] affords parties the right to fully participate in the hearing.

The importance of the record has already been mentioned. In order to avoid unnecessary expense, a transcript of oral proceedings need not be prepared unless requested by a party. The requesting party must pay the expense of the transcript, unless a statute provides to the contrary.

Section 301 [2-4-601, 2-4-603(1), 2-4-612(1), 2-4-614, 2-4-623(2)] is the same as section 9 of the [1961] Revised Model Act with two exceptions. Language is added to [2-4-614] to clarify the requirements regarding the record of oral proceedings and transcript. The words "as evidence" have been added to [2-4-614 (1)(g)] so its provisions will not be interpreted to apply to legal memoranda which may be prepared for a decision maker.

[Section 2-4-611:]

As indicated in [the comment for 2-4-612(2), (3), (5) through (7)], many agencies have little direction with regard to the conduct of hearings. Only a few statutes provide for the appointment of hearing examiners, which may be a useful procedure for busy agencies, as well as for smaller agencies who wish to delegate the hearing function in contested cases to persons they feel to be more qualified to handle such matters.

[Section 2-4-611] expressly gives agencies authority to appoint hearing examiners. [Section 2-4-611] describes the authority which agency members and hearing examiners have in connection with the conduct of hearings. Although the provisions of these two sections may be implied by the nature of the contested case function or from other provisions of the [1971 proposed] MAPA, it is believed desirable that they be expressly stated to give proper guidance to agencies. The requirement that testimony be given under oath or affirmation is included [now at 2-4-612(4)] because of the importance of the record made before the agency in the decisional process and for judicial review.

[Section 2-4-611] relates to voluntary and involuntary disqualification of hearing examiners and agency members. It is felt that this is a matter which should be covered by statute.

[Section 2-4-612:]

[*Section 2-4-612(2), (3), (5) through (7):*]

Statutory provisions relating to the admission or exclusion of evidence fall into four basic categories: those which require that agencies follow the rules of evidence which courts follow; those which state that agencies are not bound by the rules of evidence; those which are ambiguous; and those which are silent on the subject. The statutes for many agencies fall into the final category. Similarly, many statutes make no reference to the right to cross-examine.

These are areas where agencies need specific direction if they are to properly perform the contested case function.

[Section 2-4-612] provides that agencies are not bound by statutory or common law rules of evidence [changed during enactment; see 2-4-612(2)]. This is a substantial departure from section 10(1) of the [1961] Revised Model Act which states that, "rules of evidence as applied in (non-jury) civil cases shall be followed." This requirement is relaxed "when necessary to ascertain facts not reasonably susceptible of proof under those rules." In the latter situation a "prudent man" test is applied. This provision of the [1961] Revised Model Act has been criticized as being confusing even for lawyers to apply.

To a large degree, state administrative agencies are operated by persons who do not have legal training. For this reason, requiring that agency personnel comply with technical rules of evidence is not deemed to be practical or appropriate. Accordingly, this recommendation in the [1961] Revised Model Act, which may be subject to varying interpretations even by lawyers and is subject to an exception which is somewhat nebulous, has not been followed.

It is the author's conclusion that the rules of evidence should not be binding in contested case proceedings unless otherwise provided by statute. However, this does not mean that agencies do not have limitations or guidelines. [Section 2-4-612] provides a standard for admission or exclusion of evidence and expressly limits the extent to which findings may be based upon hearsay evidence [now common law and statutory rules of evidence; see Title 25, chapter 26]. An additional requirement which insures that agencies' findings will be based upon reliable evidence is found in [2-4-704] relating to judicial review. A court may reverse an agency's findings which are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Thus, the findings of an agency must be based upon reliable evidence, irrespective of the evidence which is admitted during the hearing.

[Section 2-4-612] is patterned after the Model Act and section 303 of Senate Bill No. 179 [1959]. The remaining provisions of [2-4-612] follow the [1961] Revised Model Act in providing for receipt of documentary evidence, cross-examination and official notice. Language is added to [2-4-612] regarding cross-examination to insure that an agency does not receive in evidence documents which are not subject to cross-examination.

[*Section 2-4-612(4):*]

As indicated in the previous comment [regarding 2-4-612(2), (3), (5) through (7)], many agencies have little direction with regard to the conduct of hearings. Only a few statutes provide for the appointment of hearing examiners, which may be a useful procedure for busy agencies, as well as for smaller agencies who wish to delegate the hearing function in contested cases to persons they feel to be more qualified to handle such matters.

[Section 2-4-611] expressly gives agencies authority to appoint hearing examiners. [Section 2-4-611] describes the authority which agency members and hearing examiners have in connection with the conduct of hearings. Although the provisions of these two sections may be implied by the nature of the contested case function or from other provisions of the [1971 proposed] MAPA, it is believed desirable that they be expressly stated to give proper guidance to agencies. The requirement that testimony be given under oath or affirmation is included [at 2-4-612(4)] because of the importance of the record made before the agency in the decisional process and for judicial review.

[Section 2-4-611] relates to voluntary and involuntary disqualification of hearing examiners and agency members. It is felt that this is a matter which should be covered by statute.

[Section 2-4-613:]

It has been stated that "it is a fundamental principal of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert." [Section 2-4-613] is patterned after section 13 of the [1961] Revised Model Act. The Commissioners' comment gives the following explanation:

"This section is intended to preclude litigious facts reaching the deciding minds without getting into the record. Also precluded is ex parte discussion of the law with the party or his representative. No objection is interposed to discussion of the law with other persons, e.g., the attorney general, or an outside expert."

The words "after issuance of notice of hearing" have been added in [2-4-613] so that it will not be interpreted to apply to preliminary inquiries or investigation made to determine if formal contested case proceedings should be instituted. See the comment following [2-4-102(4)] defining "contested case."

No comparable restriction was found for any state agency.

[Sections 2-4-621, 2-4-622:]

Section 304 [2-4-621, 2-4-622] is identical to section 11 of the [1961] Revised Model Act. The following comment, supplied by the Commissioners, explains the purpose of the section:

The purpose of this section is to make certain that those persons who are responsible for the decision shall have mastered the record, either by hearing the evidence, or reading the record or at the very least receiving briefs and hearing oral argument. It is intended to preclude "signing on the dotted line."

No comparable requirement was found for any state agency.

[Section 2-4-631:]

This section is substantially the same as section 14 of the [1961] Revised Model Act. The words "suspensions, annulment, withdrawal, limitation or amendment" have been added to [2-4-631(1)] and the word "amendment" has been added to [2-4-631(3)]. In addition, the words "required by law" have been substituted for "required" in [2-4-631(1)]. The intent of this section is to specifically include licensing among "contested cases."

With some exceptions, administrative licensing statutes provide for a hearing when a previously issued license is revoked or suspended. The language describing the possible actions that may be taken to revoke, suspend or otherwise effect a license is not as comprehensive as stated in [2-4-631], but usually the right to a hearing is recognized. However, a number of statutes do not provide for a hearing where the initial application for a license is denied. Many of the licensing statutes permit or require agencies to deny licenses on the basis of discretionary considerations. Typical is a provision that an agency may or must deny a license if the applicant is not of "good moral character." Basic principles of fairness and due process require that when an agency bases the denial of a license upon such discretionary considerations, the applicant should have the right to a contested case hearing. The United States Supreme Court and state supreme courts have recognized the right to a hearing in such situations as a matter of constitutional right.

The words "required by law" as used in [2-4-631(1)] have the same broad meaning referred to in the comment under [2-4-102(4)], which defines "contested case." The intent of [2-4-631] is to insure that contested case procedures will be followed in all licensing situations where a hearing is required by statute or as a matter of constitutional right, including the denial of a license on the basis of discretionary considerations.

[Section 2-4-631(3)] provides for summary license suspension where the public health, safety, or welfare is involved.

[Sections 2-4-702 through 704:]

Section 308 [2-4-702 through 2-4-704] provides for the mode and scope of judicial review in contested cases. Under the provisions of subsection 308(a) [2-4-702 (not enacted in proposed form—see Uniform Commissioner's comment in annotations of 2-4-702)] it is the sole mode of review available and pre-existing statutory or common law methods of review are eliminated.

Review is based upon the record made before the agency. The reviewing court may permit a party to submit additional evidence regarding the merits of the case. Such evidence is to be heard and considered by the agency before submission to the court. However, the court may hear evidence relating to alleged procedural irregularities before the agency.

The reviewing court may not substitute its judgment for that of the agency as to the weight of evidence on questions of fact. However, the court may reverse or modify the agency's determination if such findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Specific grounds for challenging the decision of an agency are set forth in [2-4-704].

Section 308 [2-4-702 through 2-4-704] follows section 15 of the [1961] Revised Model Act, with two exceptions. Under section 15(a) of the [1961] Revised Model Act, pre-existing methods of review are not eliminated. The Commissioner's comment indicates that this provision is inserted as a matter of expediency to eliminate opposition to passage of the act, not because it is considered to be the most desirable provision.

The [1961] Revised Model Act does not give any guidance as to the allegations which should be contained in a petition for review. It is believed that minimum requirements should be stated by statute. This has been done in [2-4-702].

Judicial review of agency decisions [is] one of the most confused and troublesome areas in the state administrative procedures. There is a lack of uniformity among agencies as to mode and scope of review. A number of statutes make no mention whatsoever of judicial review. Some mention only the right to appeal or review, but say little or nothing about how it should be accomplished or the extent to which a court may review the agency's findings. The statutes which are more specific with regard to method or scope of review lack uniformity and, in many

cases are ambiguous and incomplete. The methods of review specifically provided for include trial de novo, certiorari and injunction.

It is the author's conclusion that there is no justification for the lack of uniformity in judicial review proceedings. This matter is discussed in some detail in the report of the study of state administrative procedures. It would not be practical to restate the discussion here. However, a few words about de novo review are deemed warranted. A number of statutes provide for de novo review specifically, some seem to provide for it by implication, and others specifically prohibit it. De novo review, even where specifically provided for, has no common meaning. Each statute seems to reflect a different concept of the term.

De novo review is abolished under [2-4-702 (not enacted in proposed form—see Uniform Commissioner's comment in annotations of 2-4-702)] along with other pre-existing forms of review because it causes wasteful and costly duplication of effort by courts and agencies. If a party can present a new or substantially different case to a court than was presented to the agency, there is no real purpose in having an agency hearing at all. Such procedures will only encourage parties to withhold evidence at the agency hearing so as not to fully advise the opposition of their case. Orderly administrative procedures should foreclose such practices. The procedural safeguards set forth in the contested case sections of the [1971 proposed] MAPA should eliminate any need which may previously have existed for de novo review.

[Section 2-4-711:]

[Section 2-4-711] contains the same basic provision for appeal of district court decisions to the state supreme court as is contained in the [1961] Revised Model Act. However, specific provision for continuing or discontinuing stays is added. This section is similar to section 307 of Senate Bill No. 179 [1959]."

Severability: Section 25, Ch. 2, Ex. L. 1971, was a severability clause.

Repealer: Section 24, Ch. 2, Ex. L. 1971, read: "Repeal of inconsistent provisions. All laws or parts of laws in conflict herewith are hereby repealed to the extent of such conflict."

Effective Date: Section 26, Ch. 2, Ex. L. 1971, read: "Time of taking effect. This act shall take effect on December 31, 1972, except that pending proceedings shall not be affected."

Chapter Case Notes

Principles of Construction of Rules Generally Same as for Statutes: The court generally applies the same principles in construing administrative rules as are applicable in interpreting statutes. Thus, the court first looks to the plain language of the rule. Bean v. Bd. of Labor Appeals, 270 M 253, 891 P2d 516, 52 St. Rep. 169 (1995).

No Departmental Rulemaking Authority Regarding Water Claims — Jurisdiction in Water Courts — Rulemaking Reserved to Supreme Court: Legislation in 1979 placed the procedure for adjudication of water claims in the Water Courts and reserved the power of rulemaking with respect to pending judicial proceedings to the Supreme Court. Lacking express legislative authority, neither the Board nor Department of Natural Resources and Conservation has any rulemaking authority with respect to procedures in the adjudication of water rights before the Water Courts, and the Montana Administrative Procedure Act does not supply such authority. Functions of the Department respecting water claims are limited to rendering assistance to the Water Judges as set out in 85-2-243. In re Dept. of Natural Resources and Conservation, 226 M 221, 740 P2d 1096, 44 St. Rep. 604 (1987).

Confidentiality Rule of Medical Legal Panel — Panel Not Subject to MAPA: Plaintiffs who filed a claim with the Montana Medical Legal Panel alleging malpractice against two doctors requested a stenographic record of the hearing. The doctors opposed the request, and the Panel chairman ruled that under Rule 15(c), Panel Rules of Procedure, no transcript would be made. Plaintiffs then applied to the District Court for a Writ of Mandamus, and the court ruled that denial of the transcript violated due process under the 14th amendment of the U.S. Constitution and Art. II, sec. 17., Mont. Const. On appeal, the Supreme Court found that the language of 27-6-502 indicated legislative intent that the Montana Administrative Procedure Act provisions concerning transcripts do not apply. The court held that the Panel is a purely advisory body and therefore confidential. Given its confidential nature, it cannot be said that Rule 15(c) arbitrarily denies parties a transcript or that denial of a transcript destroys the right to fully cross-examine witnesses at trial. The court found no constitutional infirmities in the workings of Rule 15(c); therefore, the District Court was reversed. State ex rel. Hufford v. Mont. Medical Legal Panel, 223 M 73, 724 P2d 186, 43 St. Rep. 1541 (1986).

Inapplicable to Unemployment Benefits Process: The Montana Administrative Procedure Act does not apply to agency and court handling of claims for unemployment insurance benefits. Billings v. Bd. of Labor Appeals, 204 M 38, 663 P2d 1167, 40 St. Rep. 648 (1983).

Administrative Rule Void When Contrary to Longstanding Administrative Interpretation: The Department of Revenue's longstanding administrative interpretation of the meaning of "on the same street" as used in 16-3-306 has the force and effect of law due to the repeated reenactment of that section by the Legislature without change in the operative language that no license be issued to a business "on the same street" and within 600 feet of a church or school. Thus the interpretation could not be changed, and an administrative rule making a change is invalid. Hovey v. Dept. of Revenue, 203 M 27, 659 P2d 280, 40 St. Rep. 272 (1983).

Preliminary Environmental Review — Hearing Requirements: Neither the Montana Environmental Policy Act (MEPA) nor the Montana Administrative Procedure Act (MAPA) requires a hearing in a preliminary environmental review. Titeca v. St., 194 M 209, 634 P2d 1156, 38 St. Rep. 1533 (1981).

Authority to Adopt Rules Not Conferred: The Montana Administrative Procedure Act alone does not confer authority to adopt rules; it merely outlines the correct procedure an agency must use once the agency has been granted statutory power to adopt rules. Bradco Supply Co. v. Larsen, 183 M 97, 598 P2d 596 (1979).

Chapter Law Review Articles

Montana Supreme Court Survey: Administrative Law, Reep, 42 Mont. L. Rev. 329 (1981).

Montana Supreme Court Survey: Administrative Law, Snyder, 41 Mont. L. Rev. 151 (1980).

Administrative Law, Matteucci, 40 Mont. L. Rev. 178 (1979).

Administrative Procedures in Montana: A View After Four Years With the Montana Administrative Procedure Act, McCrory, 38 Mont. L. Rev. 1 (1977).

Alternative Dispute Resolution With Emphasis on Rulemaking Negotiations, 4 Admin. L.J. 83 (1990).

Commentary on "Administrative Arrangements and the Political Control of Agencies": Political Uses of Structure and Process, Robinson, 75 Va. L. Rev. 483 (1989).

Fashioning an Administrative Law System, Schwartz, 37 U.N.B.L.J. 59 (1988).

Chapter Collateral References

Montana Administrative Procedures Handbook, State Bar of Montana, Helena, Mont.

Part 1
General Provisions

2-4-102. Definitions.

Compiler's Comments

2003 Amendment: Chapter 181 in definition of rule in (b)(i) near beginning after "agency" inserted "or state government" and at end inserted "including rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide budgeting and accounting system" and deleted former (e) that read: "(e) rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide budgeting and accounting system"; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 19 substituted definition of administrative rule review committee for definition of administrative code committee that was provided for in Title 5, chapter 14. Amendment effective February 17, 1999.

1997 Amendments: Chapter 349 in definition of agency, under entities excepted from the provisions of Title 2, chapter 4, inserted (a)(v) providing "the public service commission when conducting arbitration proceedings pursuant to 47 U.S.C. 252 and 69-3-837". Amendment effective April 22, 1997.

Chapter 489 inserted definitions of interested person and significant interest to the public; and made minor changes in style.

Severability: Section 39, Ch. 349, L. 1997, was a severability clause.

1995 Amendment: Chapter 546 in (2)(a)(i), after "state board of pardons", inserted "and parole"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: In (10)(d), in two places, after "annually", inserted "or biennially"; and made minor changes in style. Amendment effective April 4, 1991.

1985 Amendment — Retroactive Application: Inserted language listing entities that definition of agency does not include.

Section 2, Ch. 671, L. 1985, provided: "Section 1 shall apply as of December 31, 1972, except that proceedings pending on that date are not affected."

Administrative Code Committee Bill: Senate Bill No. 13, Ch. 671, L. 1985, clarifying the definition of "agency", was introduced by request of the Administrative Code Committee. See Administrative Code Committee Report, December 1984, Montana Legislative Council.

Preamble: The preamble to Ch. 671, L. 1985, provided: "WHEREAS, the Montana Supreme Court has held in recent opinions that the Montana Administrative Procedure Act applies to school districts; and

WHEREAS, it is clear from the language of section 2-4-102(2), MCA, as originally enacted, and from the 1971 official comments of the Administrative Procedures Subcommittee recommending the enactment of the Montana Administrative Procedure Act that the Act was never intended to apply to units of local government, school districts, or any other political subdivisions; and

WHEREAS, substantial confusion could result if the provisions of the Act are continued to be applied to any government entity other than state agencies; and

WHEREAS, it is the intent of the Legislature that the Act be applied only to those agencies of state government provided for in the Act and the belief of the Legislature that the Act was never intended to apply to units of local government, school districts, or any other political subdivisions of the state.

THEREFORE, it is the intent of this bill to clarify that the Montana Administrative Procedure Act does not apply to units of local government, school districts, or any other political subdivisions of this state."

Retroactive Application: Section 2, Ch. 671, L. 1985, provided: "Retroactive Application. Section 1 shall apply as of December 31, 1972, except that proceedings pending on that date are not affected."

Source: 1961 Revised Model Act, sec. 1.

Case Notes

Challenge of Environmental Assessment — No Jurisdiction for Administrative Review: A grain company sought a permit to build a high-speed grain loading terminal near Pompeys Pillar national monument. The permit was granted and plaintiff, a nonprofit association supporting the monument's preservation, began administrative proceedings in an effort to overturn the permit issuance on grounds that the Department of Environmental Quality erred in its preparation of the environmental assessment related to the permit. An administrative law judge concluded that the Department acted arbitrarily and capriciously by issuing a permit without preparing an environmental impact statement. The Department filed exceptions to the administrative law judge's conclusions with the Board of Environmental Review. The Board ultimately affirmed the Department's decision to issue the permit, and plaintiff appealed to District Court. The Department contended that because the challenge to the administrative decisions did not contain any air quality issues, but only addressed environmental assessment issues governed by the Montana Environmental Policy Act (MEPA), and that because MEPA does not provide for administrative review of challenges to MEPA compliance, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. The District Court agreed and dismissed plaintiff's petition for lack of subject matter jurisdiction. Plaintiff appealed, but the Supreme Court affirmed. Had plaintiff challenged air quality issues, it would have been entitled to administrative proceedings. However, plaintiff's challenge pertained only to issues related to the environmental assessment, which is governed by MEPA. MEPA requires that a compliance challenge be brought in District Court, rather than through administrative proceedings. Thus, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. Plaintiff's petition was properly dismissed. Pompeys Pillar Historical Ass'n v. Dept. of Environmental Quality, 2002 MT 352, 313 M 401, 61 P3d 148 (2002).

Veterans Administration (Now Department of Veterans Affairs) Per Diem Payments to Be Reported as Third-Party Liability Payments for Medicaid Reimbursement — Reasonable Administrative Rule Defining Third Party: A longstanding administrative rule of the Department of Public Health and Human Services (DPHHS), ARM 46.12.304, required monthly Veterans Administration (now Department of Veterans Affairs) per diem payments to be reported as third-party liability payments that would result in a reduction of Medicaid reimbursements. Plaintiff challenged the interpretation of the administrative rule with the Board of Public Assistance, which confirmed DPHHS's interpretation, and the District Court affirmed the finding of the Board. On appeal to the Supreme Court, plaintiff asserted that it was not required to report its receipt of monthly Veterans Administration (now Department of

Veterans Affairs) per diem payments as anything other than a subsidy to offset against its general operating expenses. The Supreme Court found that the plain meaning of the rule provided specific notice that a public agency will be considered a third party if it is liable to pay all or part of the cost of medical treatment and medical-related services for a person's personal injury, disease, or illness. The rule sufficiently identified entities considered third parties, which included the Veterans Administration (now Department of Veterans Affairs). DPHHS's interpretation of the rule lay within the range of reasonable interpretation permitted by the wording of the rule and was not plainly inconsistent with the spirit or plain language of the rule. Therefore, DPHHS's interpretation was correct, and the District Court did not err in holding that the decision of the Board of Public Assistance affirming DPHHS's interpretation was legally correct. Glendive Medical Center, Inc. v. Dept. of Public Health and Human Services, 2002 MT 131, 310 M 156, 49 P3d 560 (2002).

Standing of Local Air Pollution Control Board to Challenge Validity of State Administrative Rules: A local pollution control board is a person within the statutory definition in this section, and in the same way as a citizen of a local area is more particularly affected by actions of the state Board of Environmental Review than is a citizen of another area, the interest of a local board is distinguishable from and greater than the interest of the public generally. Because of threatened injury to a local board in the form of potential economic harm from additional expenses necessary to implement state administrative rules, a local board has standing to challenge the validity of administrative rules concerning air pollution applicable within its area of jurisdiction. Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review, 282 M 255, 937 P2d 463, 54 St. Rep. 338 (1997), followed in Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999).

County Standing to Sue State Over Improperly Adopted Administrative Rule: The Department of Revenue directed county tax assessors to change their method of appraising the value of heavy equipment. The change in method would have resulted in substantial loss of revenue to counties. After receiving objections from the counties, the Department scheduled a public hearing, and after the hearing adopted an administrative rule requiring use of the new valuation method despite the potential loss of revenue to the counties. Rosebud County brought suit, alleging that the rule was invalid because the Department had failed to follow the statutory procedure for adopting administrative rules. The Department argued that the county could not sue another branch of state government and also could not bring suit because it had not suffered any damage. The Supreme Court ruled that the county could sue another state entity because it was seeking declaratory relief not damages and that the county had standing because it was facing potential loss of revenue. The court also affirmed the lower court's ruling that the administrative rule was invalid because the Department had not followed the proper procedure in adopting the rule. Rosebud County v. Dept. of Revenue, 257 M 306, 849 P2d 177, 50 St. Rep. 281 (1993).

No Departmental Rulemaking Authority Regarding Water Claims — Jurisdiction in Water Courts — Rulemaking Reserved to Supreme Court: Legislation in 1979 placed the procedure for adjudication of water claims in the Water Courts and reserved the power of rulemaking with respect to pending judicial proceedings to the Supreme Court. Lacking express legislative authority, neither the Board nor Department of Natural Resources and Conservation has any rulemaking authority with respect to procedures in the adjudication of water rights before the Water Courts, and the Montana Administrative Procedure Act does not supply such authority. Functions of the Department respecting water claims are limited to rendering assistance to the Water Judges as set out in 85-2-243. In re Dept. of Natural Resources and Conservation, 226 M 221, 740 P2d 1096, 44 St. Rep. 604 (1987).

Administrative Decision to Include Overflight Mileage in Tax Apportionment Formula — Must Be Rule — Noncompliance With MAPA: The unilateral administrative decision of a Department of Revenue auditor to include an airline's nonstop flyover mileage in the numerator of the statutory apportionment formula qualified as a rule under 2-4-102 and was subject to the notice and hearing requirements of 2-4-302 in order to be valid under the Montana Administrative Procedure Act. NW. Airlines, Inc. v. St. Tax Appeal Bd., 221 M 441, 720 P2d 676, 43 St. Rep. 959 (1986).

Contested Case — Requirement for Judicial Review — Exhaustion of Administrative Remedies: Plaintiff, a nursing home operator, was notified by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) that it was disallowing certain nursing care costs claimed by plaintiff. The Department notified plaintiff that a hearing could be requested under the Department's administrative rules. Plaintiff requested time extensions in which to submit objections, and the Department agreed. The

Department finally set a time limitation that plaintiff did not meet. The Department then filed its reimbursement rate for plaintiff. Plaintiff filed a complaint in District Court for judicial review of the Department's determination. The District Court dismissed the case. On appeal, the Supreme Court held that only a party who has exhausted all administrative remedies is entitled to judicial review if aggrieved in a contested case. A contested case is a determination of legal rights after an opportunity for hearing. Because there was no hearing in this case, dismissal was proper. B.G.M. Enterprises v. St., 673 P2d 1205, 40 St. Rep. 1827 (1983) (apparently not reported in Montana Reports).

P.S.C. Motor Carrier Certificate Issuance Not Contested Case: Where District Court nullified Public Service Commission (P.S.C.) Class D motor carrier certificate and appellant contended the court had no jurisdiction since the judicial review leading to the nullification had not been initiated within 30 days of the administrative action, as required by 2-4-702(2)(a), Supreme Court held that 2-4-702 applies only to contested cases, that P.S.C. certificate issuing process is not a contested case, and that hence 30-day limitation did not apply in this case. In re Application of Galt, 196 M 534, 644 P2d 1019, 39 St. Rep. 106 (1982).

Dismissal of Tenured Teacher — Procedure Within MAPA: The County Superintendent of Schools and the State Superintendent of Public Instruction come under the definition of "agency" within the Montana Administrative Procedure Act (MAPA) (decided prior to 1985 amendment of "agency" definition), and the decision not to award a contract to a tenured teacher is a "contested case" under MAPA. Yanzick v. School District, 196 M 375, 641 P2d 431, 39 St. Rep. 191 (1982).

Right of Judicial Review of Administrative Action: Under this chapter, the right of judicial review attaches only to a contested case proceeding. The court found no statutory or constitutional right of a terminated state employee to a hearing, although she had been given one; hence, the grievance proceeding was not a contested case under this chapter, and no right of judicial review attached. Nye v. Dept. of Livestock, 196 M 222, 639 P2d 498, 39 St. Rep. 49 (1982).

Effect of Department Manual — Jury Instruction on Negligence as Matter of Law: Plaintiff contended that it was error to refuse to instruct the jury that the State and Burlington Northern were negligent as a matter of law in failing to place signals on the railroad crossing where the accident occurred in conformity with the Department of Highways' Manual on Traffic Control Devices. (The Department of Highways became the Department of Transportation in 1991.) The manual, however, does not have equal dignity with statutory law. Before the defendants can be charged with negligence in violating the manual, it must first be determined: (1) that the crossing was extrahazardous; and (2) that failure to install additional warning signals was the proximate cause of plaintiff's injuries. These were questions of fact for the jury since conflicting evidence was offered at trial, so no error was committed by failing to give the requested instructions. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980).

No Hearing Required Before Issuance of Permit: The Hard Rock Mining Act (HRMA) does not provide for public participation in the decisionmaking process that precedes the issuance of a permit. Further, at the time pertinent events transpired, HRMA did not provide opportunity for hearing prior to issuance of a permit. Thus, the constitutional right to participation and the contested hearing provisions of the Montana Administrative Procedure Act are not invoked. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

Job Classification — No Participation by Employing Agency: The statutes and rules governing job classification procedures do not contemplate participation by the employing agency other than the opportunity for input into the Personnel Division's decision. If and when the dispute reaches step four of the formal appeals procedure, the employee represents his interests, and the Personnel Division, through its Classification Bureau, represents the interests of the state. The employing agency not being a "party" under this section, the Board of Personnel Appeals had no clear legal duty and no authority to hear its objections. State ex rel. St. Tax Appeal Bd. v. Bd. of Personnel Appeals, 181 M 366, 593 P2d 747 (1979).

Hearing on Corporate License Tax Deficiency Assessment — Not a "Contested Case": The hearing contemplated by 15-31-503 regarding a corporate license tax deficiency is not a "contested case" as defined by this section and hence is not governed by the Montana Administrative Procedure Act because 15-31-503 does not provide for a true adversary hearing, but only for a presentation of additional evidence by taxpayer and a reconsideration by the Department of Revenue of the administrative procedures used to calculate the tax deficiency. W.R. Grace & Co. v. Dept. of Revenue, 173 M 339, 567 P2d 913 (1977).

Metropolitan Police Commission — Not a State Agency: Though city Police Commissions are creations of state law, they are obviously entities of municipal government. The metropolitan Police Commission is not an agency "of state government" as used in the definition of agency in this section; hence, the Montana Administrative Procedure Act is not applicable to the

administrative functions of the Police Commission. Miskovich v. Helena, 170 M 138, 551 P2d 995 (1976).

Attorney General's Opinions

Proceedings of Workers' Compensation Board of Directors Subject to Montana Administrative Procedure Act: The Board of Directors of the Montana self-insurers guaranty fund fits the definition of "agency" in state law. The fund is considered a public organization because it a public purpose and because it has been granted statutory authority to adopt public rules and to enter public contracts. Therefore, when the Board adopts rules or resolves contested cases, it must comply with the provisions of the Montana Administrative Procedure Act. 46 A.G. Op. 1 (1995).

Construction Standards — Interpretive Rules: Title 50, ch. 53, authorizes the Department of Health and Environmental Sciences (now Department of Public Health and Human Services) to adopt interpretive rules, which do not have the force of law, concerning construction standards relating to safety for public swimming pools generally. A court may give interpretive rules the force of law if it is so pursuaded, but it is free to substitute its judgment for that of the agency. See 2 K. Davis, Administrative Law Treatise, §7.10 (2d ed. 1979). 39 A.G. Op. 18 (1981).

Department Rules Upheld — Leave Time — Agency Interpretation Entitled to Substantial Weight: The Department of Administration's comprehensive set of rules, adopted under Title 2, ch. 18, part 6, explicitly recognizes that vacation and sick leave credits are accrued on an hourly basis. In construing statutes, the interpretation of the administrative body is entitled to substantial weight. Here, agency's interpretation was applied to public employees at the local level. 39 A.G. Op. 15 (1981).

Department — State Plan: A state plan prepared by the Department of Health and Environmental Sciences (now Department of Public Health and Human Services) pursuant to federal law is a "rule" as defined in this section and is therefore subject to the requirements of the Montana Administrative Procedure Act. 35 A.G. Op. 8 (1973).

Department of Administration — Management Memoranda: The Montana Administrative Procedure Act does not apply to management memoranda issued by the Department pursuant to some of its financial and management duties. 35 A.G. Op. 2 (1973).

Law Review Articles

Montana Supreme Court Survey: Administrative Law, Reep, 42 Mont. L. Rev. 329 (1981).
Montana Supreme Court Survey: Administrative Law, Snyder, 41 Mont. L. Rev. 151 (1980).
Law and Legislation in the Administrative State, Rubin, 89 Colum. L. Rev. 369 (1989).

Collateral References

Administrative Law and Procedure *key* 4, 5.
73 C.J.S. Public Administrative Law and Procedure §2.
2 Am. Jur. 2d Administrative Law §204.

2-4-103. Rules and statements to be made available to public.

Compiler's Comments

Source: 1961 Revised Model Act, sec. 2(part).

Collateral References

Administrative Law and Procedure *key* 386, 408, 504.
73 C.J.S. Public Administrative Law and Procedure §§94, 101; 73A C.J.S. Public Administrative Law and Procedure §149.
2 Am. Jur. 2d Administrative Law §§279, 280, 287.

2-4-104. Subpoenas and enforcement — compelling testimony.

Compiler's Comments

Source: New.

Case Notes

Medical Reports Considered: The workers' compensation court properly considered unsworn written medical reports without violating Montana Rules of Evidence regarding hearsay, since the court is not bound by common law and statutory rules of evidence. Claimant's right to cross-examination was not violated because she had the opportunity at the hearing to present rebutting medical evidence and, as provided by this section, she could have called the doctors as witnesses at the hearing. Stevens v. Glacier Gen. Assurance Co., 176 M 61, 575 P2d 1326 (1978).

Law Review Articles

Constitutional Challenges to Independent Agency Enforcement Actions, 2 Ad. L.J. 423 (1988).

Collateral References

73 C.J.S. Public Administrative Law and Procedure §86.

2 Am. Jur. 2d Administrative Law §§263, et seq., 421.

Power of administrative agency, in investigation of nonjudicial nature, to issue subpoenas against persons not subject to agency's regulatory jurisdiction. 27 ALR 2d 1208.

The Supreme Court and administrative subpoenas. 78 L. Ed. 2d 940.

2-4-105. Representation by counsel.

Subcommittee Comments

[See chapter compiler's comments.]

The statutes for some state agencies specifically provide for the right to counsel. It is felt that such a provision for all agencies is appropriate.

Compiler's Comments

Source: New.

Collateral References

73 C.J.S. Public Administrative Law and Procedure §86.

2 Am. Jur. 2d Administrative Law §§273, 274.

Right to assistance by counsel in administrative proceedings. 33 ALR 3d 229.

Comment note: federal constitution as guaranteeing assistance of counsel at administrative proceedings—federal cases. 1 L. Ed. 2d 1865.

2-4-106. Service.

Compiler's Comments

Source: New.

Case Notes

Abuse of Discretion in Failure to Reference Statutory Judicial Review Provisions in Administrative Order Addressing Child Support Enforcement — Due Process Violation Constituting Reversible Error: The mother filed a petition with the Child Support Enforcement Division (CSED) for assistance in obtaining child support from the father. CSED initiated an administrative action to determine the amount of support owing, and an administrative law judge conducted a contested case hearing on the issue and entered an order establishing the father's current and past-due child support obligation. The order included a paragraph notifying the parents of their statutory right to petition for judicial review of the administrative decision under Title 2, ch. 4, part 7 (MAPA), but did not reference 40-5-253, which contains more specific procedural requirements for appealing from an administrative decision in a child support enforcement case than the provisions in MAPA. The father filed a petition for judicial review and mailed copies to the mother and CSED but failed to properly serve the parties as required in 40-5-253. The District Court concluded that it lacked subject matter jurisdiction because the father failed to comply with 40-5-253. The court dismissed the petition. The father moved the court to amend or reconsider the petition, contending that the application of 40-5-253 violated his due process rights because he did not receive sufficient notice of the procedures by which to obtain judicial review of the administrative decision. The motion was denied, but the court nevertheless subsequently entered another order correcting the clerical error by adding a reference to 40-5-253 to the notice provision of the earlier order and then granted CSED's motion to dismiss. The father appealed. The Supreme Court noted that proper service of a petition for judicial review was a threshold requirement for the District Court to obtain jurisdiction in this case and that under Title 2, ch. 4, part 7, a petition for judicial review may be properly served by mailing copies to the agency and other parties, but there is no requirement that a summons be issued and served in conjunction with the petition. By filing the petition for judicial review and mailing copies to the mother and CSED, the father fulfilled the service requirements of MAPA and Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469 (1996). However, specific statutory requirements prevail over general provisions such as those in MAPA, and the Supreme Court agreed that the portion of the notice informing the father that MAPA would govern the proceedings was misleading, absent any reference to the different, specific procedural requirements for CSED actions under 40-5-253. The Supreme Court adopted federal interpretations of the due process notice requirements in this regard, which provide that the

opportunity to be heard is not meaningful if the notice provided does not accurately inform the person to whom it is given of how to take advantage of that opportunity. The notice provisions in the administrative order did not provide father with adequate notice to meet due process requirements, so application of 40-5-253 would violate the father's due process rights. Under these unique circumstances, it was required that the father's petition for judicial review must be governed by the service requirements of MAPA and Hilands. Those requirements were met, so the District Court did acquire subject matter jurisdiction and abused its discretion in dismissing the father's petition for judicial review based on his failure to comply with 40-5-253. The case was reversed for further proceedings under MAPA. Pickens v. Shelton-Thompson, 2000 MT 131, 300 M 16, 3 P3d 603, 57 St. Rep. 543 (2000). See also Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 2d 865, 70 S Ct 652 (1950), Gonzales v. Sullivan, 914 F2d 1197 (9th Cir. 1990), Walters v. Reno, 145 F3d 1032 (9th Cir. 1998), and City of W. Covina v. Perkins, 525 US 234, 142 L Ed 2d 636, 119 S Ct 678 (1999).

Petition for Judicial Review of Contested Case — Service on Parties Under Rule 5(b) Held Sufficient: Ashmore brought a claim before the Human Rights Commission, alleging that she had been discriminated against by Hilands Golf Club because of her gender, in violation of 49-2-304. The Commission found in favor of Ashmore and awarded her relief. Hilands filed a petition for judicial review pursuant to 2-4-702 and served copies of the petition by mail upon counsel for the Commission and Hilands. No summons was served with the petition, and no service was made upon the Attorney General. Ashmore filed a motion to dismiss under Rule 12(b), M.R.Civ.P. (Title 25, ch. 20), alleging that no jurisdiction had been obtained over the Commission by service of a summons upon the Attorney General, contrary to the holding in Fife v. Martin, 261 M 471, 863 P2d 403 (1993). The District Court granted the motion. The Supreme Court reversed, overruling Fife and holding that because judicial review pursuant to 2-4-702 is in the nature of an appeal, in which jurisdiction over the parties has already been established, service of a summons with the petition is unnecessary and holding that the petition may be served upon the parties by mail under Rule 5(b), M.R.Civ.P. (Title 25, ch. 20). The Supreme Court noted that it was sufficient to mail a copy of the petition upon the parties and the agency, whether or not the agency had been a party to the administrative proceeding. Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469, 53 St. Rep. 664 (1996).

Time for Filing of Petition for Judicial Review — Time of "Service" of Final Agency Decision Defined: Following proceedings in an administrative action before the Public Service Commission, the Commission mailed a copy of its decision to MCI on May 19, 1992, but MCI did not receive the decision until May 21, 1992. On June 19, 1992, MCI filed its petition for judicial review under 2-4-702. The District Court dismissed the petition as being untimely filed. The Supreme Court held that 2-4-702 did not define the time of "service" at which the 30-day period for filing a petition for review began to run. This section requires that Rule 6(e), M.R.Civ.P. (Title 25, ch. 20), be applied to define when service by mail is complete for administrative decisions. Rule 6(e) requires that when service is made by mail, an additional 3 days must be added to the time for taking action. Thus, the time for judicial review began to run on May 23, and MCI's petition was filed within the 30-day time period provided by 2-4-702. MCI Telecommunications Corp. v. Dept. of Public Service Regulation, 260 M 175, 858 P2d 364, 50 St. Rep. 989 (1993), distinguished in In re Support of McGurran, 1999 MT 192, 295 M 357, 983 P2d 968, 56 St. Rep. 741 (1999).

Service of Petition on Agency for Judicial Review — Rules Not Applicable: Since 2-4-702 requires "prompt" service on an agency of a petition for judicial review of the agency's decision in District Court, the 3-year time limit of Rule 41(e) (replaced by Rule 4E), M.R.Civ.P., does not apply. Rierson v. St., 188 M 522, 614 P2d 1020 (1980).

2-4-107. Construction and effect.

Compiler's Comments

Source: New.

Repealer: Section 24, Ch. 2, Ex. L. 1971, read: "Repeal of inconsistent provisions. All laws or parts of laws in conflict herewith are hereby repealed to the extent of such conflict."

Case Notes

Reversal of Conviction for Medicaid Fraud Based on Violation of Improperly Adopted Administrative Policy: Vainio, an optometrist, was charged with three counts of Medicaid fraud under 45-6-313. The jury found Vainio guilty, and the District Court concluded as a matter of law that a violation of the administrative policies at issue formed a criminal act. On appeal, Vainio argued that by criminalizing violations of administrative policies that were not formally

promulgated as rules, 45-6-313 contravened the Montana Administrative Procedure Act (MAPA), Title 2, ch. 4, and that policies that were not promulgated according to MAPA lacked the force of law. The state contended that because 45-6-313 specifically refers to violations of "policies", it was not necessary for those policies to be embodied in a rule promulgated pursuant to MAPA. The Supreme Court agreed with Vainio. The use of the term "policies" in 45-6-313 is limited to those policies that have been formally adopted as rules pursuant to MAPA. The fact that 45-6-313 does not expressly reference MAPA does not mean that Medicaid providers can be criminally prosecuted for violating the state's informal policies. Further, 45-6-313 does not have to expressly reference MAPA for MAPA to apply; rather, MAPA must be followed because 45-6-313 does not expressly repudiate it. When the Legislature authorizes an agency to adopt rules, the procedures mandated by MAPA apply regardless of whether the authorizing statute refers to MAPA. The practices for which Vainio was convicted were not prohibited by rules adopted in compliance with MAPA and in effect at the time of the alleged offenses and thus were not illegal, so the convictions were reversed. St. v. Vainio, 2001 MT 220, 306 M 439, 35 P3d 948 (2001), following NW. Airlines, Inc. v. St. Tax Appeal Bd., 221 M 441, 720 P2d 676 (1986), and Rosebud County v. Dept. of Revenue, 257 M 306, 849 P2d 177 (1993), and distinguishing Huether v. District Court, 2000 MT 158, 300 M 212, 4 P3d 1193 (2000).

Montana Administrative Procedure Act Inapplicable: The Montana Administrative Procedure Act does not apply to agency and court handling of claims for unemployment insurance benefits. Billings v. Bd. of Labor Appeals, 204 M 38, 663 P2d 1167, 40 St. Rep. 648 (1983).

Evidentiary Hearing Not Contemplated: Section 15-31-503 does not contemplate an evidentiary hearing but merely an opportunity for the taxpayer to request a review of the administrative procedures used to calculate the assessment and to present evidence in support of his tax calculations. Thus, the Department of Revenue is not entitled to further discovery after entering a deficiency assessment and before the protest hearing, and the Montana Administrative Procedure Act does not apply. W. R. Grace & Co. v. Dept. of Revenue, 173 M 339, 567 P2d 913 (1977).

2-4-110. Departmental review of rule notices.

Compiler's Comments

2001 Amendment: Chapter 210 in (2)(a) near beginning substituted "statement of reasonable necessity" for "rationale". Amendment effective April 6, 2001.

1999 Amendment: Chapter 19 in (1) near end substituted "appropriate administrative rule review committee" for "administrative code committee". Amendment effective February 17, 1999.

1991 Amendment: In (1) inserted second sentence requiring notification to Secretary of State and Administrative Code Committee of appointment of reviewer; and inserted (3) regarding signature of notice by the appointed reviewer.

Part 2
Organizational and Procedural Rules

2-4-201. Rules describing agency organization and procedures.

Compiler's Comments

Source: 1961 Revised Model Act, sec. 2(part).

Case Notes

Pretrial Order Construed to Include Issue of Whether Additional Workers' Compensation Benefits Payable: Garcia claimed that in holding that she was not entitled to any benefits beyond the amount paid, the Workers' Compensation Court exceeded the issue of whether or not she was injured, depriving her of her right to notice and opportunity to be heard. However, Garcia's first contention in the pretrial order was that of whether she was entitled to temporary total disability payments. The court had wide discretion in determining that the issue of compensation was within the scope of the pretrial order. The Supreme Court found that Garcia was adequately advised by the pretrial order of the presence of the disability issue and could not claim surprise on appeal. Garcia v. St. Comp. Mut. Ins. Fund, 253 M 196, 832 P2d 770, 49 St. Rep. 440 (1992).

Lack of District Court Jurisdiction in Claim for Damages — Failure to Exhaust Administrative Remedies: Gilpins initiated suit for damages resulting from temporary suspension of their day-care license by the Department of Family Services (now Department of Public Health and Human Services), contending that, under 3-5-302, jurisdiction was in the

District Court because the action involved a civil claim against the state for payment of money. However, the court properly dismissed the claim for lack of jurisdiction because Gilpins failed to exhaust all administrative remedies available within the agency, as required by 2-4-702, and because there was no showing made pursuant to 2-4-701 that a review of the agency decision by a hearings examiner would not provide an adequate remedy. Gilpin v. St., 249 M 37, 812 P2d 1265, 48 St. Rep. 567 (1991).

Reversal of Hearing Examiner's Findings — Power of Workers' Compensation Court to Order New Trial: The Workers' Compensation Court appointed a hearing examiner to hear evidence in an injury case, but it was for the court to make the final decision. The examiner's findings, conclusions, and proposed decision were submitted to the court for approval. It was within the court's power to order a new trial on the ground that the examiner apparently disregarded or was not aware of evidence crucial to the case. Gould v. Liberty Mut. Fire Ins. Co., 233 M 494, 766 P2d 213, 45 St. Rep. 1671 (1988), distinguishing Walter v. Evans Prod. Co., 207 M 26, 672 P2d 613 (1983).

Applicability of Rules of Civil Procedure to Workers' Compensation Court: Since the Workers' Compensation Court is expressly made subject to the Montana Administrative Procedure Act and the Act allows each agency subject to the Act to promulgate its own procedural rules, the Montana Rules of Civil Procedure are not directly applicable to the court. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Collateral References

Administrative Law and Procedure *key* 386, 408, 504.

73 C.J.S. Public Administrative Law and Procedure §§89, 112; 73A C.J.S. Public Administrative Law and Procedure §149.

2-4-202. Model rules.

Compiler's Comments

Source: Sec. 183.340, Oregon Administrative Procedure Act.

Administrative Rules

Title 1, chapter 3, ARM Model rules.

Part 3
Adoption and Publication of Rules

Part Case Notes

Consistency of Rule With Authorizing Statute 70
Unconstitutional Delegation of Legislative Power 71

CONSISTENCY OF RULE WITH AUTHORIZING STATUTE

Compliance With Administrative Rules of Montana — Criminal Actions: Prior to administering the Intoxilizer 5000 test to the defendant, the calibration checks read 0.060 and 0.062 for a simulator solution that was supposed to have had a known alcohol concentration of 0.10. The Administrative Rules of Montana require a calibration check to fall within a plus or minus one-tenth range of the known alcohol concentration of the reference solution to guarantee the instrument's accuracy prior to administering the test. The Supreme Court held that the evidence showed that the low calibration readings were not indicative of a faulty instrument but only of a gradually diminished alcohol content in the simulator solution. The court further held that the District Court did not err in holding that the test was administered in substantial compliance with the Administrative Rules of Montana. O'Brian v. St., 236 M 227, 770 P2d 507, 46 St. Rep. 316 (1989), followed in St. v. Carter, 285 M 449, 948 P2d 1173, 54 St. Rep. 1235 (1997).

Invalid Rule Under Grandfather Clause: Section 66-3208(4), R.C.M. 1947 (deleted by Ch. 350, sec. 317, L. 1974), a grandfather clause, allowed licensure of an established psychologist without a doctoral degree if he had 5 years of professional experience and a master's degree. A rule adopted by the Board of Psychologists required the professional experience to have been obtained after receiving the master's degree. The rule was held invalid because it imposed the additional requirement of a chronological order in which requirements were to be met not envisioned by the Legislature. McPhail v. Mont. Bd. of Psychologists, 196 M 514, 640 P2d 906, 39 St. Rep. 290 (1982). See also Safeway, Inc. v. Mont. Petroleum Release Comp. Bd., 281 M 189, 931 P2d 1327, 54 St. Rep. 129 (1997).

Rule in Effect Prior to Conforming Amendment to Statute: Although subsection (2) of 15-31-301 was created by a 1974 amendment, it applies to the period of dispute (1971-1975)

because a similar administrative rule was in effect prior to the amendment and the rule was not inconsistent with the section as it existed prior to amendment. Ward Paper Box Co. v. Dept. of Revenue, 196 M 87, 638 P2d 1053, 38 St. Rep. 2147 (1981).

Administrative Rule More Stringent Than Statute Held Invalid: An administrative rule of the Board of Barbers requiring a year's apprenticeship served in a "commercial barbershop" prior to examination, as opposed to a year's apprenticeship served "under the immediate personal supervision of a licensed barber" as required by 37-30-301 and 37-30-305 (both now repealed), is invalid because it does not satisfy the test as required in 2-4-305 that a rule must be "reasonably necessary to effectuate the purpose of the statute". Bd. of Barbers v. Big Sky College of Barber-Styling, 192 M 159, 626 P2d 1269, 38 St. Rep. 621 (1981).

Violation of Regulation Not Negligence Per Se: In an action brought by an employee of a subcontractor against the defendant general contractor for damages for injuries in a fall from the subcontractor's scaffolding, the Supreme Court declined to hold that violations by the subcontractor of OSHA scaffolding regulations constituted negligence per se. As the general rule has been to consider the violation of regulations as merely evidence of negligence, the Supreme Court adopted the general rule. Stepanek v. Kober Constr., 191 M 430, 625 P2d 51, 38 St. Rep. 385 (1981). The general rule was applied in Hash v. St., 248 M 155, 807 P2d 1363, 48 St. Rep. 277 (1991).

Rule in Conflict With Statute: Department of Community Affairs (authority now vested in Department of Public Health and Human Services) promulgated rules declaring that a resubdivision of a platted and filed subdivision cannot be an "occasional sale" as defined in 76-3-102. Those rules are in direct conflict with that section and the provisions of the subdivision and platting law; a statute cannot be changed by an administrative regulation, hence the rules are void. State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

Rule Consistent With Implemented Statute: Rules promulgated by Department of Labor and Industry defining and delimiting "bona fide executive" as set forth in 39-3-406 attempted to set out objective and subjective criteria that are generally characteristic of an executive's job and were not unreasonable because the rules were logical and well within the boundaries of the fair and natural meaning of the word "executive". Garsjo v. Dept. of Labor & Industry, 172 M 182, 562 P2d 473 (1977).

UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

Implemented Statute — No Standards or Guidelines: The phrase "with the approval of the department" in 32-2-231 (now 32-2-271) governing savings and loan association consolidations and transfers presents a delegation of legislative power that provides no standards or guidelines and is therefore an unconstitutional delegation of legislative power to the Department of Business Regulation (now Department of Administration) contrary to Art. III, sec. 1, Mont. Const. Since the statute provides no standards or guidelines, the Department is powerless to establish guidelines or standards by rule. In re Gate City S&L Ass'n, 182 M 361, 597 P2d 84 (1979).

Broad Scope of Authorization Upheld — Environmental Protection: The promulgation of a rule governing open burning, implementing 75-2-203 of the Clean Air Act of Montana, was not an unconstitutional delegation of legislative power to the Board of Health and Environmental Sciences (now Board of Environmental Review), even though the statute is phrased in broad and general language because the field of environmental protection as yet lacks detailed and precise standards. State ex rel. Dept. of Health & Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293 (1978).

Solely Subjective Determination of Agency — Unconstitutional: Section 90-2-105 (since repealed), providing that a fund created by the sale of revenue bonds from which the Board of Natural Resources and Conservation (now Board of Environmental Review) was to make loans to farmers and ranchers "for any worthwhile project" for conservation and other renewable resources, was an unconstitutional delegation of legislative power because the standards and guides laid down by this statute are insufficient. In effect the only limit on the Board's power to loan money was its subjective determination of whether a project is worthwhile. Douglas v. Judge, 174 M 32, 568 P2d 530 (1977).

Leading Pre-MAPA Cases — Unconstitutional Delegation of Legislative Power: For leading pre-MAPA cases dealing with unconstitutional delegation of legislative power, see Bacus v. Lake County, 138 M 69, 354 P2d 1056 (1960); St. v. Stark, 100 M 365, 52 P2d 890 (1935).

Part Attorney General's Opinions

Failure of Board of Outfitters to Adopt Required Rules — Ruling on Case-by-Case Basis Ruled Improper Implementation of Statute: Section 37-47-201(5)(d) required the Board of Outfitters to adopt rules containing standards for review and approval of outfitter operation plans in order for the Board to determine whether a proposed outfitter operation would cause an undue conflict with existing hunting use that would constitute a threat to public health, safety, or welfare. The statutory requirement for the Board to adopt rules was sufficiently clear, definite, and certain that the failure of the Board to initially adopt the rules required by the statute and instead determine on a case-by-case basis whether the proposed use would cause "undue conflict" was not a proper implementation of the statute. 47 A.G. Op. 22 (1998).

Permits for X-Ray Technologists — Board Rules Adding Additional Noncontradictory Requirements to Statute Invalid: Rules of the Board of Radiologic Technologists requiring applicants for permits as radiologic technologists under 37-14-306 to take a 24-hour course approved by the Board, be employed, have at least 6 months' practical experience in the x-ray profession, pass a permit examination, and pay a $65 exam fee are void and unenforceable. The rules engraft additional, noncontradictory requirements on 37-14-306 that were not envisioned by the Legislature, even though the rules may appear to be consistent with the purposes of the statute. 40 A.G. Op. 50 (1984).

Department Rules Upheld — Leave Time — Agency Interpretation Entitled to Substantial Weight: The Department of Administration's comprehensive set of rules, adopted under Title 2, ch. 18, part 6, explicitly recognizes that vacation and sick leave credits are accrued on an hourly basis. In construing statutes, the interpretation of the administrative body is entitled to substantial weight. Here, agency's interpretation was applied to public employees at the local level. 39 A.G. Op. 15 (1981).

Change of Policy: A gratuitous service by a state agency, not required by statute, provided for 40 years does not create a legal duty to continue to provide the service, absent the applicability of estoppel principles to specific cases. There is no statutory or constitutional impediment to the adoption of a new policy, provided the policy adopted conforms to the statute to be implemented and is adopted in compliance with the Montana Administrative Procedure Act. 38 A.G. Op. 69 (1980).

Constitutional Mandate: In the context of rulemaking, the Montana Administrative Procedure Act fulfills the mandate of Art. II, sec. 8, Mont. Const., requiring reasonable opportunity for citizen participation in agency operation, by providing notice and hearing. 38 A.G. Op. 69 (1980).

Part Law Review Articles

Negotiated Rulemaking: Involving Citizens in Public Decisions, McKinney, 60 Mont. L. Rev. 499 (1999).

Agency Rules With the Force of Law: The Original Convention, Merrill & Watts, 116 Harv. L. Rev. 467 (2002).

Part Collateral References

Comment note: applicability of stare decisis doctrine to decisions of administrative agencies. 79 ALR 2d 1126.

Sufficiency of agency's compliance with requirement of Administrative Procedure Act (5 USCS §553(c)) that agency shall incorporate in rules adopted concise general statement of their basis and purpose. 46 ALR Fed. 780.

2-4-301. Authority to adopt not conferred.

Compiler's Comments

Source: New.

Case Notes

MAPA as Outlining Procedure Only — Authority to Adopt Rules Not Conferred: The Montana Administrative Procedure Act alone does not confer authority to adopt rules; it merely outlines the correct procedure an agency must use once the agency has been granted statutory power to adopt rules. Bradco Supply Co. v. Larsen, 183 M 97, 598 P2d 596 (1979).

Collateral References

73 C.J.S. Public Administrative Law and Procedure §§88 through 90.

2 Am. Jur. 2d Administrative Law §281.

2-4-302. Notice, hearing, and submission of views.

Compiler's Comments

2001 Amendment: Chapter 210 in second and third sentences in (1) substituted "reasonable necessity" for "rationale". Amendment effective April 6, 2001.

1999 Amendments — Composite Section: Chapter 19 throughout section substituted "appropriate administrative rule review committee" for "administrative code committee"; in (2)(b) in first sentence near middle substituted "agency actions to the agencies that the committee oversees that publish" for "agency actions to all agencies publishing"; in (7)(a) after "Administrative" substituted "Rule Review" for "Code"; and made minor changes in style. Amendment effective February 17, 1999.

Chapter 41 in (1) inserted fourth sentence and (1)(a) and (1)(b) requiring a notice to contain an estimate of the cumulative amount for all persons and of the number of persons affected; in (2)(c) near middle of second sentence after "electronic" substituted "access system" for "bulletin board"; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendments — Composite Section: Chapter 152 in (2)(b) substituted "register" for "Montana Administrative Register"; in (4), near middle of first sentence before "28 days", inserted "at least" and before second "notice" inserted "the original" and inserted second sentence regarding amended or supplemental notice; and made minor changes in style.

Chapter 340 in (2)(a), near beginning after "publication to", inserted "the sponsor of the legislative bill that enacted the section that is cited as implemented in the notice if the notice is the initial proposal to implement the section, to"; in (2)(c), near beginning, inserted "required by subsections (1) and (2)(a)"; inserted (2)(d) requiring an agency to notify the sponsor of a bill that enacts a section of law at the time the agency's personnel begin to work on the rule proposal intended to implement that section; inserted (8) regarding notice by an agency of a rule proposal to a sponsor of a bill enacting a section of law when the sponsor is no longer a member of the Legislature; and made minor changes in style.

Chapter 489 inserted third sentence in (1) requiring rationale to be written in easily understood language; inserted second, third, and fourth sentences in (2)(a) requiring agency to create and maintain interested persons list and to inform persons of existence of list; inserted second sentence in (2)(c) requiring agency to post notice on state bulletin board or electronic system available to public; inserted fourth sentence in (4) requiring agency to schedule oral hearing if proposed rule involves significant public interest; inserted (7)(b) requiring person presiding at hearing to inform persons of interested persons list and provide opportunity for inclusion on list; and made minor changes in style.

Style changes were slightly different in the chapters. In each case, the codifier chose the most appropriate.

1983 Amendment: Inserted provisions in (2)(a) and (2)(b) for notice to organizations or persons filing with the Administrative Code Committee.

1981 Amendment: Inserted "within 3 days of publication" after "mailed" in (2); deleted a reference to advance notice in (2); inserted "the notice of proposed rulemaking must state that" after "substantive rules" near the middle of (4); inserted "by the administrative code committee" after "subdivision or agency" near the end of (4); inserted "In the discretion of the agency, contested" at the beginning of the second sentence of (5); inserted (6) relating to failure to publish notice in time; and inserted (7) relating to reading of Administrative Code Committee notice.

Source: 1961 Revised Model Act, sec. 3.

Case Notes

Reversal of Conviction for Medicaid Fraud Based on Violation of Improperly Adopted Administrative Policy: Vainio, an optometrist, was charged with three counts of Medicaid fraud under 45-6-313. The jury found Vainio guilty, and the District Court concluded as a matter of law that a violation of the administrative policies at issue formed a criminal act. On appeal, Vainio argued that by criminalizing violations of administrative policies that were not formally promulgated as rules, 45-6-313 contravened the Montana Administrative Procedure Act (MAPA), Title 2, ch. 4, and that policies that were not promulgated according to MAPA lacked the force of law. The state contended that because 45-6-313 specifically refers to violations of "policies", it was not necessary for those policies to be embodied in a rule promulgated pursuant to MAPA. The Supreme Court agreed with Vainio. The use of the term "policies" in 45-6-313 is limited to those policies that have been formally adopted as rules pursuant to MAPA. The fact that 45-6-313 does not expressly reference MAPA does not mean that Medicaid providers can be criminally prosecuted for violating the state's informal policies. Further, 45-6-313 does not have to expressly reference MAPA for MAPA to apply; rather, MAPA must be followed because

45-6-313 does not expressly repudiate it. When the Legislature authorizes an agency to adopt rules, the procedures mandated by MAPA apply regardless of whether the authorizing statute refers to MAPA. The practices for which Vainio was convicted were not prohibited by rules adopted in compliance with MAPA and in effect at the time of the alleged offenses and thus were not illegal, so the convictions were reversed. St. v. Vainio, 2001 MT 220, 306 M 439, 35 P3d 948 (2001), following NW. Airlines, Inc. v. St. Tax Appeal Bd., 221 M 441, 720 P2d 676 (1986), and Rosebud County v. Dept. of Revenue, 257 M 306, 849 P2d 177 (1993), and distinguishing Huether v. District Court, 2000 MT 158, 300 M 212, 4 P3d 1193 (2000).

County Standing to Sue State Over Improperly Adopted Administrative Rule: The Department of Revenue directed county tax assessors to change their method of appraising the value of heavy equipment. The change in method would have resulted in substantial loss of revenue to counties. After receiving objections from the counties, the Department scheduled a public hearing, and after the hearing adopted an administrative rule requiring use of the new valuation method despite the potential loss of revenue to the counties. Rosebud County brought suit, alleging that the rule was invalid because the Department had failed to follow the statutory procedure for adopting administrative rules. The Department argued that the county could not sue another branch of state government and also could not bring suit because it had not suffered any damage. The Supreme Court ruled that the county could sue another state entity because it was seeking declaratory relief not damages and that the county had standing because it was facing potential loss of revenue. The court also affirmed the lower court's ruling that the administrative rule was invalid because the Department had not followed the proper procedure in adopting the rule. Rosebud County v. Dept. of Revenue, 257 M 306, 849 P2d 177, 50 St. Rep. 281 (1993).

Department Decision to Include Overflight Mileage in Tax Apportionment Formula — Noncompliance With MAPA: The unilateral administrative decision of a Department of Revenue auditor to include an airline's nonstop flyover mileage in the numerator of the statutory apportionment formula qualified as a rule under 2-4-102 and was subject to the notice and hearing requirements of 2-4-302 in order to be valid under the Montana Administrative Procedure Act. NW. Airlines, Inc. v. St. Tax Appeal Bd., 221 M 441, 720 P2d 676, 43 St. Rep. 959 (1986).

Authority to Adopt Rules Not Conferred: The Montana Administrative Procedure Act alone does not confer authority to adopt rules; it merely outlines the correct procedure an agency must use once the agency has been granted statutory power to adopt rules. Bradco Supply Co. v. Larsen, 183 M 97, 598 P2d 596 (1979).

Legality of Banking Board Rule — Issue to Be Raised Before Agency: There was no merit to appellant's challenge to the validity of the State Banking Board's rulemaking process. Furthermore, such a question must have been raised first before the administrative agency unless there was good cause for failure to do so. W. Bank of Billings v. St. Banking Bd., 174 M 331, 570 P2d 1115 (1977), followed in In re Sorini, 220 M 459, 717 P2d 7, 43 St. Rep. 526 (1986).

Collateral References

Administrative Law and Procedure *key* 392 through 402.
73 C.J.S. Public Administrative Law and Procedure §§104, 106.
2 Am. Jur. 2d Administrative Law §§278 through 284.

2-4-303. Emergency or temporary rules.

Compiler's Comments

1997 Amendment: Chapter 489 in first sentence in (1), after "proceed", inserted "upon special notice filed with the committee", inserted third and fourth sentences clarifying and limiting adoption of emergency rule, at end of fifth sentence, after "review", inserted "upon petition of any person", inserted sixth sentence requiring matter involving sufficiency for adoption of emergency rule to take precedence over other matters, inserted seventh sentence requiring sufficiency of reasons justifying necessity for emergency rule to be compelling and to stand alone for judicial review, and inserted eighth sentence requiring dissemination of emergency rules to be strictly observed and liberally accomplished; and made minor changes in style.

1991 Amendment: In second sentence of (1), after "120 days", inserted "after which a new emergency rule with the same or substantially the same text may not be adopted". Amendment effective January 30, 1991.

1987 Amendment: Inserted (2) relating to temporary rules; and made minor changes in style.

Source: 1961 Revised Model Act, sec. 3(b); 75 Okla. Stats. sec. 303(b).

Case Notes

Circumstances Entitling Agency to Adopt Emergency Rule: Since the Legislature reduced the amount of money requested by the Department, requiring the Department to make adjustments to live within its budget, and it was determined that it would be necessary to cut programs to live within budget, it was proper for the Department to adopt an emergency rule under this section. (See 1997 amendment.) State ex rel. Dept. of Social & Rehabilitation Services v. Cole, 167 M 353, 538 P2d 1031 (1975).

Attorney General's Opinions

Emergency Exception Inapplicable to Foreseeable Situations — Environmental Policy Act Applicable: The Department of Agriculture did not follow the directive of ARM 4.2.308 in dealing with an emergency infestation of grasshoppers when it failed to file a report with the Governor and the Environmental Quality Council. While an emergency situation is a legitimate exception to the requirements of the Montana Environmental Policy Act (MEPA), the Department should comply with MEPA before participating in a grasshopper spraying program if the need for such a program is reasonably foreseeable. 42 A.G. Op. 62 (1988).

Collateral References

Administrative Law and Procedure *key* 392 through 402.

73 C.J.S. Public Administrative Law and Procedure §§103, 104.

What constitutes "good cause" under provision of Administrative Procedure Act (5 USCS §553(d)(3)) allowing agency rule to become effective less than 30 days after publication. 55 ALR Fed. 880.

2-4-304. Informal conferences and committees.

Compiler's Comments

Source: Wis. Stats. sec. 227.018.

Collateral References

Administrative Law and Procedure *key* 394.

73 C.J.S. Public Administrative Law and Procedure §§104, 106.

2 Am. Jur. 2d Administrative Law §281.

2-4-305. Requisites for validity — authority and statement of reasons.

Compiler's Comments

2001 Amendment: Chapter 210 inserted last sentence in (6)(b) providing that a statement merely explaining rule provision is not a reasonable necessity statement. Amendment effective April 6, 2001.

1999 Amendment: Chapter 19 in (9) near beginning substituted "appropriate administrative rule review committee" for "administrative code committee". Amendment effective February 17, 1999.

1997 Amendments: Chapter 152 in (1), in third sentence, substituted "register" for "Montana Administrative Register"; in (3) inserted last phrase and inserted (3)(a) and (3)(b) regarding conditions for proposal and adoption of substantive rule; in (6), after "statute", inserted "an adoption, amendment, or repeal of" and after "a rule" deleted "adopted"; and in (6)(b) inserted second and third sentences regarding reasonable necessity and in fourth sentence substituted "clearly and thoroughly demonstrated for each adoption, amendment, or repeal of a rule" for "demonstrated".

Chapter 335 inserted (9) providing that the Committee shall notify an agency if a majority of the members object to a notice of proposed rulemaking and that the objections will be addressed at the next Committee meeting, prohibiting adoption of the proposal notice for a 6-month period under certain conditions, and requiring the Committee to include a copy of the notice to the agency in the Committee records; and made minor changes in style.

Chapter 489 near beginning in (7), after "unless", inserted "notice of it is given" and after "2-4-303" inserted "or 2-4-306"; in first sentence in (8), before "citations", deleted "statements of reasonable necessity" and inserted second sentence prohibiting agency from using adoption notice to correct deficiency in statement of reasonable necessity; and made minor changes in style.

Applicability: Section 3, Ch. 335, L. 1997, provided: "[This act] applies to rules objected to under [this act] after [the effective date of this act]." Effective October 1, 1997.

1995 Amendment: Chapter 3 in second sentence of (4), after "a policy", deleted "as used in the definition set forth in 2-4-102(10)"; at beginning of first complete sentence of (6)(b) inserted

"Subject to the provisions of subsection (8)"; inserted (8) allowing use of an amended proposal notice or adoption notice to correct certain deficiencies; and made minor changes in style.

1989 Amendment: In (3) deleted second sentence that read: "A rule proposed and adopted to implement a statute referred to in 5-4-402(3) must include a citation to the session laws of Montana containing the specific grant of rulemaking authority pursuant to which it or any part thereof is adopted."

Effective Date — Retroactive Applicability: Section 4, Ch. 420, L. 1989, provided: "(1) [This act] is effective on passage and approval [approved April 3, 1989].

(2) [Sections 1 and 2] [2-4-305 and 5-4-402, 5-4-402 now repealed] apply retroactively, within the meaning of 1-2-109, to October 1, 1983, and apply to statutes enacted and rules adopted on or after October 1, 1983."

Policies Enforceable as Rules — Resolution: House Joint Resolution No. 2, adopted by the 49th Legislature, read: "A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA DIRECTING AGENCIES TO ADOPT POLICIES HAVING THE FORCE AND EFFECT OF LAW AS ADMINISTRATIVE RULES.

WHEREAS, Article II, section 9, of the Montana Constitution guarantees to the people the right to know; and

WHEREAS, the State of Montana is committed to the concept of open government where every person is allowed to participate; and

WHEREAS, the purpose of the Montana Administrative Procedure Act is to give notice of governmental action and the opportunity to express one's opinion regarding that action; and

WHEREAS, although government must be concerned about the proliferation of rules regulating the people, this concern is outweighed by considerations of openness and certainty in the public's dealings with government; and

WHEREAS, policies enforced as law but not formally adopted as rules have been held invalid by the courts; and

WHEREAS, a survey conducted by the Administrative Code Committee has shown that most agencies are utilizing policies not formally adopted as rules.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That policies having the force and effect of law but not formally adopted as rules must be adopted as rules by agencies by October 1, 1987."

1983 Amendments: Chapter 78 inserted last sentence in (6)(b) setting forth the requirement for demonstration of reasonable necessity.

Chapter 466 inserted second sentence in (3) requiring citation to an extension of rulemaking authority under 5-4-402.

Administrative Code Committee Bills: Senate Bill 45 (Ch. 78, L. 1983), requiring necessity for administrative rules to be demonstrated in the rulemaking record and allowing the Administrative Code Committee to review that record, and House Bill 35 (Ch. 466, L. 1983), requiring a contemporaneous grant of rulemaking authority, were introduced by request of the Committee. See Administrative Code Committee Report, December 1982, Montana Legislative Council.

Review of Rules Adopted Prior to April 14, 1975: Chapter 64, L. 1983, provided: "Section 1. Review of existing rules required. Notwithstanding the provisions of 2-4-402, the administrative code committee shall review all administrative rules adopted prior to April 14, 1975, by agencies subject to the provisions of the Montana Administrative Procedure Act. The committee shall review the rules to determine whether agencies have substantially complied with subsections (5) and (6) of 2-4-305, as that section read on November 18, 1982.

Section 2. Power of the committee. (1) If the committee determines that a rule violates 2-4-305(5) or 2-4-305(6), as that section read on November 18, 1982, it may:

(a) take those steps authorized by 2-4-402(3)(a); or

(b) poll the legislature in accordance with 2-4-403, as that section may be amended by Senate Bill No. 33. If 2-4-403 is not amended by Senate Bill No. 33, no poll of the legislature may be taken by the committee on any rule reviewed pursuant to [section 1]. [Senate Bill 33 was not passed.]

(2) The committee may advise an agency concerning such matters as clarity, form, style, grammar, punctuation, and spelling with respect to any rule reviewed under [section 1].

Section 3. Committee to report to legislature. Prior to January 1, 1987, the committee shall prepare a report of its activities and any recommendations to be submitted to the legislature.

Section 4. Effective date — termination. This act is effective on passage and approval and terminates January 1, 1987."

House Bill 59 (Ch. 64, L. 1983) was introduced by request of the Administrative Code Committee. See Administrative Code Committee Report, December 1982, Montana Legislative Council.

1981 Amendment: Inserted the provision relating to substantial differences between the proposed and adopted rule, which must be described in an agency's statement of reasons, in (1); inserted "proposed and adopted" before "rule" in two places in (3); inserted (4) relating to implementing a policy; and in (7) inserted the last sentence concerning the 6-month limit as to notice.

Severability: Section 8, Ch. 381, L. 1981, was a severability section.

Source: 1961 Revised Model Act, sec. 3(c); Wis. Stats. sec. 227.024.

Case Notes

Reversal of Conviction for Medicaid Fraud Based on Violation of Improperly Adopted Administrative Policy: Vainio, an optometrist, was charged with three counts of Medicaid fraud under 45-6-313. The jury found Vainio guilty, and the District Court concluded as a matter of law that a violation of the administrative policies at issue formed a criminal act. On appeal, Vainio argued that by criminalizing violations of administrative policies that were not formally promulgated as rules, 45-6-313 contravened the Montana Administrative Procedure Act (MAPA), Title 2, ch. 4, and that policies that were not promulgated according to MAPA lacked the force of law. The state contended that because 45-6-313 specifically refers to violations of "policies", it was not necessary for those policies to be embodied in a rule promulgated pursuant to MAPA. The Supreme Court agreed with Vainio. The use of the term "policies" in 45-6-313 is limited to those policies that have been formally adopted as rules pursuant to MAPA. The fact that 45-6-313 does not expressly reference MAPA does not mean that Medicaid providers can be criminally prosecuted for violating the state's informal policies. Further, 45-6-313 does not have to expressly reference MAPA for MAPA to apply; rather, MAPA must be followed because 45-6-313 does not expressly repudiate it. When the Legislature authorizes an agency to adopt rules, the procedures mandated by MAPA apply regardless of whether the authorizing statute refers to MAPA. The practices for which Vainio was convicted were not prohibited by rules adopted in compliance with MAPA and in effect at the time of the alleged offenses and thus were not illegal, so the convictions were reversed. St. v. Vainio, 2001 MT 220, 306 M 439, 35 P3d 948 (2001), following NW. Airlines, Inc. v. St. Tax Appeal Bd., 221 M 441, 720 P2d 676 (1986), and Rosebud County v. Dept. of Revenue, 257 M 306, 849 P2d 177 (1993), and distinguishing Huether v. District Court, 2000 MT 158, 300 M 212, 4 P3d 1193 (2000).

Administrative Rule Valid — Referral to Dentist Mandatory: Plaintiffs failed to make a clear showing that a Board of Dentistry's rule requiring referral to a dentist prior to a denturist starting services added provisions not envisioned by the Legislature. The District Court erred when it declared the rule invalid. An administrative agency's interpretation of a statute under its domain is presumed to be controlling. Christenot v. St., 272 M 396, 901 P2d 545, 52 St. Rep. 749 (1995).

Rules Including Some Treatments and Excluding Others Not Inherently Arbitrary: Synek argued that State Fund incorrectly determined that her chiropractic treatment was noncompensable maintenance rather than compensable therapeutic treatment. She also argued that in adopting rules that included payment for some treatments and excluded others, State Fund was acting in a capricious and arbitrary manner. The Supreme Court upheld the agency's decision that Synek's treatment constituted maintenance and that under the rules, maintenance was not compensable. The Supreme Court also held that the rules had been adopted pursuant to broad statutory language and were not facially or inherently arbitrary. Synek v. St. Comp. Mut. Ins. Fund, 272 M 246, 900 P2d 884, 52 St. Rep. 651 (1995), distinguishing Weis v. Div. of Workers' Comp., 232 M 218, 755 P2d 1385 (1988).

Request for "in Person" Hearing Improperly Denied — Administrative Rule Contrary to Statute and Rule of Evidence Invalid: Charles disputed the amount of child support payments intended to be withheld by an income withholding proceeding and requested that he be given an "in person" hearing, rather than a telephone conference hearing, pursuant to 40-5-414. His request was denied by the administrative hearings officer pursuant to ARM 46.30.607(1). The Supreme Court held that the request for the "in person" hearing was improperly denied because 2-4-612(2) makes the Montana Rules of Evidence applicable to administrative hearings and Rule 611(e), M.R.Ev. (Title 26, ch. 10), provides that a witness can be heard only in the presence of other parties. Citing In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994), the Supreme Court held that Rule 611 requires the physical presence of a witness in the courtroom. The Supreme Court also noted that 40-5-414 requires a live hearing if a party requests it and that the

administrative rule adopted by the Child Support Enforcement Division, providing for a live hearing only upon approval of the hearings officer, was void because it was contrary to statute and Rule 611. Taylor v. Taylor, 272 M 30, 899 P2d 523, 52 St. Rep. 567 (1995).

No Proscription That Previously Canceled Lessee May Not Bid or May Not Lease State Lands — Written Findings Required When High Bid Rejected: Winchell's state land lease was canceled for gross mismanagement of the leased property. The lease was subsequently reclassified and advertised for bids, and Winchell submitted the high bid. Rather than make written findings as to why the bid was not in the best interests of the state, the Department relied on ARM 26.3.142(6) to dismiss Winchell's bid out-of-hand. This administrative rule, which purports to give the Department the ability to refuse to even consider a bid, is in derogation of law because there is no statutory proscription disallowing the bid or ability to lease of a person whose lease has been previously canceled. Absent written findings that the high bid was too high for community standards, would cause damage to the land, or would impair long-term productivity, the automatic refusal to consider the bid, based on an overbroad and unlawful administrative regulation, was in excess of the Department's jurisdiction and an abuse of its discretion. Winchell v. Dept. of State Lands, 262 M 328, 865 P2d 249, 50 St. Rep. 1580 (1993).

Department of Revenue to Assess Heavy Equipment at 100% of Market Value: The Department of Revenue directed county tax assessors to change their method of appraising the value of equipment. The change in method would have resulted in substantial loss of revenue to counties and would have been based on appraisals of heavy equipment at less than 100% of market value. The Supreme Court held that the administrative rule adopted by the Department was in conflict with the statutory requirement that heavy equipment be assessed at 100% of market value and further held that even if there was a "reasonable necessity" (see 2001 amendment) for the rule, the Department had failed to demonstrate the need for the rule change in its notice of proposed rulemaking. Rosebud County v. Dept. of Revenue, 257 M 306, 849 P2d 177, 50 St. Rep. 281 (1993).

Mileage Method as Inequitable Representation of State Business Activity: Section 15-31-312 requires an equitable representation of a taxpayer's business activity in the state. However, in this case, the mileage method promulgated in ARM 42.26.264 was not an equitable method of calculating defendant's income-producing activity for the sales factor portion of the formula. Defendant's petition for an alternative method of apportionment under 15-31-312 was appropriate. Dept. of Revenue v. United Parcel Serv., Inc., 252 M 476, 830 P2d 1259, 49 St. Rep. 20 (1992).

Department of Revenue — Rule Conflicting With Statutory Law Invalid: More than 3 years prior to his death, decedent created a joint tenancy with an individual not his spouse or issue, using property solely his. The Department's regulations relating to statutory law require a tax levy on the full value of the joint tenancy property when the survivor made no contribution. The Supreme Court held that the Department's interpretation of statutory law was incorrect and that only one-half of the property value was subject to taxation. The Department regulations conflicting with statutory law are of no effect. Dept. of Revenue v. Estate of Dwyer, 236 M 405, 771 P2d 93, 46 St. Rep. 463 (1989).

Rating of Impairments Restricted to Licensed Physicians: Under 39-71-122 (repealed 1987) and 39-71-701 through 39-71-703, the legislative intent was that the making of impairment ratings be restricted to licensed medical physicians. Therefore, the Workers' Compensation Division properly exercised its rulemaking authority by promulgating ARM 24.29.806 which imposes the restriction. Weis v. Div. of Workers' Comp., 232 M 118, 755 P2d 1385, 45 St. Rep. 1004 (1988).

Validity of Driver Rehabilitation Point System: The driver rehabilitation point system implemented by ARM 23.3.202 is a valid administrative rule expressly authorized by 61-2-302 and impliedly authorized by 61-5-206. The point system increases the fairness of the suspension process, harmonizes with its enabling legislation, and is necessary to effectuate statutory purposes. Bick v. Dept. of Justice, 224 M 455, 730 P2d 418, 43 St. Rep. 2331 (1986).

Invalid Rule Under Grandfather Clause: Section 66-3208(4), R.C.M. 1947 (deleted by Ch. 350, sec. 317, L. 1974), a grandfather clause, allowed licensure of an established psychologist without a doctoral degree if he had 5 years of professional experience and a master's degree. A rule adopted by the Board of Psychologists required the professional experience to have been obtained after receiving the master's degree. The rule was held invalid because it imposed the additional requirement of a chronological order in which requirements were to be met not envisioned by the Legislature. McPhail v. Mont. Bd. of Psychologists, 196 M 514, 640 P2d 906, 39 St. Rep. 290 (1982).

Rule in Effect Prior to Conforming Amendment to Statute: Although subsection (2) of 15-31-301 was created by a 1974 amendment, it applies to the period of dispute (1971-1975) because a similar administrative rule was in effect prior to the amendment and the rule was not inconsistent with the section as it existed prior to amendment. Ward Paper Box Co. v. Dept. of Revenue, 196 M 87, 638 P2d 1053, 38 St. Rep. 2147 (1981).

Administrative Rule More Stringent Than Statute Held Invalid: An administrative rule of the Board of Barbers requiring a year's apprenticeship served in a "commercial barbershop" prior to examination, as opposed to a year's apprenticeship served "under the immediate personal supervision of a licensed barber" as required by 37-30-301 and 37-30-305 (both now repealed), is invalid because it does not satisfy the test as required in 2-4-305 that a rule must be "reasonably necessary to effectuate the purpose of the statute". Bd. of Barbers v. Big Sky College of Barber-Styling, 192 M 159, 626 P2d 1269, 38 St. Rep. 621 (1981), followed in Taylor v. Taylor, 272 M 30, 899 P2d 523, 52 St. Rep. 567 (1995).

Consumer Protection Act Violation Alleged as Cause of Accident — Agency Rule Not in Conflict With Federal Law — Summary Judgment: The District Court properly denied summary judgment on plaintiff's Count No. II, which claimed misrepresentation as to the odometer reading on a used car, sold to her by defendant corporation as the proximate cause of her accident and subsequent injuries. A state agency rule adopted pursuant to 30-14-104 was not inconsistent with the rules and decisions of the FTC and decisions of the federal courts, although the rule deals with sales and the main purpose of the federal law is to prevent unlawful restraint of trade. Whether the alleged violation was a cause of plaintiff's damages was a jury issue. Kopischke v. First Cont. Corp., 187 M 471, 610 P2d 668 (1980).

Indigents' Right to County Medical Assistance — Rule on 5-Day Application Period Invalid — Good Cause in Delay of Application for Aid: A college student was seriously injured in an accident. Neither she or her family had ever received any welfare benefits nor had they had any knowledge of the county medical assistance program for indigents. When she became aware of the benefits, she applied for aid but was denied because she had not applied within 5 days after receiving medical services. The court held the statute providing for indigents to be mandatory and to require strict compliance. The 5-day provision was held invalid. Unless administrative rules effectively effectuate the purpose of the statute, they are invalid. A rule in conflict with the statute from which it derives is without effect. A statute cannot be changed by administrative rules. On its face, the 5-day rule is patently unreasonable. The delay of the student in applying for funds was held for good cause considering the seriousness of the injuries, and the fact the student was hospitalized far from home and then was confined to home for nearly 3 months. The Welfare Department was held to have abused its discretion in determining that the student did not have good cause for her delayed application. Michels v. Dept. of Social & Rehabilitation Services, 187 M 173, 609 P2d 271 (1980).

Administrative Rule Exceeding Statutory Authority — Barbers: Administrative regulations are inconsistent with legislative guidelines if they engraft additional requirements on the statute that were not envisioned by the Legislature. Where the statutes set forth experience and character requirements for a barber school operator but did not mention an instructor's examination, an administrative rule requiring such an examination was void. Bell v. St., 182 M 21, 594 P2d 331 (1979).

Legality of Banking Board Rule — Issue to Be Raised Before Agency: There was no merit to appellant's challenge to the validity of the State Banking Board's rulemaking process. Furthermore, such a question must have been raised first before the administrative agency unless there was good cause for failure to do so. W. Bank of Billings v. St. Banking Bd., 174 M 331, 570 P2d 1115 (1977).

Failure to Consider Submissions Concerning Proposed Rule: Where Department of Revenue adopted appraisal plan without full consideration of alternatives and taxpayer objections and failed to prepare a concise statement of the principal reasons for adoption of the plan and for overruling objections to it, this section was not complied with and the plan was invalid. Patterson v. Dept. of Revenue, 171 M 168, 557 P2d 798 (1976).

Attorney General's Opinions

Rule Requiring Every School District to Provide Educational Services to Gifted and Talented Children Invalid: The adoption of 20-2-121 did not provide a statutory grant of authority to the Board of Public Education to require the creation of gifted and talented children programs. Rather, 20-7-902 makes the creation of gifted and talented children programs optional for individual school districts. Therefore, ARM 10.55.804, promulgated pursuant to the Board's

statutory authority to adopt accreditation standards and making the creation of such programs mandatory, conflicts with 20-7-902 and is thus invalid. 44 A.G. Op. 4 (1991).

Occupational Therapists Not Permitted to Use Therapeutic Modalities — Rule Allowing for Reimbursement Void: The use of therapeutic modalities by occupational therapists has not been authorized by the Legislature and is impermissible. Therefore, ARM 46.12.547, authorizing occupational therapists to be reimbursed through Medicaid for modalities performed in the course of treatment, is invalid as an improper exercise of rulemaking authority. 44 A.G. Op. 3 (1991).

Rule Invalid — Direct Conflict With Definition — Board of Speech Pathologists and Audiologists: An administrative rule adopted by the Board of Speech Pathologists and Audiologists that was in direct conflict with the definition of "audiologist" in 37-15-102 and that purported to authorize "certified hearing aid audiologists" is invalid. 42 A.G. Op. 1 (1987).

Board of Nursing — No Authority to Require College Degree for Licensure: The Legislature did not intend to require nursing license applicants to hold a specific college degree, as is evidenced by the fact that the Legislature did not set forth this requirement in statute as it did for other license qualifications statutes, and by the fact it permits nursing educational programs to be located in educational institutions which could not confer the minimum proposed degrees. Therefore, the Board of Nursing does not have authority to adopt a rule requiring a specific college degree as a qualification for licensure. 41 A.G. Op. 23 (1985).

Permits for X-Ray Technologists — Board Rules Adding Additional Noncontradictory Requirements to Statute Invalid: Rules of the Board of Radiologic Technologists requiring applicants for permits as radiologic technologists under 37-14-306 to take a 24-hour course approved by the Board, be employed, have at least 6 months' practical experience in the x-ray profession, pass a permit examination, and pay a $65 exam fee are void and unenforceable. The rules engraft additional, noncontradictory requirements on 37-14-306 that were not envisioned by the Legislature, even though the rules may appear to be consistent with the purposes of the statute. 40 A.G. Op. 50 (1984).

Law Review Articles

Montana Supreme Court Survey: Administrative Law, Reep, 42 Mont. L. Rev. 329 (1981).

Collateral References

Administrative Law *key* 381 through 409.

73 C.J.S. Public Administrative Law and Procedure §§103 through 114.

2 Am. Jur. 2d Administrative Law §§278 through 285.

Sufficiency of agency's compliance with requirement of Administrative Procedure Act (5 USCS §553(c)) that agency shall incorporate in rules adopted concise general statement of their basis and purpose. 46 ALR Fed. 780.

2-4-306. Filing, format, and adoption and effective dates — dissemination of emergency rules.

Compiler's Comments

2001 Amendment: Chapter 210 at end of first sentence in (1) inserted "or a reference to the rule as contained in the proposal notice" and inserted second sentence providing that rule is adopted on date notice or revised notice filed with secretary of state. Amendment effective April 6, 2001.

1999 Amendment: Chapter 19 in (3) substituted "appropriate administrative rule review committee" for "administrative code committee" and near middle after "2-4-403" deleted "or the revenue oversight committee has conducted a poll in accordance with 5-18-109"; and in (4)(c) substituted "administrative rule review committee" for "administrative code committee". Amendment effective February 17, 1999.

1997 Amendments — Composite Section: Chapter 335 inserted (4)(c) providing that a rule is effective after publication in the register unless, after notice to the agency, the Administrative Code Committee meets and objects to a proposed rule before it is adopted and prohibiting an objected to rule from taking effect until after the adjournment of the legislative session following the notice proposal unless the Committee withdraws its objection or the objected rule is adopted with changes approved by the Committee; and made minor changes in style.

Chapter 489 in third sentence in (4)(b)(ii), after "shall", inserted "in addition to the required publication in the register" and after "appropriate" inserted "and extraordinary"; and made minor changes in style.

Style changes were slightly different in the chapters. In each case, the codifier chose the more appropriate.

Applicability: Section 3, Ch. 335, L. 1997, provided: "[This act] applies to rules objected to under [this act] after [the effective date of this act]." Effective October 1, 1997.

1987 Amendment: Inserted (4)(b)(i) relating to temporary rules.

Source: 1961 Revised Model Act, sec. 4.

Collateral References

Administrative Law *key* 407, 410, 416 through 419.

73 C.J.S. Public Administrative Law and Procedure §§96, 112, 114.

2 Am. Jur. 2d Administrative Law §§287, 290.

2-4-307. Omissions from ARM or register.

Compiler's Comments

1999 Amendment: Chapter 19 in (4) near beginning substituted "appropriate administrative rule review committee" for "administrative code committee"; and made minor changes in style. Amendment effective February 17, 1999.

1981 Amendment: Divided former section into (1) and (2) with substantial amendment (see 1981 Session Law for text); deleted need for the secretary of state to initiate omissions; deleted need for filing all omitted material with the secretary of state; rewrote both subsections to reflect incorporation by reference in a rule rather than omission of a rule containing material incorporated by reference (for prior version see sec. 8, Ch. 243, L. 1979); inserted (3) requiring amendments to omitted material to be adopted; inserted (4) requiring publication after Administrative Code Committee vote; inserted (5) relating to federal regulations; and inserted (6) providing for a hearing petition to contain amendatory language.

Source: 1961 Revised Model Act, sec. 5(part).

Case Notes

Federal Regulations Incorporated Into Rule — Retroactive Application: Generally, an appellate court must apply the law in effect at the time it renders its decision. If, subsequent to a judgment below and before the decision of the appellate court, a law, whether constitutional, statutory, administrative, or judicial, intervenes and positively changes the rule that governs the case, the new law must be obeyed. Retroactive application of new law is impermissible only if it takes away or impairs vested rights acquired under existing law or creates new obligations or imposes new duties in respect to transactions already past. Here, a board considering whether to issue a certificate of need considered the effect of competition, believing it was required to do so under a statute allegedly incorporating federal law. The parties offered evidence on the competition issue, and the losing party argued on appeal that the federal law was not in fact incorporated. After the appeal and before the decision, the board adopted the federal requirement by rule. The Supreme Court held that it must consider the rule, which required the effect of competition to be considered. The administrative rule properly incorporated the federal regulations where it stated that criteria listed in 42 CFR 123.412 will be considered in making a decision. West-Mont Community Care, Inc. v. Bd. of Health & Environmental Sciences, 217 M 178, 703 P2d 850, 42 St. Rep. 1116 (1985), followed in Brockie v. Omo Constr., Inc., 268 M 519, 887 P2d 167, 51 St. Rep. 1322 (1994).

Collateral References

Administrative Law *key* 407, 906.

73 C.J.S. Public Administrative Law and Procedure §§112, 114.

2 Am. Jur. 2d Administrative Law §287.

2-4-308. Adjective or interpretive rule — statement of implied authority and legal effect.

Compiler's Comments

1999 Amendment: Chapter 19 in (1) in first sentence after "adopted" deleted "after October 1, 1983"; in (2) in two places substituted "appropriate administrative rule review committee" for "administrative code committee"; and made minor changes in style. Amendment effective February 17, 1999.

Source — Administrative Code Committee Bill: House Bill 47 (Ch. 637, L. 1983), enacting this section, was introduced by request of the Administrative Code Committee. The provisions of the section are generally based on section 3-109, Model State Administrative Procedure Act (1981). See Administrative Code Committee Report, December 1982, Montana Legislative Council.

Collateral References

Administrative Law and Procedure *key* 392, 417.

73 C.J.S. Public Administrative Law and Procedure §§94, 96, 97.
2 Am. Jur. 2d Administrative Law §§291 through 307.

2-4-309. Rulemaking authority for laws not yet effective — rule not effective until law effective.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

2-4-311. Publication and arrangement of ARM.

Compiler's Comments

2001 Amendment: Chapter 396 in (2) substituted third and fourth sentences concerning charging a fee for separate publications to be set and deposited in accordance with 2-15-405 for former sentence that read: "The cost of any separate publications, determined in accordance with 2-4-313(4), must be paid by the agency." Amendment effective July 1, 2001.

1999 Amendment: Chapter 19 in (1) in first sentence near end inserted "in the appropriate format" and in third sentence near middle after "matter" deleted reference to consideration of the matter by the administrative code committee; and made minor changes in style. Amendment effective February 17, 1999.

Source: 1961 Revised Model Act, sec. 5(part).

Collateral References

Administrative Law *key* 406, 407.
73 C.J.S. Public Administrative Law and Procedure §112.
2 Am. Jur. 2d Administrative Law §287.

2-4-312. Publication and arrangement of register.

Compiler's Comments

2001 Amendment: Chapter 396 in (2) at end of second sentence substituted "which must be established and deposited in accordance with 2-15-405" for "established as provided in 2-4-303(4)". Amendment effective July 1, 2001.

1999 Amendment: Chapter 19 in (1) near middle after "month" deleted "or as directed by the administrative code committee"; and made minor changes in style. Amendment effective February 17, 1999.

1987 Amendment: In (2) deleted second sentence that read: "The cost, determined in accordance with 2-4-313(4), must be paid by appropriation from the general fund to the account within the state special revenue fund created in 2-4-313(5)."

1983 Amendment: Substituted reference to state special revenue fund for reference to revolving fund.

Source: 1961 Revised Model Act, sec. 5(part).

Collateral References

Administrative Law *key* 394, 395.
73 C.J.S. Public Administrative Law and Procedure §104.
2 Am. Jur. 2d Administrative Law §§279, 280.

2-4-313. Distribution, costs, and maintenance.

Compiler's Comments

2001 Amendment: Chapter 396 at end of first sentence of (3) substituted "for a fee set in accordance with subsection (5)" for "at prices fixed in accordance with subsection (4)"; deleted first three sentences of former (4) that read: "The secretary of state shall determine the cost of supplying copies of the ARM and supplements or revisions to the ARM and the register to persons not listed in subsection (1). The cost must be the approximate cost of publication of the copies, including indexing, printing or duplicating, and mailing. However, a uniform price per page or group of pages may be established without regard to differences in the cost of printing different parts of the ARM and supplements or revisions to the ARM and the register"; deleted former (5) that read: "(5) The secretary of state shall deposit all fees in a proprietary fund"; substituted (5) concerning setting and depositing fees in accordance with 2-15-405 for former text that read: "The secretary of state shall fix the fee to cover the costs of supplying copies of the ARM and supplements or revisions to the ARM and the register to the persons listed in subsection (1). The cost must be the approximate cost of publication of the copies, including indexing, printing or duplicating, and mailing. However, a uniform price per page or group of pages may be established without regard to differences in the cost of printing different parts of

the ARM and supplements or revisions to the ARM and the register"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 19 in (4) near beginning after "state" deleted "in consultation with the administrative code committee"; in (6) in second sentence after "fix" deleted "in consultation with the administrative code committee"; and made minor changes in style. Amendment effective February 17, 1999.

1997 Amendment: Chapter 42 in (1)(i) substituted reference to Legislative Services Division for reference to Legislative Council. Amendment effective March 12, 1997.

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula".

1993 Amendment: Chapter 411 in (4), at end, inserted last sentence that read: "Fees are not refundable"; in (5) substituted "a proprietary fund" for "an account within the state special revenue fund created for paying the expenses of publication of ARM and the register"; and made minor changes in style. Amendment effective July 1, 1993.

1992 Special Session Amendment: Chapter 6 in (5) inserted language requiring the deposit of $20,000 for fiscal year 1993 in the general fund on or before June 30, 1993. Amendment effective January 21, 1992.

Effective Date — Termination: Section 3, Ch. 6, Sp. L. January 1992, provided: "[This act] is effective on passage and approval [approved January 21, 1992] and terminates July 1, 1993."

1987 Amendment: In (1), near end of introductory clause after "revisions thereto", deleted "with costs paid as provided in 2-4-312(2)"; in (4), at end of first sentence, inserted "to persons not listed in subsection (1)" and substituted second sentence, relating to the approximate cost of publication, for former text that read: "The cost shall be the approximate cost of publication, including indexing, printing or duplicating, and mailing, less fees charged agencies pursuant to subsection (6) and money appropriated for 2-4-312(2) and 2-4-313(1)"; and in (6) substituted second sentence, concerning fixing the filing fee for all material to be published in ARM or the register, for former text that read: "He shall fix, in consultation with the administrative code committee, the fee to cover a portion of the costs of publication and mailing" and inserted third and fourth sentences concerning cost and price per page.

1985 Amendment: Deleted former (1)(b) that read: "clerk of each court of record of this state, one copy"; and in (2) near beginning, after "secretary of state", deleted "clerk of each court of record in the state".

1983 Amendments: Chapter 163 in (1)(e) substituted "county commissioners or governing body of each county" for "each county clerk", changed "one copy" to "at least one but not more than two copies", and inserted "as the county commissioners or governing body of the county may determine"; in (1)(j) changed "three copies" to "two copies"; and near beginning of (2), before "each county", deleted "clerk of".

Chapter 277 substituted reference to state special revenue fund for reference to revolving fund.

Source: 1961 Revised Model Act, sec. 5(part).

2-4-314. Biennial review by agencies — recommendations by committee.

Compiler's Comments

1983 Amendment: Deleted former (2), which read: "Prior to October 1, 1980, and prior to October 1 of each even-numbered year thereafter, each agency shall prepare and submit a report to the administrative code committee, in tabular or other form, indicating the agency's recommendations for legislation which will clarify existing grants of rulemaking authority and grant or eliminate rulemaking authority as necessary."

1981 Amendment: Inserted (3) relating to recommendations to the Legislature.

Severability: Section 8, Ch. 381, L. 1981, was a severability section.

Source: New. (See 3-201, Model State Administrative Procedure Act (1981)—Annotator.)

2-4-315. Petition for adoption, amendment, or repeal of rules.

Compiler's Comments

1997 Amendment: Chapter 110 near beginning of second sentence, after "shall", inserted "determine and", in third sentence, after "writing", deleted "(stating its reasons for the denial)", and inserted fourth, fifth, sixth, and seventh sentences concerning written decision and permissive hearing.

Source: 1961 Revised Model Act, sec. 6.

Case Notes

Statute Requiring "Necessary" Rules Requires Rulemaking Hearing — Mandamus Proper Remedy: Pursuant to 5-7-111 and this section, Common Cause submitted a petition to the Commissioner of Political Practices requesting the adoption of a definition of "lobbying". When the Commissioner denied the petition, Common Cause brought a petition for mandamus. The District Court dismissed pursuant to Rule 12(b)(6), M.R.Civ.P. (Title 25, ch. 20). The Supreme Court reversed, citing Commonwealth of Pa. v. Nat'l Ass'n of Flood Insurers, 520 F2d 11 (3d Cir. 1975), and holding that the language in 5-7-111 requiring rules "necessary" to implement the statute mandated the Commissioner to hold a hearing to determine whether rules were necessary. The Supreme Court held that the discretionary authority contained in this section to adopt or not adopt a particular rule does not give the Commissioner the authority to avoid altogether the rulemaking required by 5-7-111. For this reason, the Supreme Court also held that mandamus was a proper remedy because the Commissioner had a clear legal duty to conduct rulemaking procedures to determine what rules were necessary. Common Cause of Mont. v. Argenbright, 276 M 382, 917 P2d 425, 53 St. Rep. 386 (1996). (See 1997 amendment clearly stating that a hearing need not be held.)

Petition for Rule Amendment Rendered Moot by Legislation: The Legislature, by placing automobiles and recreational vehicles in separate and distinct classes, emasculated plaintiff's contention that different methods of valuation and different appraisal guides were being improperly used by the Department of Revenue to appraise automobiles and recreational vehicles. The enactment of 15-6-110 and 15-6-111 rendered plaintiff's petition for rule amendment moot. Wetzel v. Dept. of Revenue, 180 M 123, 589 P2d 162 (1979).

Collateral References

73 C.J.S. Public Administrative Law and Procedure §90.

2 Am. Jur. 2d Administrative Law §288.

What constitutes agency "action," "order," "decision," "final order," "final decision," or the like, within meaning of federal statutes authorizing judicial review of administrative action—Supreme Court cases. 47 L. Ed. 2d 843.

Part 4
Legislative Review of Rules

2-4-402. Powers of committees — duty to review rules.

Compiler's Comments

1999 Amendment: Chapter 19 in (1) substituted "The administrative rules review committees shall review" for "Except for rules proposed by the department of revenue, the administrative code committee shall review"; deleted former (2) that provided: "(2) The revenue oversight committee shall review all rules proposed by the department of revenue"; in (2) substituted "appropriate administrative rule review committee" for "administrative code committee"; and made minor changes in style. Amendment effective February 17, 1999.

1989 Amendment: At beginning of (1) inserted exception clause; at beginning of (2) substituted "The revenue oversight committee shall review all rules" for "Rules" and after "revenue" deleted "may be reviewed only in regard to the procedural requirements of the Montana Administrative Procedure Act"; and in (3) inserted "administrative code".

1983 Amendment: Inserted (3)(a) relating to access to certain agency records.

Administrative Code Committee Bills: Senate Bill 45 (Ch. 78, L. 1983), requiring necessity for administrative rules to be demonstrated in the rulemaking record and allowing the Administrative Code Committee to review that record, and House Bill 35 (Ch. 466, L. 1983), requiring a contemporaneous grant of rulemaking authority, were introduced by request of the Committee. See Administrative Code Committee Report, December 1982, Montana Legislative Council.

Review of Rules Adopted Prior to April 14, 1975: Chapter 64, L. 1983, provided: "**Section 1. Review of existing rules required.** Notwithstanding the provisions of 2-4-402, the administrative code committee shall review all administrative rules adopted prior to April 14, 1975, by agencies subject to the provisions of the Montana Administrative Procedure Act. The committee shall review the rules to determine whether agencies have substantially complied with subsections (5) and (6) of 2-4-305, as that section read on November 18, 1982.

Section 2. Power of the committee. (1) If the committee determines that a rule violates 2-4-305(5) or 2-4-305(6), as that section read on November 18, 1982, it may:

(a) take those steps authorized by 2-4-402(3)(a); or

(b) poll the legislature in accordance with 2-4-403, as that section may be amended by Senate Bill No. 33. If 2-4-403 is not amended by Senate Bill No. 33, no poll of the legislature may be taken by the committee on any rule reviewed pursuant to [section 1]. [Senate Bill 33 was not passed.]

(2) The committee may advise an agency concerning such matters as clarity, form, style, grammar, punctuation, and spelling with respect to any rule reviewed under [section 1].

Section 3. Committee to report to legislature. Prior to January 1, 1987, the committee shall prepare a report of its activities and any recommendations to be submitted to the legislature.

Section 4. Effective date — termination. This act is effective on passage and approval and terminates January 1, 1987."

House Bill 59 (Ch. 64, L. 1983) was introduced by request of the Administrative Code Committee. See Administrative Code Committee Report, December 1982, Montana Legislative Council.

1981 Amendment: Deleted a reference to a hearing in accordance with 2-4-302 through 2-4-305 from end of (3)(a); deleted "prepare recommendations for the adoption, amendment, or rejection of a rule" after "proposing the rule" in (3)(a).

Severability: Section 8, Ch. 381, L. 1981, was a severability section.

2-4-404. Evidentiary value of legislative poll.

Compiler's Comments

1999 Amendment: Chapter 19 near beginning substituted "appropriate administrative rule review committee" for "administrative code committee"; and made minor changes in style. Amendment effective February 17, 1999.

2-4-405. Economic impact statement.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 19 throughout section substituted "appropriate administrative rule review committee" for "administrative code committee"; in (1) in first sentence before "members" substituted "a majority of the" for "at least five"; and made minor changes in style. Amendment effective February 17, 1999.

Chapter 46 in (1) inserted second and third sentences requiring preparation of an economic impact statement upon the request of at least 15 legislators; in (2) near middle of first sentence after "must be made" deleted "by the committee", in second sentence after "3 months of the" deleted "committee's", and substituted third sentence concerning withdrawing an economic impact statement for former language that read: "The committee may withdraw its request or decision for an economic impact statement at any time"; in (3) near beginning of third sentence after "notice" inserted "including a summary of the statement and"; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 339 in first and seventh sentences in (1) and in second sentence in (2) substituted "appropriate administrative rule review committee" for "administrative code committee" (the amendment to seventh sentence was rendered void by the amendment by Ch. 46); in (1) in first sentence after second "request of" substituted "a majority of the members" for "at least five members", inserted fourth, fifth, and sixth sentences requiring agency to prepare family impact note, requiring copies of note request, and requiring note to contain required material if data available, and at end of seventh sentence inserted "or the family impact note"; in first sentence in (2) and in (5) inserted "family impact note or economic impact"; in first and second sentences of (2) before "statement" inserted "note or" and in third sentence substituted "note or statement" for "an economic impact statement"; and made minor changes in style. Amendment effective April 19, 1999, and terminates October 1, 2003.

1983 Amendment: Substituted (1), (2), and (3) (see Ch. 665, L. 1983, for text) for former text that read: "(1) Upon request of the administrative code committee, an agency shall prepare a statement of the estimated economic impact of the adoption, amendment, or repeal of a rule as proposed. The statement must include an estimate of:

(a) the cost to the state of administering and enforcing the rule;

(b) the aggregate cost of compliance to all persons affected; and

(c) any economic benefit of compliance to all persons affected.

(2) The statement must be filed with the secretary of state for publication in the register and mailed to persons who have requested advance notice of the agency's rulemaking proceedings. The statement must be published and mailed at least 20 days prior to the adoption, amendment, or repeal of the rule. If a hearing is held, it must be published 20 days prior to the hearing.

(3) If it is impossible to formulate such an estimate, the reasons for impossibility of formulation must be published instead of the estimate."; and inserted (6), relating to environmental impact statements, that was enacted as a separate section by sec. 2, Ch. 665, L. 1983.

Administrative Code Committee Bill — 1983: The 1983 amendments to this section were enacted from legislation introduced by request of the Administrative Code Committee. Some of the material from such amendments was from section 3-105(b), Model State Administrative Procedure Act (1981). See Administrative Code Committee Report, December 1982, Montana Legislative Council.

2-4-406. Committee objection to violation of authority for rule — effect.

Uniform Commissioner's Comment

[See chapter compiler's comments.]

Uniform law commissioner's comment reproduced only in part reflecting Montana's adoption of only a portion of section 3-204, Model Administrative Procedure Act (1981): "...If a legislature wishes to vest its administrative rules review committee with more than purely recommendatory authority, it should enact bracketed subsection (d) [subsections (d)(1), (d)(3), (d)(4), and (d)(5) are basis of 2-4-406]. Subsection (d) is a substantially modified Iowa Act, Section 17A.4(4)(a)-(b). This provision provides an effective legislative check, by means less than statute, on unlawful agency rules. It authorizes a legislative committee to file a formal objection to a rule on the ground that it is procedurally or substantively unlawful. That objection would detail the precise reasons why the committee believes the rule to be unlawful. Notice that such an objection has been filed would be printed adjacent to the rule wherever it is published, and the objection itself would be made available for public inspection. The formal committee objection would then shift to the particular agency the burden of establishing that the rule is procedurally and substantively lawful in any subsequent proceeding for judicial review or for enforcement of the rule. If the agency fails to meet its unusual burden of persuasion in that case, the court would invalidate the entire rule, or the relevant portion thereof.

The filing of a formal objection to a rule by the appropriate legislative committee will place the adopting agency in a dilemma. The agency can rely upon the rule as it is, thereby accepting this special burden of demonstrating that the rule is wholly lawful in a future court case, or the agency can change the rule in order to reinstate the usual presumption of validity that attaches to an agency rule. The extent to which an agency will be amenable to modifying the rule to eliminate any objection of the committee will obviously depend upon the extent to which the agency thinks it needs the challenged rule in its original form, and the agency's confidence that it can overcome its special burden of persuading the court that the rule in that form is lawful in all respects. If the rule's validity is doubtful because it is not clearly procedurally and substantively lawful, the agency will usually modify the rule: for the reversed burden of persuasion will result in the invalidation of many rules of doubtful legality when they are challenged in court. Of course, the legislative committee's objection authority would not interfere with the operation or effectiveness of clearly valid agency rules. The committee is only authorized to alter one aspect of the procedure by which the legality of the rule will be finally determined by the courts.

As a consequence, a legislative committee with authority to object to agency rules in the manner described in subsection (d) [2-4-406] will be a credible check on illegal agency rule making. The committee-objection mechanism proposed here may be justified, therefore, on the ground that its mere existence is likely to make agencies act more responsibly in exercising their rule-making powers; for they will know that the shift in the burden of persuasion after a committee objection will, in close cases, make judicial invalidation of the rule much more likely than at present. Actual exercise of its objection authority by a legislative committee will also have the added benefit of inducing agencies which have issued rules of doubtful or clear illegality to withdraw them, thereby sparing the public the cost of complying with those rules or contesting them in the courts. Finally, it seems desirable to provide a means by which members of the public who are aggrieved by allegedly illegal agency rules can, in those cases where their claims are especially credible, be aided in their efforts to secure a judicial invalidation of those rules. A good way to separate the credible claims deserving such help from those that do not is by securing an evaluation of the legality of the rules in question by an independent responsible body external to the agency. And a good way to aid such aggrieved persons whenever that independent evaluation agrees with their contention is to shift the burden of persuasion in any subsequent judicial proceeding involving the validity of those rules from the assailant, who had to convince the court they were unlawful, to the agency, which is then required to convince the court that they are lawful.

It is also logical to shift to the agency the burden of demonstrating the validity of a rule in subsequent litigation when a more politically accountable and independent body objects thereto. Unlike the agency, the legislative committee members are directly accountable to the public and represent the body that created the agency and invested it with whatever authority the agency may lawfully exercise. The usual presumption of validity accorded an agency rule, therefore, may reasonably be deemed inappropriate when a legislative committee believes the rule to be unlawful. Furthermore, legislatures have always been assumed to have the authority, which they have often exercised, to allocate the burden of persuasion in court litigation, so long as they act "reasonably" when they do so. And a shift in the burden of persuasion as to the validity of a particular rule in these circumstances certainly seems "reasonable." Note also that there is a clear standard against which the committee is to operate when it objects: "beyond the procedural or substantive authority delegated to the adopting agency ["not to have been proposed or adopted in substantial compliance with ..." in 2-4-406(1)]." And the committee must include the specific reasons for its action in the objection so that courts and others who wish to examine the specific grounds supporting an objection may easily do so.

In addition, it should be noted that the reversed burden-of-persuasion mechanism is a fair compromise between the extremes of authorizing one or two houses of the legislature or a legislative committee to veto, temporarily or permanently, rules issued by an agency, and authorizing a legislative committee merely to recommend to the legislature that it overrule such regulations by statute. The undesirability of such a one or two house or a committee veto was discussed above.

Of course, as paragraph (6) of subsection (d) [not enacted in 2-4-406 but similar to 2-4-412(4)] states, the failure of the appropriate legislative committee to file a formal objection to a rule should not be construed by a reviewing court as an implied legislative authorization of the rule. Time constraints will often prevent the appropriate committee from carefully reviewing all agency rules; and an affected party may decide to seek judicial relief directly rather than a legislative committee objection. Therefore, it would be unfair to imply negatively legislative authorization for any rule merely because no objection to it had been filed by the committee.

Currently, Iowa, Montana, and Vermont provide for a scheme whereby the burden of persuasion as to the validity of a rule is reversed after an objection has been filed to the rule by a legislative committee. See Iowa Act, Section 4(4), Montana Act, Section 2-4-506(3) [now 2-4-406(4), first sentence], and Vermont Act, Section 842. The constitutionality of that scheme has been impliedly upheld in Iowa. In doing so, the Iowa Supreme Court voided certain agency rules solely because the agency, after those rules were formally objected to as unlawful by the appropriate legislative committee, could not meet its burden of persuading the court that they were lawful in all respects. The court intimated that if the objection had not been filed it might have held the rules valid. See Schmitt v. Iowa Dept. of Social Services, 263 N.W.2d 739 (Iowa 1978). In another Iowa case, the court upheld an agency rule after an objection to it had been filed by the appropriate legislative committee, because the agency successfully met its burden and persuaded the court that the rule was lawful. Iowa Auto Dealers Ass'n v. Iowa Dept. Revenue, 301 N.W.2d 760 (1981).

See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 905-924 (1975), for a discussion of the desirability and operation of this reversed burden-of-persuasion mechanism after an authorized legislative committee formally objects to a rule.

Though not provided for in the text of subsection (d) [2-4-406], a state enacting it might also consider adding to that subsection a provision embodying the following notion: whenever a rule is invalidated because an agency fails to meet its legislative committee imposed special burden of persuasion under subsection (d)(5) [2-4-406(4), first sentence], judgment shall also be rendered against the agency for court costs, including a reasonable attorney's fee. Addition of a provision providing for reimbursement of this sort would encourage aggrieved persons to litigate the validity of rules that are tainted by a formal, legislative committee objection, and would thus remove one obstacle—financial expense—that discourages persons from seeking judicial review of unlawful agency rules. The Iowa Act has such a provision in its Section 4(4). If it is desired to add a provision of this type to Section 3-204(d)(5) [2-4-406(4)] it might be added at the very end and provide:

and render judgment against the agency for court costs. Court costs include a reasonable attorney's fee and are payable by the [state comptroller] from the support appropriations of the agency that adopted the rule...."

Compiler's Comments

1999 Amendment: Chapter 19 in (1) at beginning substituted "appropriate administrative rule review committee" for "administrative code committee"; and made minor changes in style. Amendment effective February 17, 1999.

Source: Section 3-204(d)(1), (3) through (5), Model Administrative Procedure Act (1981).

Administrative Code Committee Bill: House Bill 92 (Ch. 589, L. 1983), enacting this section, was introduced by request of the Administrative Code Committee. See Administrative Code Committee Report, December 1982, Montana Legislative Council.

2-4-410. Report of litigation.

Compiler's Comments

1999 Amendment: Chapter 19 near beginning substituted "appropriate administrative rule review committee" for "administrative code committee". Amendment effective February 17, 1999.

Severability: Section 8, Ch. 381, L. 1981, was a severability section.

Collateral References

Comment note: applicability of stare decisis doctrine to decisions of administrative agencies. 79 ALR 2d 1126.

2-4-411. Report.

Compiler's Comments

1993 Amendment: Chapter 349 at beginning, after "committee", deleted "shall prepare and, as provided in 5-11-210, submit a report to the legislature and" and at end, after "2-4-412", inserted "and make other recommendations and reports as it considers advisable".

1991 Amendment: Near beginning, after "prepare", inserted "and, as provided in 5-11-210, submit" and after "legislature" deleted "at least once each biennium". Amendment effective March 20, 1991.

2-4-412. Legislative review of rules — effect of failure to object.

Compiler's Comments

1999 Amendment: Chapter 19 in (4) substituted "appropriate administrative rule review committee" for "administrative code committee"; and made minor changes in style. Amendment effective February 17, 1999.

1983 Amendment: In (1), changed "joint resolution" to "bill" in three places; in (2), after "by joint resolution", substituted "request or advise or by bill direct the adoption, amendment, or repeal of any rule" for "direct a change to be made in any rule in ARM or direct the adoption of an additional rule"; in second sentence of (2), inserted "advised, requested, or" and "or bill"; at end of (2), inserted "in a bill"; and in (3), substituted "Rules and changes in rules made by agencies" for "Rules made by agencies and changes in rules directed by the legislature".

Administrative Code Committee Bill — Preamble: House Bill 67 (Ch. 164, L. 1983) was introduced by request of the Administrative Code Committee. See Administrative Code Committee Report, December 1982, Montana Legislative Council. The preamble to House Bill 67 read: "WHEREAS, section 2-4-412, MCA, provides for the direct repeal of administrative rules by joint resolution of the Legislature and requires changes to be made in rules or new rules to be adopted in accordance with joint resolutions of the Legislature; and

WHEREAS, on March 18, 1982, District Judge Gordon Bennett ruled in the case of The Montana Taxpayers' Association v. The Department of Revenue, Lewis and Clark County Civil No. 47126, that the Legislature's authority to mandate a change in administrative rules by joint resolution is unconstitutional, as a violation of the doctrine of separation of powers; and

WHEREAS, the Legislature considers it desirable to advise agencies by joint resolution that rules be adopted, amended, or repealed and expects its directions to agencies to have the force of law when adopted in the form of a bill.

THEREFORE, it is the intent of the Legislature to provide for the direct repeal of administrative rules by bill; to provide for legislative requests or advice for the adoption, amendment, or repeal of administrative rules by joint resolution; to provide for legislative direction for the adoption, amendment, or repeal of administrative rules by bill; and to require agency compliance with that direction when adopted in bill form."

1981 Amendment: Inserted (4) relating to effect of Legislature's failure to object to a rule.

Severability: Section 8, Ch. 381, L. 1981, was a severability section.

Case Notes

Legislative Acquiescence: That the Legislature intended to grant the Board of Health and Environmental Sciences (now Board of Environmental Review) authority to enact a rule controlling open burning under 75-2-203 can be ascertained by examining several sections relating to establishment of air standards and Board rulemaking authority and because, for the three legislative sessions the rule has been in existence, the Legislature has not taken any action pursuant to this section to amend the rule except to provide that applicable area fire control agencies be notified of the issuance of open-burning permits. Dept. of Health & Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293 (1978).

Part 5
Judicial Notice and Declaratory Rulings

Part Case Notes

Standard of Review of Public Service Commission Conclusion of Law: The standard of review applicable to a Public Service Commission's conclusion of law is whether the Public Service Commission correctly interpreted the law in reaching the conclusion. Grouse Mtn. Associates, Ltd. v. Dept. of Public Service Regulation, 284 M 65, 943 P2d 971, 54 St. Rep. 750 (1997).

2-4-501. Declaratory rulings by agencies.

Compiler's Comments

Source: 1961 Revised Model Act, sec. 8.

Case Notes

Jurisdiction and Nature of Workers' Compensation Court: A driver was injured while operating a tractor-trailer owned by one company and leased to another company that was in turn a division of a third company. The driver was awarded workers' compensation benefits. When the Workers' Compensation Uninsured Employers' Fund sought to collect the amount of the benefits from the company that owned the rig and from the third company, both companies denied any responsibility for the employment of the injured man. The Workers' Compensation Court and the Fund could not agree on the court's jurisdiction, and the instant appeal followed. The Supreme Court determined that the dispute involved benefits payable to the claimant, the Workers' Compensation Court has exclusive jurisdiction, the legislative history relied upon by the Fund and the history of the court indicated that the jurisdiction of the Workers' Compensation Court went beyond adjudication of workers' claims only when a dispute is related to benefits payable to a claimant, and that the Workers' Compensation Court has declaratory power under the Montana Administrative Procedure Act. St. v. Hunt, 191 M 514, 625 P2d 539, 38 St. Rep. 421 (1981).

Law Review Articles

Montana Supreme Court Survey: Administrative Law, Reep, 42 Mont. L. Rev. 329 (1981).

Collateral References

Administrative Law *key* 326.
73A C.J.S. Public Administrative Law and Procedure §158.
2 Am. Jur. 2d Administrative Law §§233 through 236.

2-4-505. Judicial notice of rules.

Subcommittee Comments

[See chapter compiler's comments.]

The state supreme court has not always been willing to take judicial notice of administrative rules. In view of the filing and publication requirements in the [proposed] MAPA, this requirement, which will eliminate the necessity for submitting proof as to the existence and authenticity of rules, is warranted.

Compiler's Comments

Source: New.

Case Notes

Family Member Exclusion Inapplicable to Claim for Unpaid Back Wages — One Hundred Ten Percent Penalty Applied — Attorney Fees and Costs Properly Awarded: Greta worked for her husband's broadcasting company as a traffic system manager, initially working without hourly wages or a salary. About 10 months after her employment began, her husband offered Greta a monthly salary and agreed that Greta should be paid retroactively to the first day on which she started working, preparing a memorandum of understanding to that effect. The M.O.U. also

provided that Greta be repaid for the 10-month period according to a mutually agreeable schedule. Greta continued to work several months at salary, but the marriage began to dissolve, and she left her position without receiving any back wages. The company eventually made some payments, but Greta ultimately sued for unpaid wages plus penalties under the wage protection statutes. The District Court granted Greta summary judgment on the issue of whether unpaid wages were owed and, after trial, ordered the company to pay Greta the amount still owing. However, the court declined to award the maximum 110% penalty, establishing a 55% penalty instead and awarding Greta her attorney fees and costs. Both parties appealed. The company claimed that the penalty and fees should not have been awarded because, as a family member, Greta's employment relationship was excluded under 39-3-406. However, that exception applies to the minimum wage and overtime provisions of the employment relationship, not to the failure to timely pay wages, which is governed by 39-3-205. Once Greta became a salaried employee, she was entitled to the rights and remedies afforded to all employees under state law. Therefore, the District Court properly determined that back wages were owing. However, under ARM 24.16.7551, an employer who pays some or all of a contested wage may be relieved in whole or in part of paying a penalty, unless the employer has previously violated similar wage and hour statutes within 3 years prior to the date of the filing of the wage claim. The District Court erred in not taking judicial notice of the administrative rule. Because the company had been the subject of at least three prior wage claims by other employees, the special circumstances of the rule applied, so the 110% penalty, as a matter of law, applied to the back wages owed to Greta at the time of her separation from employment. Thus, the Supreme Court vacated the 55% award and directed a 110% award from that date. Further, the District Court's award of attorney fees and costs was based on substantial evidence and was proper under 39-3-214, including Greta's attorney fees incurred on appeal. Reier Broadcasting Co. v. Reier, 2000 MT 120, 299 M 463, 1 P3d 940, 57 St. Rep. 504 (2000).

Collateral References

Comment note: applicability of stare decisis doctrine to decisions of administrative agencies. 79 ALR 2d 1126.

Comment note: administrative official notice—federal cases. 3 L. Ed. 2d 1628.

2-4-506. Declaratory judgments on validity or application of rules.

Compiler's Comments

1983 Amendment: Deleted former (3), which read: "If the administrative code committee has objected to the adoption or amendment of a rule on the grounds set forth in subsection (2), the agency bears the burden, in any action brought under this section, of proving that its rule was not adopted with an arbitrary or capricious disregard for the purpose of the authorizing statute."

Source: 1961 Revised Model Act, sec. 7.

Case Notes

No Allegations of Fact or Law on Which to Base Cause of Action — Claim Properly Dismissed: Taxpayers brought a civil action in 1996 against the Department of Revenue and others, seeking declaratory judgment relief and refund of property taxes paid in 1989 through 1992, based upon their rights as determined in Dept. of Revenue v. Sheehy, 262 M 104, 862 P2d 1181 (1993). In that case, the Supreme Court found the stratified sales assessment ratio valuation adjustment in 15-7-111 to be unconstitutional. As part of their causes of action, taxpayers asserted a claim pursuant to this section, but as the District Court noted, at no time did the taxpayers contend that any of the administrative rules mentioned in their complaint were invalid or inapplicable. For this reason, the Supreme Court held that the District Court did not err in dismissing the taxpayers' complaint insofar as the complaint was premised upon this section. Samson v. St., 285 M 310, 948 P2d 232, 54 St. Rep. 1165 (1997).

Amended Petition Seeking Declaratory Judgment Not Subject to Thirty-Day Rule on Proceedings for Judicial Review: A declaratory action pursuant to this section is not subject to the 30-day limit imposed on proceedings for judicial review in contested cases under 2-4-702. An amended petition seeking to void amendments to administrative rules, to the extent that the petition seeks declaratory judgment on the validity of those amendments, is also not subject to the 30-day limit. Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review, 282 M 255, 937 P2d 463, 54 St. Rep. 338 (1997).

Authority to Adopt Regulations: Montana Department of Revenue had the authority to adopt regulations concerning rules for the apportionment of corporate net income derived from sources both within and without the state based on a "business vs. nonbusiness" test. Dept. of Revenue v. Am. Smelting & Ref. Co., 173 M 316, 567 P2d 901 (1977).

Law Review Articles

Montana Supreme Court Survey: Administrative Law, Reep, 42 Mont. L. Rev. 329 (1981).

The Application of the Uniform Declaratory Judgments Act in Montana, Martin, 8 Mont. L. Rev. 57 (1947).

Collateral References

Declaratory Judgment *key* 81, 294.

26 C.J.S. Declaratory Judgments §30; 73A C.J.S. Public Administrative Law and Procedure §158.

Right to jury trial in action for declaratory relief in state court. 33 ALR 4th 146.

Part 6
Contested Cases

Part Case Notes

Board of Psychologists — Immunity From Suit: Rahrer sought to hold the Board of Psychologists liable for damages arising out of a contested case hearing involving the Board's investigation of a complaint against Rahrer, a licensed psychologist. Applying Butz v. Economou, 438 US 478, 57 L Ed 2d 895, 98 S Ct 2894 (1978), and Koppen v. Bd. of Medical Examiners, 233 M 214, 759 P2d 173, 45 St. Rep. 1433 (1988), the Supreme Court held that the Board of Psychologists was entitled to quasi-judicial immunity. Initiating, investigating, and presenting a case pursuant to the Montana Administrative Procedure Act involve precisely the types of decisions for which the state and its agencies are granted quasi-judicial immunity. Rahrer v. Bd. of Psychologists, 2000 MT 9, 298 M 28, 993 P2d 680, 57 St. Rep. 53 (2000).

Attorney Entitled to Absolute Quasi-Judicial Immunity for Actions in Contested Case Proceedings: The doctrine of immunity evolved to protect not only judges but also certain participants in the judicial process whose functions are closely associated with those of judicial officers. The immunity that those participants receive is quasi-judicial immunity, which is not a mere defense to liability but an absolute immunity from suit. Like judicial immunity, quasi-judicial immunity benefits the public by ensuring that quasi-judicial officers exercise their functions unfettered by fear of legal consequences, as long as the functions are within the scope of the officers' jurisdiction and authorized by law. A state attorney who discharged his duty under professional rules of conduct when notifying a contested case hearings examiner that a certified public accountant who was representing a client was practicing law without a license was protected by quasi-judicial immunity and was not subject to suit. Steele v. McGregor, 1998 MT 85, 288 M 238, 956 P2d 1364, 55 St. Rep. 349 (1998).

Hearings Examiner Entitled to Judicial Immunity: The state Department of Labor and Industry's hearings examiners perform adjudicatory functions comparable to those performed by judges under similar safeguards. As a result, those hearings examiners are entitled to absolute judicial immunity when acting in their adjudicatory capacities. This immunity results from the independence that judges need to make decisions in matters involving such things as monetary and liberty interests, without fear of reprisal from dissatisfied litigants. Absolute immunity is immunity from suit, rather than a mere defense to liability. Judicial immunity is dependent on the challenged conduct being an official act within the judge's broad statutory jurisdiction but does not depend on acting correctly. A person acting in a judicial capacity will not be deprived of immunity simply because that person acted maliciously, mistakenly, or in excess of authority. Steele v. McGregor, 1998 MT 85, 288 M 238, 956 P2d 1364, 55 St. Rep. 349 (1998).

Cancellation of State Agricultural Lease for Nonpayment — Hearing Not Required — District Court Jurisdiction to Review Cancellation: There is no provision in 77-6-506 requiring the Department to conduct a hearing when canceling a state land lease for nonpayment, nor is a hearing required pursuant to the due process clause of Art. II, sec. 17, Mont. Const. The District Court thus has no jurisdiction to review a lease cancellation for nonpayment under contested case procedures because lease cancellation for nonpayment does not constitute a contested case. However, the District Court does retain inherent jurisdiction to review administrative decisions and erred in deciding that it did not have jurisdiction. The standard of review is whether the agency acted arbitrarily, capriciously, or unlawfully. Johansen v. St., 1998 MT 51, 288 M 39, 955 P2d 653, 55 St. Rep. 211 (1998), following N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989). See also Winchell v. Dept. of Natural Resources and Conservation, 1999 MT 11, 293 M 89, 972 P2d 1132, 56 St. Rep. 48 (1999). On remand, the District Court determined that the rent had been paid on time, and the Department appealed. The Supreme Court held that the Department had uncontroverted evidence before it, in the form of an affidavit from the postmaster, that Johansen had timely mailed the rental payment on January 2. So

although the envelope did not receive a postmark until January 3, the Department's decision to not renew the lease for nonpayment was arbitrary and capricious and not supported by substantial evidence. The District Court's holding was affirmed. Johansen v. St., 1999 MT 187, 295 M 339, 983 P2d 962, 56 St. Rep. 731 (1999).

Part Not Applicable to Unemployment Insurance Claims: The unemployment compensation insurance law contains a complete procedure for hearing and determining undisputed claims for unemployment insurance. The Board of Labor Appeals, as a quasi-judicial board, may consider not only the record made before the appeals referee but new evidence produced at the Board hearing. The provisions of MAPA are unworkable when an attempt is made to apply them to determine claims for unemployment insurance benefits. It is an incorrect interpretation of statutory law to hold that the Board has no power to overturn the findings of fact of the appeals referee. In reviewing the Board's decision, the District Court is limited by the provisions of 39-51-2410. Decker Coal Co. v. Employment Security Div., 205 M 1, 667 P2d 923, 40 St. Rep. 1056 (1983).

Part Law Review Articles

A Simple and Fast Means for Judicial Review of Agency Decisions in Contested Cases, Porter, 63 Mich. B.J. 1053 (1984).

2-4-601. Notice.

Compiler's Comments

Source: 1961 Revised Model Act, sec. 9(a), (b).

Case Notes

Challenge of Environmental Assessment — No Jurisdiction for Administrative Review: A grain company sought a permit to build a high-speed grain loading terminal near Pompeys Pillar national monument. The permit was granted and plaintiff, a nonprofit association supporting the monument's preservation, began administrative proceedings in an effort to overturn the permit issuance on grounds that the Department of Environmental Quality erred in its preparation of the environmental assessment related to the permit. An administrative law judge concluded that the Department acted arbitrarily and capriciously by issuing a permit without preparing an environmental impact statement. The Department filed exceptions to the administrative law judge's conclusions with the Board of Environmental Review. The Board ultimately affirmed the Department's decision to issue the permit, and plaintiff appealed to District Court. The Department contended that because the challenge to the administrative decisions did not contain any air quality issues, but only addressed environmental assessment issues governed by the Montana Environmental Policy Act (MEPA), and that because MEPA does not provide for administrative review of challenges to MEPA compliance, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. The District Court agreed and dismissed plaintiff's petition for lack of subject matter jurisdiction. Plaintiff appealed, but the Supreme Court affirmed. Had plaintiff challenged air quality issues, it would have been entitled to administrative proceedings. However, plaintiff's challenge pertained only to issues related to the environmental assessment, which is governed by MEPA. MEPA requires that a compliance challenge be brought in District Court, rather than through administrative proceedings. Thus, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. Plaintiff's petition was properly dismissed. Pompeys Pillar Historical Ass'n v. Dept. of Environmental Quality, 2002 MT 352, 313 M 401, 61 P3d 148 (2002).

Notice of Administrative Hearing Regarding Unemployment Insurance Proceedings Not Violative of Due Process Rights — Administrative Hearings Not Governed by Rules of Civil Procedure: In an unemployment insurance case, the notice of appeal sent to the attorney for Wheelsmith Fabrication, Inc. (Wheelsmith), stated that the purpose of an administrative hearing was to determine whether Hall was discharged for misconduct connected with her work or directly affecting her employment. Wheelsmith contended that the notice failed to adequately inform Wheelsmith of the factual claims involved, constituting a denial of due process of law. Applying the traditional due process balancing test in Mathews v. Eldridge, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893 (1976), the Supreme Court held that Wheelsmith failed to show a risk of erroneous deprivation of a private interest affected by official government action. Further, unemployment insurance proceedings are governed by administrative rule, rather than the Montana Rules of Civil Procedure, and pursuant to this section, a notice of hearing must contain a short and plain statement of the matters asserted. The notice sent to Wheelsmith's attorney

met the statutory criteria of a short and plain statement, and the District Court did not err in holding that Wheelsmith's due process rights were not violated by the notice of hearing. Wheelsmith Fabrication, Inc. v. Dept. of Labor and Industry, 2000 MT 27, 298 M 187, 993 P2d 713, 57 St. Rep. 131 (2000). See also ARM 24.11.201 and 24.11.317.

Unfair Labor Practices — Due Process — Collateral Estoppel: In an action charging unfair labor practices, an employee was collaterally estopped from relitigating the issue of whether his due process rights were violated by the 3-year delay between the filing of his charges and the administrative hearing on the charges. The issue was previously decided, a final judgment was rendered, and the party against whom the claim was advanced remained the same or was privy of the earlier party. Klundt v. St., 222 M 172, 720 P2d 1181, 43 St. Rep. 1148 (1986).

Contested Case — Requirement for Judicial Review — Exhaustion of Administrative Remedies: Plaintiff, a nursing home operator, was notified by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) that it was disallowing certain nursing care costs claimed by plaintiff. The Department notified plaintiff that a hearing could be requested under the Department's administrative rules. Plaintiff requested time extensions in which to submit objections, and the Department agreed. The Department finally set a time limitation that plaintiff did not meet. The Department then filed its reimbursement rate for plaintiff. Plaintiff filed a complaint in District Court for judicial review of the Department's determination. The District Court dismissed the case. On appeal, the Supreme Court held that only a party who has exhausted all administrative remedies is entitled to judicial review if aggrieved in a contested case. A contested case is a determination of legal rights after an opportunity for hearing. Because there was no hearing in this case, dismissal was proper. B.G.M. Enterprises v. St., 673 P2d 1205, 40 St. Rep. 1827 (1983) (apparently not reported in Montana Reports).

Complaint in Compliance With Notice Requirements of MAPA: The Billings Education Association's complaint complied with the notice requirements of Montana Administrative Procedure Act when it alleged that the mailing of individual contracts violated section 59-1605(1)(a) and (e), R.C.M. 1947 (now 39-31-401(1) and (5)), which prohibits coercion of employees in the exercise of certain rights protected by the collective bargaining law. The word "coercion" is not a talisman without which the complaint fails. The allegations were sufficient to inform the Board of Trustees that the issue of coercion would be litigated. Bd. of Trustees v. State ex rel. Bd. of Personnel Appeals, 185 M 104, 604 P2d 778 (1979).

No Hearing Required Before Issuance of Permit: The Hard Rock Mining Act (HRMA) does not provide for public participation in the decisionmaking process that precedes the issuance of a permit. Further, at the time pertinent events transpired, HRMA did not provide opportunity for hearing prior to issuance of a permit. Thus, the constitutional right to participation and the contested hearing provisions of the Montana Administrative Procedure Act are not invoked. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

MAPA Not Sole Remedy: The Public Employees' Retirement Board was estopped to claim that the petitioner's sole remedy was under the Montana Administrative Procedure Act (MAPA) and that this remedy was not timely exercised because the board at no time indicated it was bound by and acting pursuant to MAPA with its notice and hearing requirements. State ex rel. Stowe v. Bd. of Administration, PERS, 172 M 337, 564 P2d 167 (1977).

Failure to Object — Defective Notice: When Consumer Counsel appeared as a representative of the consuming public, participated in all proceedings before the Public Service Commission regarding a proposed natural gas rate hike, and raised no issue on the sufficiency of the notice of the proceedings, he cannot now raise this issue on appeal. Consumer Counsel v. P.S.C. & Mont. Power Co., 168 M 180, 541 P2d 770 (1975).

Law Review Articles

Montana Supreme Court Survey: Administrative Law, Reep, 42 Mont. L. Rev. 329 (1981).

Collateral References

Administrative Law *key* 452 through 454.

73A C.J.S. Public Administrative Law and Procedure §§134, 135.

2 Am. Jur. 2d Administrative Law §§359 through 364.

2-4-602. Discovery.

Compiler's Comments

Source: New.

Case Notes

Power of Hearing Examiner to Limit Case to Proof of Matters Disclosed Through Discovery: Byard brought an action against Montana Rail Link, alleging sex discrimination in employment practices. Her attorney, during discovery, asked for the substance of the testimony to be offered by one of Montana Rail Link's witnesses, but the information was never produced. During the hearing, Montana Rail Link attempted to introduce the witnesses' testimony and was not allowed to do so by the hearing examiner. Based upon ARM 24.9.317, adopted by the Commission for Human Rights, the Supreme Court upheld the right of the hearing examiner to limit the prosecution or defense of a contested case to proof of matters disclosed through discovery when one party does not engage in full and complete discovery. Mont. Rail Link v. Byard, 260 M 331, 860 P2d 121, 50 St. Rep. 1084 (1993).

Collateral References

Administrative Law *key* 466.

73A C.J.S. Public Administrative Law and Procedure §124.

Use of Freedom of Information Act (5 USCS §552) as substitute for, or as means of, supplementing discovery procedures available to litigants in federal civil, criminal, or administrative proceedings. 57 ALR Fed. 903.

2-4-603. Informal disposition and hearings — waiver of administrative proceedings — recording and use of settlement proceeds.

Compiler's Comments

2001 Amendment: Chapter 305 in (1)(b) in three places after "be" substituted "deposited" for "recorded", in first sentence near beginning before "settlement" inserted "monetary" and after "proceeds" deleted "including cash or other assets, whether received by the state or a third party", in second sentence near beginning after "designated for" deleted "recording of", and deleted former third sentence that read: "The provisions of this section do not apply to the portions of a settlement negotiated on behalf of or paid to a party other than the state"; inserted (1)(c) requiring certain state agency nonmonetary settlements to be recorded in a nonstate, nonfederal state special revenue account; and made minor changes in style. Amendment effective April 21, 2001.

1999 Amendment: Chapter 451 in (1) inserted second through fourth sentences regarding recording of settlement proceeds; and made minor changes in style. Amendment effective April 22, 1999.

Applicability: Section 5, Ch. 451, L. 1999, provided: "[This act] applies to any arbitration, compromise, or settlement of actions entered into on or after [the effective date of this act]." Effective April 22, 1999.

Internal Reference: Title 37 referred to in this section is Professions and Occupations.

Source: 1961 Revised Model Act, sec. 9(d).

2-4-604. Informal proceedings.

Compiler's Comments

Source: New.

Collateral References

Administrative Law *key* 452.

73A C.J.S. Public Administrative Law and Procedure §§134 through 139.

2 Am. Jur. 2d Administrative Law §§410 through 413.

2-4-611. Hearing examiners — legal services unit — conduct of hearings — disqualification of hearing examiners and agency members.

Compiler's Comments

1985 Amendment: Near beginning of (2) substituted "an agency legal assistance program, if any" for "the legal assistance program".

Source: New.

Case Notes

Attorney Entitled to Absolute Quasi-Judicial Immunity for Actions in Contested Case Proceedings: The doctrine of immunity evolved to protect not only judges but also certain participants in the judicial process whose functions are closely associated with those of judicial officers. The immunity that those participants receive is quasi-judicial immunity, which is not a mere defense to liability but an absolute immunity from suit. Like judicial immunity, quasi-judicial immunity benefits the public by ensuring that quasi-judicial officers exercise their

functions unfettered by fear of legal consequences, as long as the functions are within the scope of the officers' jurisdiction and authorized by law. A state attorney who discharged his duty under professional rules of conduct when notifying a contested case hearings examiner that a certified public accountant who was representing a client was practicing law without a license was protected by quasi-judicial immunity and was not subject to suit. Steele v. McGregor, 1998 MT 85, 288 M 238, 956 P2d 1364, 55 St. Rep. 349 (1998).

Hearings Examiner Entitled to Judicial Immunity: The state Department of Labor and Industry's hearings examiners perform adjudicatory functions comparable to those performed by judges under similar safeguards. As a result, those hearings examiners are entitled to absolute judicial immunity when acting in their adjudicatory capacities. This immunity results from the independence that judges need to make decisions in matters involving such things as monetary and liberty interests, without fear of reprisal from dissatisfied litigants. Absolute immunity is immunity from suit, rather than a mere defense to liability. Judicial immunity is dependent on the challenged conduct being an official act within the judge's broad statutory jurisdiction but does not depend on acting correctly. A person acting in a judicial capacity will not be deprived of immunity simply because that person acted maliciously, mistakenly, or in excess of authority. Steele v. McGregor, 1998 MT 85, 288 M 238, 956 P2d 1364, 55 St. Rep. 349 (1998).

Criminal Conviction as Conclusive Evidence of Unprofessional Conduct — Hearings Examiner Conflict of Interest Not Prejudicial: Erickson claimed that a hearings examiner's conflict of interest constituted prejudicial error warranting reversal of Erickson's medical license revocation. However, the mere existence of an error does not mandate reversal. The error must cause substantial prejudice. In light of the conclusive and objective evidence of Erickson's unprofessional conduct stemming from a federal Medicare fraud conviction, the bias or conflict of interest on the part of the hearings examiner did not adversely affect the outcome of the case or prejudice Erickson's substantial rights. Erickson v. St., 282 M 367, 938 P2d 625, 54 St. Rep. 395 (1997).

No Denial of Due Process When Agency Order Subject to Judicial Review: Schneeman argued that the agency board reviewing her unemployment insurance claim was not impartial and therefore her right to due process had been violated. The Supreme Court held that her claims of agency bias were irrelevant when a District Court independently determined that there was substantial evidence to support the denial of benefits. Schneeman v. Dept. of Labor and Industry, 257 M 254, 848 P2d 504, 50 St. Rep. 256 (1993).

Claimed Bias of Appeals Referee Not Timely Raised: Schneeman raised the issue of bias on the part of the appeals referee for the first time in District Court. The Supreme Court affirmed the lower court's ruling that a claim of bias had to have been raised prior to the hearing before the appeals referee. Schneeman v. Dept. of Labor and Industry, 257 M 254, 848 P2d 504, 50 St. Rep. 256 (1993). See also Wheelsmith Fabrication, Inc. v. Dept. of Labor and Industry, 2000 MT 27, 298 M 187, 993 P2d 713, 57 St. Rep. 131 (2000).

Designation of Hearing Officer's Order as Final: The Commissioner of Labor and Industry is charged with the responsibility of investigating wage claims and holding hearings under Montana wage payment law, and under 2-15-112, the Commissioner may delegate these functions to a subordinate employee. Therefore, statute and Department rule clearly allow the decision of an appointed hearing examiner to be a final order. Hoven, Vervick, & Amrine, P.C. v. Comm'r of Labor, 237 M 525, 774 P2d 995, 46 St. Rep. 1024 (1989).

Revocation of Real Estate Broker's License — No Denial of Rights at Administrative Hearing — Hearing Examiner and Board Attorney as Deputy Attorneys General: A hearing examiner recommended that Sorini's real estate broker's license be revoked for violations of 37-51-321. On appeal, Sorini argued that she was denied her rights at the administrative hearing because both the hearing examiner and the attorney for the Board of Realty Regulation were deputies in the Attorney General's office; however, she failed to submit any proof to support this allegation. The Supreme Court noted that 2-4-611 establishes the manner in which a party may file an affidavit for disqualification of a hearing examiner, holding that in the absence of an affidavit it was not proper to raise the issue on appeal. The court agreed that having a greater separation of prosecutorial and decisionmaking functions would eliminate an appearance of impropriety, but found nothing to warrant a reversal of the District Court. In re Sorini, 220 M 459, 717 P2d 7, 43 St. Rep. 526 (1986).

Collateral References

Administrative Law *key* 478, 479.

73A C.J.S. Public Administrative Law and Procedure §138.

2 Am. Jur. 2d Administrative Law §§407 through 419.

2-4-612. Hearing — rules of evidence, cross-examination, judicial notice.

Compiler's Comments

Source: 1961 Revised Model Act, sec. 9(c) and 10.

Case Notes

Challenge of Environmental Assessment — No Jurisdiction for Administrative Review: A grain company sought a permit to build a high-speed grain loading terminal near Pompeys Pillar national monument. The permit was granted and plaintiff, a nonprofit association supporting the monument's preservation, began administrative proceedings in an effort to overturn the permit issuance on grounds that the Department of Environmental Quality erred in its preparation of the environmental assessment related to the permit. An administrative law judge concluded that the Department acted arbitrarily and capriciously by issuing a permit without preparing an environmental impact statement. The Department filed exceptions to the administrative law judge's conclusions with the Board of Environmental Review. The Board ultimately affirmed the Department's decision to issue the permit, and plaintiff appealed to District Court. The Department contended that because the challenge to the administrative decisions did not contain any air quality issues, but only addressed environmental assessment issues governed by the Montana Environmental Policy Act (MEPA), and that because MEPA does not provide for administrative review of challenges to MEPA compliance, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. The District Court agreed and dismissed plaintiff's petition for lack of subject matter jurisdiction. Plaintiff appealed, but the Supreme Court affirmed. Had plaintiff challenged air quality issues, it would have been entitled to administrative proceedings. However, plaintiff's challenge pertained only to issues related to the environmental assessment, which is governed by MEPA. MEPA requires that a compliance challenge be brought in District Court, rather than through administrative proceedings. Thus, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. Plaintiff's petition was properly dismissed. Pompeys Pillar Historical Ass'n v. Dept. of Environmental Quality, 2002 MT 352, 313 M 401, 61 P3d 148 (2002).

Request for "in Person" Hearing Improperly Denied — Administrative Rule Contrary to Statute and Rule of Evidence Invalid: Charles disputed the amount of child support payments intended to be withheld by an income withholding proceeding and requested that he be given an "in person" hearing, rather than a telephone conference hearing, pursuant to 40-5-414. His request was denied by the administrative hearings officer pursuant to ARM 46.30.607(1). The Supreme Court held that the request for the "in person" hearing was improperly denied because 2-4-612(2) makes the Montana Rules of Evidence applicable to administrative hearings and Rule 611(e), M.R.Ev. (Title 26, ch. 10), provides that a witness can be heard only in the presence of other parties. Citing In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994), the Supreme Court held that Rule 611 requires the physical presence of a witness in the courtroom. The Supreme Court also noted that 40-5-414 requires a live hearing if a party requests it and that the administrative rule adopted by the Child Support Enforcement Division, providing for a live hearing only upon approval of the hearings officer, was void because it was contrary to statute and Rule 611. Taylor v. Taylor, 272 M 30, 899 P2d 523, 52 St. Rep. 567 (1995).

Admissibility of Expert Testimony in Administrative Proceeding Regarding Sexual Conduct by Teacher: Allegations were made to a school board regarding sexual conduct by a teacher toward students and former students, triggering criminal charges that were later dismissed. The District Court found that conclusions by a hearings examiner denying renewal of the teacher's certificate were based on inadmissible testimony by a drug and alcohol counselor who testified as an expert on sexual abuse. The Supreme Court, examining the issue of expert testimony in administrative proceedings, noted that agencies are bound by common law and statutory rules of evidence and that while the rules of evidence are generally more relaxed in an administrative proceeding than they are in a court of law, they are not to be relaxed to the point of disregarding due process of law and fundamental individual rights. In a criminal case, the question of whether a child is a victim of sexual abuse is a question that may be clarified by expert testimony. However, expert testimony evaluating the credibility of witnesses is generally not admissible, except when the witness is a child victim who testifies at trial and credibility is brought into question. In this case, neither victim was a child, nothing in the record established that any of the witnesses were incompetent or were under any form of mental or physical disability, and the expert's general statements that the victims' conduct was consistent with that of sexually abused children prejudiced the accused because the trier of fact deferred to the expertise of the expert

and inferred that the expert believed the witness to be credible. Failure to establish a foundation for the use of any of the expert testimony constituted reversible error. In re Renewal of Teaching Certificate of Thompson, 270 M 419, 893 P2d 301, 52 St. Rep. 200 (1995).

Power of Hearing Examiner to Limit Case to Proof of Matters Disclosed Through Discovery: Byard brought an action against Montana Rail Link, alleging sex discrimination in employment practices. Her attorney, during discovery, asked for the substance of the testimony to be offered by one of Montana Rail Link's witnesses, but the information was never produced. During the hearing, Montana Rail Link attempted to introduce the witnesses' testimony and was not allowed to do so by the hearing examiner. Based upon ARM 24.9.317, adopted by the Commission for Human Rights, the Supreme Court upheld the right of the hearing examiner to limit the prosecution or defense of a contested case to proof of matters disclosed through discovery when one party does not engage in full and complete discovery. Mont. Rail Link v. Byard, 260 M 331, 860 P2d 121, 50 St. Rep. 1084 (1993).

Summary Judgment Proper: Due process does not require development of facts through an evidentiary hearing when there are no material factual issues in dispute. When Peila's own deposition testimony negated any material factual issues and when he moved for summary judgment, the Board of Horseracing properly granted summary judgment. In re Peila, 249 M 272, 815 P2d 139, 48 St. Rep. 655 (1991).

Testimony at Administrative Hearing by Person Who Decides Appeal: Police officers at a disciplinary hearing before the Police Commission argued that because the city manager could veto or modify the Commission's decision, it was an inherent conflict of interest for him to testify against them at the hearing. On appeal, the District Court found no prejudice in the city manager's testimony, and the officers showed none on appeal to the Supreme Court. No rule prevented the testimony. The Supreme Court found no reversible error. Gentry v. Helena, 237 M 353, 773 P2d 309, 46 St. Rep. 862 (1989).

Consideration of Written and Videotaped Testimony at De Novo Hearing: A dismissed teacher claimed he was wrongfully deprived of his right to a de novo hearing because the County Superintendent considered transcripts and videotaped testimony taken during the school board hearing. However, the testimony was admissible under 20-4-612(2) because it expedited disposition of the issue without substantial prejudice to the teacher. Johnson v. Bd. of Trustees, 236 M 532, 771 P2d 137, 46 St. Rep. 598 (1989).

Issuance of License — Off-the-Record Site Visit Improper: After an administrative hearing, the Director of the Department of Revenue awarded a beer and wine license to one of two parties after unannounced site visits to the premises of each party. On appeal, the District Court overruled the Director's decision and reinstated the order of the hearing examiner, which proposed award of the license to the other party. The Supreme Court affirmed the District Court's order vacating the Director's order because it was founded on an unlawful procedure that violated the appellant's due process interests. Whether the conduct prejudiced both contenders' rights equally is irrelevant. Lack of prior notice, coupled with lack of any documentation, is fatal to an ordinarily permissible inspection. This type of conduct under a Montana Administrative Procedure Act proceeding violates certain other safeguards built in by statute: the right to respond and present evidence and argument on all relevant issues and the right to conduct a cross-examination sufficient for full and true disclosure of facts. However, the trial judge erred in ordering the adoption of the hearing examiner's proposal. This was not an alternative authorized by statute. The case was remanded to the Department for final determination. Frascell, Inc. v. St., 235 M 152, 766 P2d 850, 45 St. Rep. 2267 (1988).

Exhibit Admitted, Then Rejected, in Medical Malpractice Hearing — No Prejudice: A physician in a medical malpractice hearing was not prejudiced by admission of an exhibit over his objection and without proper prehearing exchange, followed by reversal and rejection of the exhibit by the hearing examiner. The issue was similar to a bench trial in which the trier of fact routinely reviews proposed exhibits before admitting or rejecting them. Kauffman v. Dept. of Commerce, 229 M 204, 746 P2d 103, 44 St. Rep. 1905 (1987).

Unfair Labor Practices — Due Process — Collateral Estoppel: In an action charging unfair labor practices, an employee was collaterally estopped from relitigating the issue of whether his due process rights were violated by the 3-year delay between the filing of his charges and the administrative hearing on the charges. The issue was previously decided, a final judgment was rendered, and the party against whom the claim was advanced remained the same or was privy of the earlier party. Klundt v. St., 222 M 172, 720 P2d 1181, 43 St. Rep. 1148 (1986).

Administrative Order Not Supported by Evidence Remanded for Redetermination: Upon complaint by an applicant for employment with a county welfare department, the Human Rights Commission erred in reducing the complainant's backpay award when no evidence was

presented at the contested hearing supporting the reduction. Because the Commission failed to make findings of fact specifying the evidence upon which the order was based or failed to inform the parties that it would take judicial notice of the evidence upon which the order was based, the case must be remanded to the Commission for a redetermination of the offset of interim wages. Martinez v. Yellowstone County Welfare Dept., 192 M 42, 626 P2d 242, 38 St. Rep. 474 (1981).

Extent of Cross-Examination: An administrative agency may limit cross-examination to examination of the witnesses of opposing or adverse parties and is not required to permit cross-examination of the witness of one party by a second party not having adverse interests to the first party. N. Plains Resource Council v. Bd. of Natural Resources & Conservation, 181 M 500, 594 P2d 297 (1979).

Job Classification — No Participation by Employing Agency: The statutes and rules governing job classification procedures do not contemplate participation by the employing agency other than the opportunity for input into the Personnel Division's decision. If and when the dispute reaches step four of the formal appeals procedure, the employee represents his interests and the Personnel Division, through its Classification Bureau, represents the interests of the state. Therefore, the Board of Personnel Appeals had no clear legal duty and no authority to hear the objections of the employing agency. State ex rel. St. Tax Appeal Bd. v. Bd. of Personnel Appeals, 181 M 366, 593 P2d 747 (1979).

Workers' Compensation Court — Evidence That May Be Considered — Judicial Notice: The rules of evidence are more relaxed in an administrative proceeding than in a court of law, but due process will not be disregarded. The right to cross-examination is a constitutionally protected fundamental right and not an evidentiary rule. Section 2-4-612(5) makes this right absolute. The workers' compensation judge may only consider evidence that is offered at the hearing or of which he may take judicial notice. A judicially noticed fact must be one not subject to reasonable dispute. Disputed medical conclusions by doctors contained in medical reports cannot be judicially noticed. Hert v. Lumberman Mut. Cas. Co., 178 M 355, 584 P2d 656 (1978), distinguishing Stevens v. Glacier Gen. Assurance Co., 176 M 61, 575 P2d 1326 (1978), and clarified and rehearing denied in Hert v. Lumberman Mut. Cas. Co., 179 M 160, 587 P2d 11 (1978). Hert was held to no longer be authority for admissibility of medical records, in light of the 1990 adoption of ARM 24.5.317, in Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

MAPA Not Sole Remedy: The Public Employees' Retirement Board was estopped to claim that the petitioner's sole remedy was under the Montana Administrative Procedure Act (MAPA) and that this remedy was not timely exercised because the Board at no time indicated it was bound by and acting pursuant to MAPA with its notice and hearing requirements. State ex rel. Stowe v. Bd. of Administration, PERS, 172 M 337, 564 P2d 167 (1977).

Standing: Where member of Public Service Commission dissented on decision to increase cost to customers of electric company as fuel costs increased and sued to vacate and set aside Commission's rate order, he had no standing to bring suit because he was not "party in interest", which means party outside decisionmaking process. McTaggart v. P.S.C., 168 M 155, 541 P2d 778 (1975).

Law Review Articles

Montana Supreme Court Survey: Administrative Law, Snyder, 41 Mont. L. Rev. 151 (1980).

Collateral References

Administrative Law *key* 458 through 477.

73A C.J.S. Public Administrative Law and Procedure §115, et seq.

2 Am. Jur. 2d Administrative Law §§376 et seq., 397 through 426.

Comment note on hearsay evidence in proceedings before administrative agencies. 36 ALR 3d 12.

Weight, in administrative proceeding, of evidence of surveys or polls of public or consumers' opinion, recognition, preference, or the like. 76 ALR 2d 633.

Libel and slander — privilege applicable to judicial proceedings as extending to administrative proceedings. 45 ALR 2d 1296.

2-4-613. Ex parte consultations.

Compiler's Comments

Source: 1961 Revised Model Act, sec. 13.

Collateral References

2 Am. Jur. 2d Administrative Law §§407 through 413.

Privilege as to communications between lay representative in judicial or administrative proceedings and client. 31 ALR 4th 1226.

Administrative decision or finding based on evidence secured outside of hearing, and without presence of interested party or counsel. 18 ALR 2d 552.

2-4-614. Record — transcription.

Compiler's Comments

Source: 1961 Revised Model Act, sec. 9(e).

Case Notes

Record on Appeal — Lack of Transcript: Arguments on the sufficiency of the evidence in action on charges of unfair labor practices could not be considered without a transcript of the testimony at the original administrative hearing. The cause was remanded to the trial court for election by the employee either to order and pay for the transcript so the trial court could receive it and enter further judgment or to accept affirmation of the trial court's decision. Klundt v. St., 222 M 172, 720 P2d 1181, 43 St. Rep. 1148 (1986).

Written Transcript: Where, in contested case, Board of Personnel Appeals submitted to the reviewing court only a tape recording of the proceedings before it, the District Court could properly order it to furnish a written transcript in compliance with this section. State ex rel. Bd. of Personnel Appeals v. District Court, 171 M 128, 556 P2d 1238 (1976).

Collateral References

Administrative Law *key* 506.

73A C.J.S. Public Administrative Law and Procedure §160.

2-4-621. When absent members render decision — proposal for decision and opportunity to submit findings and conclusions — modification by agency.

Compiler's Comments

Source: 1961 Revised Model Act, sec. 11(part).

Case Notes

Board of Personnel Appeals Not Bound by Findings and Conclusions of Hearings Examiner — District Court Bound by Board Conclusions if Correct: The interpretation of an administrative rule and an agency's policy is a question of law, and in its final order, an agency may reject or modify a hearings officer's conclusion of law and interpretation of administrative rules in the proposal for decision. As the final administrative authority in the state employee classification process, the Board of Personnel Appeals must review and interpret applicable rules promulgated by the Department of Administration. Thus, the Board is not bound by a hearings officer's conclusions and interpretations. However, the District Court is bound by the Board's conclusions of law and interpretation of administrative rules, if correct. In the present case, the Board reasonably interpreted applicable employee classification rules and correctly concluded that child support enforcement investigators were improperly classified in violation of 2-18-202, and the District Court erred in reversing the Board's final order. St. Personnel Div. v. Child Support Investigators, 2002 MT 46, 308 M 365, 43 P3d 305 (2002). See also Weber v. Pub. Employees' Retirement Bd., 270 M 239, 890 P2d 1296 (1995), and In re Grievance of Brady, 1999 MT 153, 295 M 75, 983 P2d 292 (1999).

Interpretation of Agency Policy Held to Be Question of Law — Standard for Agency Interpretation — Department of Justice Disciplinary Action Upheld: Brady, a supervisor with the Criminal Investigation Bureau (CIB) of the Montana Department of Justice (DOJ), was to transfer 134 pounds of contraband marijuana from himself to Missoula County Deputy Sheriffs. As part of that transfer, Brady arranged with the Deputy Sheriffs for him to use the marijuana as part of an undercover operation in which Brady briefly revealed the marijuana to an associate of a drug dealer. The Deputy Sheriffs then took the marijuana to the Cascade County evidence locker. Brady was later demoted because he failed to receive the approval of a supervisor, contrary to the "otherwise illegal acts" written policy of the DOJ that required approval by the Montana Attorney General before an employee could participate in "any activity that is proscribed by federal, state, or local law as a felony or that is otherwise a serious crime . . .". Brady challenged the disciplinary demotion through a DOJ grievance procedure in which a hearings officer held that the revelation of the marijuana to the drug dealer's associate ("the scam") did not require approval by the Attorney General and recommended that Brady be reinstated to his former position. The DOJ appealed the hearings officer's decision to the Attorney General, who found that the hearings officer failed to give proper deference to the DOJ's consistent interpretation of its own "otherwise illegal acts" policy and ignored the plain

meaning of the policy, which the Attorney General interpreted as stating that a CIB agent may not "engage in conduct which would constitute a crime under state or federal law if the conduct was engaged in by a private person" unless authorization was obtained. The Attorney General found that possession of the marijuana for the purposes of the scam had not been authorized and that certain findings of fact made by the hearings officer were clearly erroneous. The Attorney General affirmed the disciplinary demotion, and the District Court upheld the Attorney General. Brady argued before the Supreme Court that the Attorney General failed to comply with subsection (3) of this section in that the Attorney General, who had not heard the evidence in the case, failed to state with particularity after a review of all the evidence in the case why any findings of the hearings officer were being rejected and that that failure to state with particularity constituted an abuse of discretion under 2-4-704(2)(a)(vi). The Supreme Court held that: (1) the interpretation of an agency's policy is not a question of fact but a question of law and is entitled to considerable deference; (2) because the findings of the hearings officer concerned the interpretation of the DOJ's own "otherwise illegal acts" policy and because under subsection (3) of this section an agency may reject or modify the conclusions of law and interpretation of administrative rules, the Attorney General's failure to state with particularity why the findings of the hearings officer regarding the policy were being rejected was harmless error; (3) the Attorney General's interpretation of the "otherwise illegal acts" policy was not inconsistent with the spirit of the rule; (4) Brady's possession of the marijuana would have been illegal under 45-9-102; (5) Brady's use of the marijuana as part of the scam was prohibited by the DOJ's policy because Brady failed to receive approval of the scam from the Attorney General; and (6) the District Court did not err in finding that Brady violated DOJ policy. In re Grievance of Brady, 1999 MT 153, 295 M 75, 983 P2d 292, 56 St. Rep. 600 (1999).

Rejection of Hearings Examiner's Findings and Revocation of License — Abuse of Discretion: Ulrich sought reinstatement of his mortician's license, which was revoked by the Board of Funeral Service on grounds of unprofessional conduct following Ulrich's conviction of criminal charges based on his conduct as a real estate agent. The Board rejected the findings of a hearings examiner, who recommended reinstatement, on grounds that licensing Ulrich would affect the public's health, safety, and welfare. However, the hearings examiner's conclusions were supported by competent, substantial evidence of Ulrich's remorse, attempts to provide ongoing restitution payments, and rehabilitation. It was an abuse of discretion in violation of subsection (3) of this section for the Board to reject the hearings examiner's findings and revoke Ulrich's license to practice mortuary science. Ulrich v. State ex rel. Bd. of Funeral Serv., 1998 MT 196, 289 M 407, 961 P2d 126, 55 St. Rep. 822 (1998).

Board's Rejection of Hearings Examiner's Findings Abuse of Discretion: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) denied Shodair's claim for reimbursement for certain psychiatric care on the basis that the treatment was not medically necessary. Shodair requested a hearing, and the hearings examiner entered findings denying the claim. The Department then appealed to the Board of Social and Rehabilitation Services Appeals (now Board of Public Assistance), which summarily reversed the hearings examiner's findings based on the "undisputed facts" of the record. The District Court reversed. The Supreme Court held that the Board abused its discretion because it could not reject or modify the hearings examiner's findings unless it stated with particularity that the findings were not based on competent substantial evidence. St. v. Shodair Hosp., 273 M 155, 902 P2d 21, 52 St. Rep. 879 (1995). See also St. Personnel Div. v. Child Support Investigators, 2002 MT 46, 308 M 365, 43 P3d 305 (2002).

Overturned Findings of Hearings Officer — Substantial Evidence Required — Proper Procedure Alone Insufficient: Fugate filed a complaint with the Human Rights Commission based upon sexual discrimination. The Commission's hearings examiner upheld Fugate's claim of sexual discrimination. However, the hearings examiner's findings and conclusions were extensively modified by the members of the Commission, who then reversed the hearings examiner's decision and dismissed the case. The District Court reversed the Commission and reinstated the decision of the hearings examiner. The Supreme Court held that it was not enough for the Commission to simply state with particularity in its order that the hearings examiner's findings were not based upon substantial evidence; that statement must in fact be true. The Supreme Court held that the Commission improperly weighed inconsistent testimony. The Supreme Court concluded that although the procedure followed by the Commission was correct, the Commission's legal conclusions that there was insufficient evidence to support the hearings examiner's findings were incorrect. Moran v. Shotgun Willies, Inc., 270 M 47, 889 P2d 1185, 52 St. Rep. 71 (1995).

Allowing Filing of Additional Findings After Factfinder's Facts Submitted Improper: This section sets forth the procedure by which an agency may alter the findings and conclusions of its factfinder. It does not provide that proposed findings may be filed at any point in an administrative hearing. In allowing its prosecuting attorney to file additional findings after the hearing examiner's findings had been filed, the Board of Nursing erred in going beyond its authority under this section, which allows parties adversely affected to file exceptions and present briefs and oral argument in response to the proposed decision. The Board erred by receiving and considering the prosecuting attorney's proposed findings after the hearing examiner's findings had been submitted. Brackman v. Bd. of Nursing, 258 M 200, 851 P2d 1055, 50 St. Rep. 497 (1993). Petition for rehearing denied, 258 M 200, 851 P2d 1055, 50 St. Rep. 501A (1993).

Court Adoption of Hearing Examiner's Recommendations for Discipline Not Error: The Board of Nursing rejected the recommendations of its hearing examiner regarding discipline of hospice nurses, substituting instead its own disciplinary measures as suggested by its prosecuting attorney. On appeal, the District Court reinstated the hearing examiner's recommendations rather than remand the action to the Board, which the Board claimed was a violation of its legal duty to determine discipline. However, the findings of the hearing examiner were supported by substantial evidence and his recommendation for discipline was consistent with other Board discipline rulings. The District Court decision not to remand was supported by the need for final resolution of the matter after extended litigation and was not error. Brackman v. Bd. of Nursing, 258 M 200, 851 P2d 1055, 50 St. Rep. 497 (1993). Petition for rehearing denied, 258 M 200, 851 P2d 1055, 50 St. Rep. 501A (1993). Brackman followed in Moran v. Shotgun Willies, Inc., 270 M 47, 889 P2d 1185, 52 St. Rep. 71 (1995).

Director's Rejection of Grievance Committee Recommendations Without Further Hearing or Review of Complete Record — Abuse of Discretion: The unanimous recommendations of a grievance committee were passed along to the Director of the Department of Institutions, who rejected two of the committee's factual findings without conducting an additional hearing or receiving any additional evidence. Arbitrary rejection of the findings by the Director, who neither heard nor personally observed the testimony, without a review of the complete record, as required in this section, was an abuse of discretion within the meaning of 2-4-704. Brander v. Dept. of Institutions, 247 M 302, 806 P2d 530, 48 St. Rep. 207 (1991), followed in Brackman v. Bd. of Nursing, 258 M 200, 851 P2d 1055, 50 St. Rep. 497 (1993), and Moran v. Shotgun Willies, Inc., 270 M 47, 889 P2d 1185, 52 St. Rep. 71 (1995). See also In re Grievance of Brady, 1999 MT 153, 295 M 75, 983 P2d 292, 56 St. Rep. 600 (1999).

Designation of Hearing Officer's Order as Final: The Commissioner of Labor and Industry is charged with the responsibility of investigating wage claims and holding hearings under Montana wage payment law, and under 2-15-112, the Commissioner may delegate these functions to a subordinate employee. Therefore, statute and Department rule clearly allow the decision of an appointed hearing examiner to be a final order. Hoven, Vervick, & Amrine, P.C. v. Comm'r of Labor, 237 M 525, 774 P2d 995, 46 St. Rep. 1024 (1989).

Reversal of Hearing Examiner's Findings — Power of Workers' Compensation Court to Order New Trial: The Workers' Compensation Court appointed a hearing examiner to hear evidence in an injury case, but it was for the court to make the final decision. The examiner's findings, conclusions, and proposed decision were submitted to the court for approval. It was within the court's power to order a new trial on the ground that the examiner apparently disregarded or was not aware of evidence crucial to the case. Gould v. Liberty Mut. Fire Ins. Co., 233 M 494, 766 P2d 213, 45 St. Rep. 1671 (1988), distinguishing Walter v. Evans Prod. Co., 207 M 26, 672 P2d 613 (1983).

Findings of Fact Changed by Board of Horseracing Upheld — Hearing Examiner's Facts Not Based on Competent, Substantial Evidence: The Board of Horseracing changed findings of fact of the Board's hearing examiner after stating they were not based on competent, substantial evidence. The Board also modified the examiner's legal conclusions because the examiner inserted a concept in the applicable administrative rule that had been omitted. The Board's actions were within the bounds of this section, and the procedure used was appropriate. Carruthers v. Bd. of Horseracing, 216 M 184, 700 P2d 179, 42 St. Rep. 729 (1985).

Human Rights Commission Award of Backpay Contrary to Legal Conclusion of Hearing Examiner: It was not error for the Montana Human Rights Commission to award backpay when the hearing examiner, as a matter of law, refused to do so. After reviewing the record, the Commission may, under 2-4-621, reject or modify an examiner's conclusions of law. The Commission also has the authority under 49-2-506 to use its discretion to rectify harm done a person discriminated against. Unless the conclusions of the Commission in awarding backpay

are arbitrary or capricious, which was not the case here, neither the District Court nor the Supreme Court may alter them. European Health Spa v. Human Rights Comm'n, 212 M 319, 687 P2d 1029, 41 St. Rep. 1766 (1984).

Modification of Findings of Fact by Commission Held Proper: When the Human Rights Commission, in redetermining a backpay award, held a supplemental hearing and applied a different termination date from that applied by the hearing examiner and consequently modified two of the hearing examiner's findings of fact, without stating that the findings were not based on substantial evidence, the Supreme Court upheld the Commission's determination. Billings v. Mont. Human Rights Comm'n, 209 M 251, 681 P2d 33, 41 St. Rep. 688 (1984).

Scope of Agency Review: This section and 2-4-703 indicate a legislative intent that in reviewing a hearing examiner's decision the agency's determination should be based on a review of all material evidence. Billings v. Mont. Human Rights Comm'n, 209 M 251, 681 P2d 33, 41 St. Rep. 688 (1984).

Technical Failure to Comply With Statute Overlooked: In its final order, an agency modified two of the hearing examiner's findings of fact but did not state with particularity that the findings of fact were not based on substantial credible evidence. The Supreme Court ruled that although there had been a technical failure to comply with (3) of this section, there was no reason to use up more time by returning the case for supplemental statements in the final order because the evidence supporting the agency's findings was uncontradicted. Billings v. Mont. Human Rights Comm'n, 209 M 251, 681 P2d 33, 41 St. Rep. 688 (1984).

Section Not Applicable to Unemployment Insurance Claims: The unemployment compensation insurance law contains a complete procedure for hearing and determining undisputed claims for unemployment insurance. The Board of Labor Appeals, as a quasi-judicial board, may consider not only the record made before the appeals referee but new evidence produced at the Board hearing. The provisions of MAPA are unworkable when an attempt is made to apply them to determine claims for unemployment insurance benefits. It is an incorrect interpretation of statutory law to hold that the Board has no power to overturn the findings of fact of the appeals referee. In reviewing the Board's decision, the District Court is limited by the provisions of 39-51-2410. Decker Coal Co. v. Employment Security Div., 205 M 1, 667 P2d 923, 40 St. Rep. 1056 (1983).

Collateral References

Administrative Law *key* 484.

73A C.J.S. Public Administrative Law and Procedure §143, et seq.

2 Am. Jur. 2d Administrative Law §473, et seq.

Power of successor or substituted master or referee to render decision or enter judgment on testimony heard by predecessor. 70 ALR 3d 1079.

Power of administrative agency to reopen and reconsider final decision as affected by lack of specific statutory authority. 73 ALR 2d 939.

Administrative decision by officer not present when evidence was taken. 18 ALR 2d 606.

2-4-622. When hearings officer unavailable for decision.

Compiler's Comments

1997 Amendment: Chapter 42 in (2), after "2-4-621 and", substituted "this section" for "2-4-622". Amendment effective March 12, 1997.

Source: 1961 Revised Model Act, sec. 11(part).

2-4-623. Final orders — notification — availability.

Compiler's Comments

Source: 1961 Revised Model Act, sec. 9(part).

Case Notes

Attorney Entitled to Absolute Quasi-Judicial Immunity for Actions in Contested Case Proceedings: The doctrine of immunity evolved to protect not only judges but also certain participants in the judicial process whose functions are closely associated with those of judicial officers. The immunity that those participants receive is quasi-judicial immunity, which is not a mere defense to liability but an absolute immunity from suit. Like judicial immunity, quasi-judicial immunity benefits the public by ensuring that quasi-judicial officers exercise their functions unfettered by fear of legal consequences, as long as the functions are within the scope of the officers' jurisdiction and authorized by law. A state attorney who discharged his duty under professional rules of conduct when notifying a contested case hearings examiner that a certified public accountant who was representing a client was practicing law without a license

was protected by quasi-judicial immunity and was not subject to suit. Steele v. McGregor, 1998 MT 85, 288 M 239, 956 P2d 1364, 55 St. Rep. 349 (1998).

Cancellation of State Agricultural Lease for Nonpayment — Hearing Not Required — District Court Jurisdiction to Review Cancellation: There is no provision in 77-6-506 requiring the Department to conduct a hearing when canceling a state land lease for nonpayment, nor is a hearing required pursuant to the due process clause of Art. II, sec. 17, Mont. Const. The District Court thus has no jurisdiction to review a lease cancellation for nonpayment under contested case procedures because lease cancellation for nonpayment does not constitute a contested case. However, the District Court does retain inherent jurisdiction to review administrative decisions and erred in deciding that it did not have jurisdiction. The standard of review is whether the agency acted arbitrarily, capriciously, or unlawfully. Johansen v. St., 1998 MT 51, 288 M 39, 955 P2d 653, 55 St. Rep. 211 (1998), following N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989). See also Winchell v. Dept. of Natural Resources and Conservation, 1999 MT 11, 293 M 89, 972 P2d 1132, 56 St. Rep. 48 (1999). On remand, the District Court determined that the rent had been paid on time, and the Department appealed. The Supreme Court held that the Department had uncontroverted evidence before it, in the form of an affidavit from the postmaster, that Johansen had timely mailed the rental payment on January 2. So although the envelope did not receive a postmark until January 3, the Department's decision to not renew the lease for nonpayment was arbitrary and capricious and not supported by substantial evidence. The District Court's holding was affirmed. Johansen v. St., 1999 MT 187, 295 M 339, 983 P2d 962, 56 St. Rep. 731 (1999).

Grazing District and Board of Natural Resources and Conservation (Now Abolished) Required to Comply With Administrative Procedure Act: In the conduct of proceedings pursuant to the Grass Conservation Act, both the grazing district and the Board of Natural Resources and Conservation (now abolished) are required to comply with the requirements of the Montana Administrative Procedure Act. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

Standard of Review for Decisions of County Superintendents: Baldridge appealed his dismissal by the school board to the acting County Superintendent, Barrick. Barrick reinstated Baldridge, and the school board appealed to the State Superintendent, Keenan. Keenan reviewed Barrick's reinstatement order and remanded it to Barrick, with instructions to assess the credibility of witnesses testifying as to other incidents of wrongdoing by Baldridge. Barrick again reinstated Baldridge in an order much the same as the first order. The school board again appealed. In the second review, Keenan stated that Barrick had acted in an arbitrary and capricious manner in reinstating Baldridge when the transcript indicated that there was sufficient evidence to reach a conclusion that the board had a standard of good cause for dismissal. Baldridge appealed to the District Court, which affirmed Keenan on the basis that the State Superintendent had found that good cause existed for Baldridge's dismissal. The Supreme Court held that Barrick had not set out sufficient findings of fact for her conclusions, as required by statute and rule. The Supreme Court stated that Keenan's standard of review was whether or not the findings were sufficient to support the County Superintendent's conclusions. If the findings were not sufficient, then the State Superintendent's only proper recourse was to again remand the case with instructions to set out more fully a statement of facts in support of the County Superintendent's conclusions. Keenan was in error in interpreting the facts to see if there was a standard of good cause to support the board's dismissal of Baldridge. The Supreme Court also held that the lower court was in error in supporting Keenan's finding of good cause for termination and that the lower court was also limited to determining if the findings of fact reached by the County Superintendent were sufficient to support her conclusions. Baldridge v. Rosebud County School District No. 19, 264 M 199, 870 P2d 711, 51 St. Rep. 166 (1994).

Designation of Hearing Officer's Order as Final: The Commissioner of Labor and Industry is charged with the responsibility of investigating wage claims and holding hearings under Montana wage payment law, and under 2-15-112, the Commissioner may delegate these functions to a subordinate employee. Therefore, statute and Department rule clearly allow the decision of an appointed hearing examiner to be a final order. Hoven, Vervick, & Amrine, P.C. v. Comm'r of Labor, 237 M 525, 774 P2d 995, 46 St. Rep. 1024 (1989).

Board of Personnel Appeals to Address Personnel Division Findings Regarding Reclassification: Certain highway patrol officers successfully appealed to the Personnel Division of the Department of Administration to have their grade raised pursuant to 2-18-203. In response, other officers filed a grievance pursuant to 2-18-1011, seeking reclassification of their positions and grades. Appeal was permissible under 2-18-203 as it existed at the time. The Division reclassified their positions using a "five factor" formula. The affected officers appealed

their resulting grade reassignment to the Board of Personnel Appeals, which issued an order to the Division requiring reclassification of certain positions. The Board, without issuing findings of fact addressing the Division's recommendations, subsequently rejected the Division's classification recommendations and upheld the so-called "practice" of maintaining a grade difference between supervisors and persons they supervise. In the subsequent appeal from the classification process used by the Division, the Supreme Court held that the matter must be remanded to the Board for further findings expressly addressing the Division's recommendations. St. Personnel Div. v. Bd. of Personnel Appeals, 235 M 208, 766 P2d 1300, 45 St. Rep. 2324 (1988).

Refusal to Consider Taxpayer's Appraisal — Abuse of Discretion: A taxpayer presented evidence of market value but the State Tax Appeal Board (STAB) refused to consider the evidence in a commercial property tax appeal. Citing Dept. of Revenue v. Paxson, 205 M 194, 666 P2d 768 (1983), the Supreme Court held that STAB was required to consider the theory and figures offered by a taxpayer, although not bound to adopt them, and that to refuse to accept a taxpayer's appraisal was an abuse of discretion. Devoe v. Dept. of Revenue, 233 M 190, 759 P2d 991, 45 St. Rep. 1414 (1988).

Findings of Fact Not Requested by Appellant — Standard of Review: An order transferring territory from one elementary district to another did not contain a finding that the four elements of a valid petition listed in 20-6-213 (now repealed) were met, nor did the order contain findings that the transfer was in the best interests of the residents of the affected territory. Although 2-4-623 requires that a final decision in a contested case must include findings of fact, the Supreme Court found substantial credible evidence supporting the transfer, including unanimous favorable testimony from residents of the affected territory. Additionally, the court noted that appellants failed to request findings of fact from the County Superintendent or the Board of County Commissioners and that such failure barred court reversal for lack of factfindings, pursuant to 2-4-704(2)(g). Bd. of Trustees, Clinton School District v. Bd. of Trustees, Bonner School District, 221 M 341, 719 P2d 1240, 43 St. Rep. 877 (1986).

MAPA Inapplicable to Pre-1977 County School Superintendent Decision — Substantial Evidence: Plaintiff was terminated from her tenured teaching position by the County Board of Trustees in 1977. The decision was reviewed and upheld by the County Superintendent of Schools, the State Superintendent of Public Instruction, and the District Court. On appeal to the Supreme Court, plaintiff contended that the County Superintendent had not complied with the Montana Administrative Procedure Act (MAPA) since he failed to include statements of underlying facts supporting his findings and failed to rule on plaintiff's proposed findings. The Supreme Court noted that MAPA was made applicable to school districts by a 1977 amendment. The court, relying on sec. 26, Ch. 2, Ex. L. 1971, which provided that the adoption of MAPA would not affect pending proceedings, held that MAPA did not apply to this case, which was begun prior to the 1977 amendment. The court determined that the school district's decision was supported by substantial evidence and was not clearly erroneous, the standard for review under 2-4-704. Donnes v. State ex rel. Supt. of Pub. Instruction, 206 M 530, 672 P2d 617, 40 St. Rep. 1834 (1983).

Factfinding Responsibility of Administrative Body: The Department of Revenue assessed Paxson's land for tax purposes. Paxson contended the valuation was too high because part of the land was in a flood plain. The County Tax Appeal Board entered an order granting a 20% reduction in the assessment. This was upheld by the State Tax Appeal Board. The District Court concluded that the 20% reduction was arbitrary and capricious since no evidence was contained in the record to support this figure. The court then adopted Paxson's theory of reduction and figures. On appeal, the Supreme Court upheld the overturning of the 20% reduction as not supported by the evidence but vacated the District Court's order and remanded the case to the State Tax Appeal Board. The Supreme Court held that the responsibility of factfinding and arriving at the proper taxable valuation is the function of the administrative bodies. Dept. of Revenue v. Paxson, 205 M 194, 666 P2d 768, 40 St. Rep. 1210 (1983).

Certificate of Environmental Compatibility and Public Need — Findings and Conclusions in Compliance With Law: The Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate of environmental compatibility and public need under the Montana Utility Siting Act of 1973 (now the Montana Major Facility Siting Act of 1975), after making findings of fact and conclusions of law under that Act. The Supreme Court upheld the legal sufficiency of those findings and conclusions. In accordance with Mont. Consumer Counsel v. P.S.C. and Mont. Power Co., 168 M 180, 541 P2d 770 (1975), separate, express rulings on each proposed finding of fact are not required by 2-4-623(4) as long as the agency's decision and order are clear. The court also held that there was sufficient compliance with 2-4-623(1) because the findings of fact were factually supported when viewed as a whole and

that there was sufficient compliance with 2-4-623(4) because the conclusions of law, while not followed immediately by an authority or opinion, were sufficiently supported by reasoned opinion to render their basis reasonably ascertainable. Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv., 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

Nonrenewal of Tenured Teacher's Contract — Scope of Review: A tenured teacher's contract was not renewed. A hearing was held by the Board of Trustees, which affirmed its decision not to renew the contract. The teacher appealed to the County Superintendent where he was given a trial de novo with witnesses and record evidence. The teacher then appealed to the State Superintendent based upon the record, and the State Superintendent upheld the decision. The teacher appealed to District Court based upon the record. The District Court reversed the administrative decision, and an appeal to the Supreme Court was made upon the record. The Supreme Court reversed the District Court, saying that the procedure to be used in this instance was identical to that for any other District Court decision involving an administrative decision. The District Court was not a trier of fact. The Supreme Court should not substitute its judgment for that of the County Superintendent as to the weight of the evidence on questions of fact. The Supreme Court may reverse or modify if the substantial rights of the appellant have been prejudiced because the administrative findings and conclusions are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Yanzick v. School District, 196 M 375, 641 P2d 431, 39 St. Rep. 191 (1982), followed in Booth v. Argenbright, 225 M 272, 731 P2d 1318, 44 St. Rep. 227 (1987).

Administrative Order Not Supported by Evidence Remanded for Redetermination: Upon complaint by an applicant for employment with a county welfare department, the Human Rights Commission erred in reducing the complainant's backpay award when no evidence was presented at the contested hearing supporting the reduction. Because the Commission failed to make findings of fact specifying the evidence upon which the order was based or failed to inform the parties that it would take judicial notice of the evidence upon which the order was based, the case must be remanded to the Commission for a redetermination of the offset of interim wages. Martinez v. Yellowstone County Welfare Dept., 192 M 42, 626 P2d 242, 38 St. Rep. 474 (1981).

Computation of Time Limit for Appeal in Workers' Compensation Case — Civil Procedure Rules Applied: A person who appeals from a final decision of the workers' compensation court should in all fundamental fairness be given the benefit of that provision of Rule 5, M.R.App.Civ.P. (now M.R.App.P.), which states that "except that in cases where service of notice of entry of judgment is required by Rule 77(d) of the M.R.Civ.P. the time shall be 30 days from the service of notice of entry of judgment". When service of notice of the final decision is made as mandated by 2-4-623 and that service is made by mail, the provisions of Rule 21(c), M.R.App.Civ.P. (now M.R.App.P.), are automatically put into play adding 3 days to the prescribed 30-day time limit for filing the notice of appeal set by Rule 4(a), M.R.App.Civ.P. (now M.R.App.P.) However, when the final day of the period falls on a Sunday, Rule 21(a), M.R.App.Civ.P. (now M.R.App.P.), comes into play extending the time limit to the next day. Dumont v. Aetna Fire Underwriters, 183 M 190, 598 P2d 1099 (1979).

Relief After Thirty Days of Purported "Final Decision": There may be some circumstances when State ex rel. Stowe v. Board of Administration, 172 M 337, 564 P2d 167 (1977), might provide relief for a petitioner who filed for judicial relief after 30 days of a purported "final decision", but this is not that case. The Stowe decision was limited to a set of circumstances wherein the agency did not show even a "token compliance" with the Montana Administrative Procedure Act (MAPA). In the instant case, the appellant was given the hearing as required by the MAPA and the final decision substantially complied with this section. Bradco Supply Co. v. Larsen, 183 M 97, 598 P2d 596 (1979).

Supporting Statements: Something more than conclusory findings of fact or conclusions of law was necessary to meet the requirements of the Montana Major Facility Siting Act with respect to location of transmission line facilities, especially of the magnitude sought in conjunction with Colstrip Units 3 and 4. N. Plains Resource Council v. Bd. of Natural Resources & Conservation, 181 M 500, 594 P2d 297 (1979).

Workers' Compensation Court — Judicial Notice: The rules of evidence are more relaxed in an administrative proceeding than in a court of law, but due process will not be disregarded. The right to cross-examination is a constitutionally protected fundamental right and not an evidentiary rule. Section 2-4-612(5) makes this right absolute. The workers' compensation judge may only consider evidence that is offered at the hearing or of which he may take judicial notice. A judicially noticed fact must be one not subject to reasonable dispute. Disputed medical conclusions by doctors contained in medical reports cannot be judicially noticed. Hert v. Lumberman Mut. Cas. Co., 178 M 355, 584 P2d 656 (1978), distinguishing Stevens v. Glacier

Gen. Assurance Co., 176 M 61, 575 P2d 1326 (1978), and clarified and rehearing denied in Hert v. Lumberman Mut. Cas. Co., 179 M 160, 587 P2d 11 (1978). Hert was held to no longer be authority for admissibility of medical records, in light of the 1990 adoption of ARM 24.5.317, in Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Sufficiency of Final Order: A letter containing no findings of fact but only the final conclusion that the Public Employees' Retirement Board had ruled against plaintiff is not a final order or decision sufficient under this section to foreclose plaintiff a right of appeal under 2-4-702 if not taken within 30 days. State ex rel. Stowe v. Bd. of Administration, PERS, 172 M 337, 564 P2d 167 (1977).

Does Not Require a Separate Express Rule on Each Proposed Finding: Provision construed as not requiring a separate, express ruling on each proposed finding of a party provided the agency's decision and order on a party's proposed findings are clear. Consumer Counsel v. P.S.C. & Mont. Power Co., 168 M 180, 541 P2d 770 (1975).

Law Review Articles

Montana Supreme Court Survey: Administrative Law, Snyder, 41 Mont. L. Rev. 151 (1980).

Collateral References

Administrative Law *key* 489.

73A C.J.S. Public Administrative Law and Procedure §147, et seq.

2 Am. Jur. 2d Administrative Law §455, et seq.

Stare decisis doctrine as applicable to decisions of administrative agencies. 79 ALR 2d 1126.

Power of administrative agency to reopen and reconsider final decision as affected by lack of specific statutory authority. 73 ALR 2d 939.

2-4-631. Licenses.

Compiler's Comments

Source: 1961 Revised Model Act, sec. 14.

Collateral References

Licenses *key* 22, 36, 38.

53 C.J.S. Licenses §§34, 38, 39, 42, 43, 44.

Part 7
Judicial Review of Contested Cases

Part Case Notes

Abuse of Discretion in Failure to Reference Statutory Judicial Review Provisions in Administrative Order Addressing Child Support Enforcement — Due Process Violation Constituting Reversible Error: The mother filed a petition with the Child Support Enforcement Division (CSED) for assistance in obtaining child support from the father. CSED initiated an administrative action to determine the amount of support owing, and an administrative law judge conducted a contested case hearing on the issue and entered an order establishing the father's current and past-due child support obligation. The order included a paragraph notifying the parents of their statutory right to petition for judicial review of the administrative decision under Title 2, ch. 4, part 7 (MAPA), but did not reference 40-5-253, which contains more specific procedural requirements for appealing from an administrative decision in a child support enforcement case than the provisions in MAPA. The father filed a petition for judicial review and mailed copies to the mother and CSED but failed to properly serve the parties as required in 40-5-253. The District Court concluded that it lacked subject matter jurisdiction because the father failed to comply with 40-5-253. The court dismissed the petition. The father moved the court to amend or reconsider the petition, contending that the application of 40-5-253 violated his due process rights because he did not receive sufficient notice of the procedures by which to obtain judicial review of the administrative decision. The motion was denied, but the court nevertheless subsequently entered another order correcting the clerical error by adding a reference to 40-5-253 to the notice provision of the earlier order and then granted CSED's motion to dismiss. The father appealed. The Supreme Court noted that proper service of a petition for judicial review was a threshold requirement for the District Court to obtain jurisdiction in this case and that under Title 2, ch. 4, part 7, a petition for judicial review may be properly served by mailing copies to the agency and other parties, but there is no requirement that a summons be issued and served in conjunction with the petition. By filing the petition for judicial review and mailing copies to the mother and CSED, the father fulfilled the service requirements of MAPA and Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469 (1996). However, specific statutory

requirements prevail over general provisions such as those in MAPA, and the Supreme Court agreed that the portion of the notice informing the father that MAPA would govern the proceedings was misleading, absent any reference to the different, specific procedural requirements for CSED actions under 40-5-253. The Supreme Court adopted federal interpretations of the due process notice requirements in this regard, which provide that the opportunity to be heard is not meaningful if the notice provided does not accurately inform the person to whom it is given of how to take advantage of that opportunity. The notice provisions in the administrative order did not provide father with adequate notice to meet due process requirements, so application of 40-5-253 would violate the father's due process rights. Under these unique circumstances, it was required that the father's petition for judicial review must be governed by the service requirements of MAPA and Hilands. Those requirements were met, so the District Court did acquire subject matter jurisdiction and abused its discretion in dismissing the father's petition for judicial review based on his failure to comply with 40-5-253. The case was reversed for further proceedings under MAPA. Pickens v. Shelton-Thompson, 2000 MT 131, 300 M 16, 3 P3d 603, 57 St. Rep. 543 (2000). See also Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 2d 865, 70 S Ct 652 (1950), Gonzales v. Sullivan, 914 F2d 1197 (9th Cir. 1990), Walters v. Reno, 145 F3d 1032 (9th Cir. 1998), and City of W. Covina v. Perkins, 525 US 234, 142 L Ed 2d 636, 119 S Ct 678 (1999).

Valuation of Improvements — Standard of Review — All Factors Including Decision of Arbitrators to Be Reviewed De Novo by Department — Arbitration Act Inapplicable: After the Department of Natural Resources and Conservation (DNRC) awarded a lease to Hagemeister, a three-person panel of arbitrators was appointed by the DNRC to appraise the value of improvements made by the previous lessee, Winchell. Two arbitrators agreed to a value in excess of $20,000, while a third valued the improvements at $1,407.35. The DNRC then conducted its own appraisal, set aside the higher values, and established a value of $1,564 for the improvements. The Winchells appealed the valuation to the District Court pursuant to 77-6-306(4), and the District Court granted summary judgment for the DNRC. The Supreme Court affirmed, holding that: (1) the correct standard for a de novo review of the District Court's judgment is the standard applicable to the review of a case that is not a "contested" case under the Montana Administrative Procedure Act, the standard applicable in this case being whether the DNRC exceeded its statutory authority under 77-6-306(3) or whether its decision is wholly unsupported by the evidence; (2) even though the District Court applied the wrong standard of review, the standard applicable to a contested case, the District Court reached the correct result; (3) the language in 77-6-303 and 77-6-306(3) and (4), which are to be read together, indicate that the Legislature intended that the DNRC do more than review the paper records of the arbitrators in order to "fix" the value of the improvements, and the DNRC was therefore correct in using an independent valuation procedure conducted by its own appraiser in addition to considering the work of the three arbitrators; and (4) the Uniform Arbitration Act does not apply to this case because that Act establishes a District Court's standard of review in an appellate procedure. Winchell v. Dept. of Natural Resources and Conservation, 1999 MT 11, 293 M 89, 972 P2d 1132, 56 St. Rep. 48 (1999).

Part Law Review Articles

Applying the Doctrine of Exhaustion of Administrative Remedies to ERISA, Howe, 45 Lab. L.J. 659 (1994).

The Exhaustion of Alternative Remedies in Administrative Law, Lewis, 51 Cambridge L.J. 138 (1992).

Understanding Unreviewability in Administrative Law, Levin, 74 Minn. L. Rev. 689 (1990).

Exhaustion of Administrative Remedies: Exceptions and Predictability, 66 U. Det. L. Rev. 239 (1989).

Part Collateral References

Effect of court review of administrative decision. 79 ALR 2d 1141.

2-4-701. Immediate review of agency action.

Compiler's Comments

Lack of Comments: This section, although a subsection of sec. 15, 1961 Revised Model Act, was deleted in the proposed Act. This section was reinserted into enacted Montana Administrative Procedure Act (sec. 16(1), Ch. 2, Ex. L. 1971). There is no comment regarding this section either by the subcommittee or the Uniform Laws Commissioners.

Source: 1961 Revised Model Act, sec. 15(a)(part).

Case Notes

Standard of Review of Public Service Commission Conclusion of Law: The standard of review applicable to a Public Service Commission's conclusion of law is whether the Public Service Commission correctly interpreted the law in reaching the conclusion. Grouse Mtn. Associates, Ltd. v. Dept. of Public Service Regulation, 284 M 65, 943 P2d 971, 54 St. Rep. 750 (1997).

Proper Notice of Violation and Opportunity for Discovery Required by Statute and Due Process — Remand to Exhaust Administrative Remedies: Wilsons, who operated a garbage transport business under a certificate granted by the Public Service Commission, were served by the P.S.C. with a complaint and order to show cause why their certificate should not be terminated. The complaint and order did not refer to any particular rule, statute, or previous order of the Commission that was alleged to have been violated. Later, after the Commission denied an opportunity for Wilsons to discover the evidence to be used against them, the District Court granted Wilsons' motion to amend their application for a review of the P.S.C. order to include immediate review under this section. The Supreme Court held that the notice used by the P.S.C. did not comply with the requirements of 69-12-327, in that the notice did not specify the rule, statute, or order alleged to have been violated, and held that basic procedural due process was not followed by the P.S.C. in its denial of the Wilsons' request for discovery. The Supreme Court also held that judicial review of the final agency decision was not an adequate remedy when the record on which the final decision of the agency will be based contained no evidence of the statute, rule, or order violated; when no discovery was allowed; when there was no evidence that Wilsons had been notified of who would testify against them; and when, cumulatively, it appeared that Wilsons had been denied fundamental fairness. Wilson v. Dept. of Public Service Regulation, 260 M 167, 858 P2d 368, 50 St. Rep. 985 (1993).

Lack of District Court Jurisdiction in Claim for Damages — Failure to Exhaust Administrative Remedies: Gilpins initiated suit for damages resulting from temporary suspension of their day-care license by the Department of Family Services (now Department of Public Health and Human Services), contending that, under 3-5-302, jurisdiction was in the District Court because the action involved a civil claim against the state for payment of money. However, the court properly dismissed the claim for lack of jurisdiction because Gilpins failed to exhaust all administrative remedies available within the agency, as required by 2-4-702, and because there was no showing made pursuant to this section that a review of the agency decision by a hearings examiner would not provide an adequate remedy. Gilpin v. St., 249 M 37, 812 P2d 1265, 48 St. Rep. 567 (1991).

Determination of Finality of Order: For purposes of judicial review the finality of an agency order depends upon the nature of the order rather than its chronology in relation to the whole of the agency proceedings. A final order need not necessarily be the very last order in an agency proceeding, but rather, the order is final for purposes of judicial review when it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process. N. Plains Resource Council v. Bd. of Natural Resources & Conservation, 181 M 500, 594 P2d 297 (1979).

Exhaustion of Remedies: Where Public Service Commission failed, refused, or neglected to act on petitioner's application for interim rate increase to meet increased costs, action was arbitrary and Supreme Court would remand cause and order prompt action of petition. State ex rel. Great Falls Gas Co. v. Dept. of Public Service Regulation, P.S.C., 169 M 68, 544 P2d 815 (1976).

Collateral References

Comment note: applicability of stare decisis doctrine to decisions of administrative agencies. 79 ALR 2d 1126.

2-4-702. Initiating judicial review of contested cases.

Uniform Commissioner's Comment

[The second sentence of this section beginning with "This section does not limit . . ." is taken directly from sec. 15 of the 1961 Revised Model Act, but was deleted from the proposed Act. The following commissioner's comment is an extract applicable to this sentence.]

An important question that arises under subsection (a) [2-4-702] is whether or not the review provisions should be made exclusive and all other review provisions on the statute books should be repealed. Each state will have to deal with this matter as the local circumstances dictate. On the one hand, if there is but one mode and scope of review, the state procedural structure is greatly simplified. On the other hand, local considerations, including practical considerations connected with obtaining adoption of the Model Act, may indicate or even require the retention, at least for the moment, of the pre-existing methods of judicial review.

Compiler's Comments

2003 Amendment: Chapter 361 in (2)(a) near beginning of second sentence after "statute" inserted "or subsection (2)(d)"; inserted (2)(d) concerning petitions relating to certain decisions made pursuant to Title 75 or Title 82; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

1995 Amendment: Chapter 290 in (2)(a), at beginning, inserted exception clause; inserted (2)(c) regarding applicability and jurisdiction of appeals filed pursuant to 33-16-1012(2)(c); and made minor changes in style.

1985 Amendment: In (3) in second sentence, after "proper", inserted "following notice to the affected parties and an opportunity for hearing. A stay may be issued without notice only if the provisions of 27-19-315, 27-19-316, and 27-19-317 are met.

Source: 1961 Revised Model Act, sec. 15(a) through (d).

Case Notes

General 110
Procedure 111
Contested Case 115
Exhaustion 117
Scope of Review 119

GENERAL

Improper Federal District Court Jurisdiction and Review of State Agency Decision: Ford Motor Company sought to terminate an automobile dealer franchise, and the franchise holder sought a Montana Department of Justice administrative hearing under 61-4-206. The Department's decision in favor of Ford was appealed to a Montana District Court under this section. Ford successfully removed the case to the United States District Court, which reversed the Department's decision and rendered judgment in favor of Ford. The franchise holder appealed. The Montana procedure clearly provided for state District Court appellate review, not de novo review, of the administrative agency decision. Therefore, the federal District Court had neither original jurisdiction nor removal jurisdiction over review of the administrative agency decision. The removal to the federal District Court was error. The federal District Court's reversal of the administrative agency decision and rendering of judgment in favor of Ford were also in error. The judgment was vacated, and the case was remanded to the federal District Court for further remand by it to the state District Court. Shamrock Motors, Inc. v. Ford Motor Co., 120 F3d 196 (9th Cir. 1997).

Approval of Preliminary Plat Not Appealable: Kalispell argued that the issuing of a preliminary plat approval by the city-county planning board was illegal because it did not conform with the master zoning plan adopted by the city and county. The Supreme Court followed the precedent of its decision in Sourdough Protective Ass'n, Inc. v. Bd. of County Comm'rs of Gallatin County, 253 M 325, 833 P2d 207 (1992), holding that there is no statutory appeal process from the approval of a preliminary plat. Kalispell v. Flathead County, 260 M 258, 859 P2d 458, 50 St. Rep. 1033 (1993).

Dismissal of Appeal of Preliminary Subdivision Plat Approval Upheld: The Sourdough Protective Association petitioned the District Court for a writ of mandamus and moved to stay the Board of County Commissioners from further proceedings concerning a subdivision project for which it had granted preliminary approval. The Supreme Court held that the Association had no basis to support its petition because the Board was not subject to the Montana Administrative Procedure Act and the Legislature had not created an appeal process for cases involving conditional approval of preliminary plats. Sourdough Protective Ass'n, Inc. v. Bd. of County Comm'rs of Gallatin County, 253 M 325, 833 P2d 207, 49 St. Rep. 563 (1992).

School Controversy — MAPA Statute of Limitations Not Applicable: After the Superintendent of Public Instruction issued an order to reinstate plaintiff to her teaching position, trustees filed a petition for judicial review after expiration of the 30-day period allowed under this section for judicial review following a final agency decision but prior to expiration of the 60-day period allowed for judicial review of a decision to terminate a tenured teacher made pursuant to 20-3-107(2). The Supreme Court reversed and remanded the District Court's order granting a motion to dismiss plaintiff's petition for judicial review, holding that MAPA did not expressly or impliedly repeal the statute of limitations provided pursuant to 20-3-107 and that the 60-day rule applied to a school controversy. Carbon County School District Trustees v. Spivey, 247 M 33, 805 P2d 61, 48 St. Rep. 79 (1991).

Necessity That Issues in Workers' Compensation Court Have Been Presented Below: Workers' Compensation Division's cited authority for claim that an issue must be first presented before the Division before it can be heard by the Workers' Compensation Court was not persuasive where its principal case was decided before establishment of the Workers' Compensation Court and at the time of that case the Division held its own contested case hearings. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Appeal From Tax Appeal Ruling — Applicable Procedure: The Department of Revenue audited respondent's corporate license tax returns and assessed additional taxes. Respondent protested the assessment and appealed to the State Tax Appeal Board (STAB). After a hearing, STAB affirmed the Department's decision. Respondent filed for judicial review of the STAB decision in District Court. Respondent mailed a copy of the summons and petition to the attorney who represented the Department at the hearing and to STAB. The respondent received a default judgment and a reversal of STAB's final order. The Department contends that respondent failed to comply with 2-4-702 and thereby failed to obtain jurisdiction over the Department. Respondent asserts that 15-2-303 is the applicable statute. Section 2-4-702 is the procedure for initiating judicial review of agency decisions in contested cases, while 15-2-303 provides appeal procedures for initiating judicial review of STAB decisions. Section 15-2-303 is a specific statute while 2-4-702 is general. A specific statute controls over a general statute to the extent of any inconsistency. Dept. of Revenue v. Davidson Cattle Co., 190 M 326, 620 P2d 1232, 37 St. Rep. 2074 (1980).

Venue of Decision of Board of Health and Environmental Sciences (now Department of Public Health and Human Services): Under 50-5-306 (repealed effective July 1, 1991), which provides for an appeal of a decision of the Board of Health and Environmental Sciences (now Department of Public Health and Human Services) regarding a certificate of need for a health care facility, venue is determined by the Montana Administrative Procedure Act and the District Court properly determined that venue should remain in Lewis and Clark County. Mont. Health Systems Agency, Inc. v. Bd. of Health & Environmental Sciences, 188 M 188, 612 P2d 1275 (1980).

Procedure for Judicial Review Under Clean Air Act to Control: The Montana Administrative Procedure Act provides generally for judicial review. However, the provisions of subsection (2)(a) of this section exclude any possible conflict with the procedure set out in 75-2-411 relating to judicial review of an order granting a preconstruction permit under the Clean Air Act of Montana. N. Plains Resource Council v. Bd. of Health & Environmental Sciences, 184 M 466, 603 P2d 684 (1979).

MAPA Not Sole Remedy: The Public Employees' Retirement Board was estopped to claim that the petitioner's sole remedy was under the Montana Administrative Procedure Act (MAPA) and that this remedy was not timely exercised because the Board at no time indicated it was bound by and acting pursuant to MAPA with its notice and hearing requirements. State ex rel. Stowe v. Bd. of Administration, PERS, 172 M 337, 564 P2d 167 (1977).

Underlying Principles: Three principles underlie this section: (1) that limited judicial review of administrative decisions strengthens the administrative process by encouraging the full presentation of evidence at the initial administrative hearing; (2) judicial economy requires court recognition of the expertise of administrative agencies in the field of their responsibility; and (3) limited judicial review is necessary to determine that a fair procedure was used, that questions of law were properly decided, and that the decision of the administrative body was supported by substantial evidence. Vita-Rich Dairy, Inc. v. Dept. of Business Regulation, 170 M 341, 553 P2d 980 (1976).

Appeal From County Welfare Board — Venue: Appeal of an administrative decision of the County Welfare Board does not constitute an action against the county as required by 25-2-106; such an appeal is properly brought in the county where the plaintiff resides. State ex rel. Hendrickson v. Gallatin County, 165 M 135, 526 P2d 354 (1974).

PROCEDURE

Questioning Only Validity of Statute for First Time in District Court — Other Issues to Be Raised at Administrative Level: The Commission for Human Rights enjoined the Hilands Golf Club (Hilands) from engaging in future gender discrimination, ordered Hilands to create a three-person committee to review its policies and practices, required the promotion of greater numbers of female members, and ordered Hilands to pay Ashmore $750 in damages for emotional distress. Hilands petitioned for judicial review, and the Supreme Court denied a challenge to the validity of Hilands' appeal in Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469 (1996). Following remand, Hilands moved to dismiss based on its contention that Ashmore lacked standing and that the claim was moot, and the District Court granted Hilands' motion. Ashmore appealed, contending that Hilands knew the facts that gave rise to its standing and mootness claims prior to the contested case hearing, but waived those arguments by not raising them at the administrative level. Hilands maintained that because both standing and mootness are jurisdictional issues, they can be raised at any stage of the proceedings. The Supreme Court noted that a District Court's authority to review administrative rulings is constrained by statute. A plain reading of subsection (1)(b) of this section indicates that a party may question the validity of a statute for the first time on judicial review to the District Court, but other than that exception, all other issues must be raised at the administrative level absent good cause. Because the Legislature created judicial review of administrative decisions and at the same time limited the scope of review, the general rule that justiciability questions can be raised at any time does not apply in these circumstances. Therefore, standing and mootness questions cannot be raised for the first time on judicial review of an administrative decision unless the District Court determines that there was good cause for the party's failure to raise the questions before the agency. Here, Hilands knew that the claims were viable issues that could be raised before the Commission, yet Hilands failed to raise them. If some event had occurred after the administrative hearing that raised the issues, Hilands would presumably be able to show good cause for failure to raise the issues, but the good cause exception did not exist here. Thus, the District Court erred in granting the motion to dismiss, and the Supreme Court remanded for further consideration of any substantive issues raised in the petition for judicial review. Hilands

Golf Club v. Ashmore, 2002 MT 8, 308 M 111, 39 P3d 697 (2002), following Lincoln County v. Sanders County, 261 M 344, 862 P2d 1133 (1993), and distinguishing Shamrock Motors, Inc. v. Ford Motor Co., 1999 MT 21, 293 M 188, 974 P2d 1154 (1999), and Shamrock Motors, Inc. v. Chrysler Corp., 1999 MT 39, 293 M 317, 974 P2d 1154 (1999).

Abuse of Discretion in Failure to Reference Statutory Judicial Review Provisions in Administrative Order Addressing Child Support Enforcement — Due Process Violation Constituting Reversible Error: The mother filed a petition with the Child Support Enforcement Division (CSED) for assistance in obtaining child support from the father. CSED initiated an administrative action to determine the amount of support owing, and an administrative law judge conducted a contested case hearing on the issue and entered an order establishing the father's current and past-due child support obligation. The order included a paragraph notifying the parents of their statutory right to petition for judicial review of the administrative decision under Title 2, ch. 4, part 7 (MAPA), but did not reference 40-5-253, which contains more specific procedural requirements for appealing from an administrative decision in a child support enforcement case than the provisions in MAPA. The father filed a petition for judicial review and mailed copies to the mother and CSED but failed to properly serve the parties as required in 40-5-253. The District Court concluded that it lacked subject matter jurisdiction because the father failed to comply with 40-5-253. The court dismissed the petition. The father moved the court to amend or reconsider the petition, contending that the application of 40-5-253 violated his due process rights because he did not receive sufficient notice of the procedures by which to obtain judicial review of the administrative decision. The motion was denied, but the court nevertheless subsequently entered another order correcting the clerical error by adding a reference to 40-5-253 to the notice provision of the earlier order and then granted CSED's motion to dismiss. The father appealed. The Supreme Court noted that proper service of a petition for judicial review was a threshold requirement for the District Court to obtain jurisdiction in this case and that under Title 2, ch. 4, part 7, a petition for judicial review may be properly served by mailing copies to the agency and other parties, but there is no requirement that a summons be issued and served in conjunction with the petition. By filing the petition for judicial review and mailing copies to the mother and CSED, the father fulfilled the service requirements of MAPA and Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469 (1996). However, specific statutory requirements prevail over general provisions such as those in MAPA, and the Supreme Court agreed that the portion of the notice informing the father that MAPA would govern the proceedings was misleading, absent any reference to the different, specific procedural requirements for CSED actions under 40-5-253. The Supreme Court adopted federal interpretations of the due process notice requirements in this regard, which provide that the opportunity to be heard is not meaningful if the notice provided does not accurately inform the person to whom it is given of how to take advantage of that opportunity. The notice provisions in the administrative order did not provide father with adequate notice to meet due process requirements, so application of 40-5-253 would violate the father's due process rights. Under these unique circumstances, it was required that the father's petition for judicial review must be governed by the service requirements of MAPA and Hilands. Those requirements were met, so the District Court did acquire subject matter jurisdiction and abused its discretion in dismissing the father's petition for judicial review based on his failure to comply with 40-5-253. The case was reversed for further proceedings under MAPA. Pickens v. Shelton-Thompson, 2000 MT 131, 300 M 16, 3 P3d 603, 57 St. Rep. 543 (2000). See also Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 2d 865, 70 S Ct 652 (1950), Gonzales v. Sullivan, 914 F2d 1197 (9th Cir. 1990), Walters v. Reno, 145 F3d 1032 (9th Cir. 1998), and City of W. Covina v. Perkins, 525 US 234, 142 L Ed 2d 636, 119 S Ct 678 (1999).

Extension of Time Deadline by Rule Inapplicable to Administrative Law Judge's Decision — Dismissal for Lack of Subject Matter Jurisdiction Proper: The mother petitioned for judicial review of an order by an administrative law judge regarding her child support action. The Child Support Enforcement Division moved to dismiss the petition on grounds that it was not timely filed pursuant to this section and that, as a result, the District Court lacked subject matter jurisdiction to hear the case. The mother filed a motion under Rule 6(b), M.R.Civ.P. (Title 25, ch. 20), seeking an enlargement of time in which to file the petition, asserting that her failure to file the petition within the 30-day deadline was the result of excusable neglect. The motion was denied. The mother then filed for relief under Rule 60(b), M.R.Civ.P. (Title 25, ch. 20), and that motion was also denied. The mother appealed from the denial of both motions. The Supreme Court held that Rule 6(b), by its terms, applies only to acts required by the Montana Rules of Civil Procedure or by court order, but does not apply to acts required within a statutory framework, such as that established in this section. Thus, the rule does not apply, either by its

terms or by analogy, to petitions for judicial review of administrative proceedings because applying the rule in that manner would extend the jurisdiction of District Courts beyond that allowed by the statute. Further, Rule 60(b) does not provide a basis for relief in this case because the District Court was automatically deprived of jurisdiction once the 30-day period expired, and Rule 60(b) cannot be applied to revest jurisdiction where none existed in the first place. Dismissal of the mother's petition was not an abuse of discretion, and the District Court order was affirmed. In re Support of McGurran, 1999 MT 192, 295 M 357, 983 P2d 968, 56 St. Rep. 741 (1999).

Amended Petition Seeking Declaratory Judgment Not Subject to Thirty-Day Rule on Proceedings for Judicial Review: A declaratory action pursuant to 2-4-506 is not subject to the 30-day limit imposed on proceedings for judicial review in contested cases under this section. An amended petition seeking to void amendments to administrative rules, to the extent that the petition seeks declaratory judgment on the validity of those amendments, is also not subject to the 30-day limit. Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review, 282 M 255, 937 P2d 463, 54 St. Rep. 338 (1997).

Improperly Perfected Petition for Judicial Review of Administrative Decision Beyond Scope of Judicial Remedy: Following an administrative hearing, Davis was found delinquent on his child support obligation in the amount of $44,975. Davis filed a petition with the District Court naming the State of Montana and the Child Support Enforcement Division (CSED) as respondents, but CSED was not properly served with the petition. Davis requested that the court invalidate his divorce decree and support order because of fraud. The petition also made claims against persons who were not involved with the administrative action and sought money damages from the state. The District Court dismissed the petition, finding that the Court did not have the power to grant the relief sought by Davis and that the Montana Rules of Civil Procedure do not allow conversion of an appeal of an administrative decision into a lawsuit against the agency that made the decision. On appeal, the Supreme Court noted that Davis had the opportunity to appeal his original divorce decree or to request modification of the support provisions in the order, but instead of pursuing those remedies, he became delinquent in his support payments. The petition for judicial review of the administrative decision did not comply with 2-4-704 and this section and sought relief beyond that which a court could grant and was properly dismissed. In re Marriage of Davis, 277 M 188, 921 P2d 275, 53 St. Rep. 727 (1996).

Petition for Judicial Review of Contested Case — Service on Parties Under Rule 5(b) Held Sufficient: Ashmore brought a claim before the Human Rights Commission, alleging that she had been discriminated against by Hilands Golf Club because of her gender, in violation of 49-2-304. The Commission found in favor of Ashmore and awarded her relief. Hilands filed a petition for judicial review pursuant to this section and served copies of the petition by mail upon counsel for the Commission and Hilands. No summons was served with the petition, and no service was made upon the Attorney General. Ashmore filed a motion to dismiss under Rule 12(b), M.R.Civ.P. (Title 25, ch. 20), alleging that no jurisdiction had been obtained over the Commission by service of a summons upon the Attorney General, contrary to the holding in Fife v. Martin, 261 M 471, 863 P2d 403 (1993). The District Court granted the motion. The Supreme Court reversed, overruling Fife and holding that because judicial review pursuant to this section is in the nature of an appeal, in which jurisdiction over the parties has already been established, service of a summons with the petition is unnecessary and also holding that the petition may be served upon the parties by mail under Rule 5(b), M.R.Civ.P. (Title 25, ch. 20). The Supreme Court noted that it was sufficient to mail a copy of the petition to the parties and the agency, whether or not the agency had been a party to the administrative proceeding. Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469, 53 St. Rep. 664 (1996).

Court Review and Reversal of School Board Decision Revoking Teacher's Certificate Proper: The District Court reviewed the entire record of proceedings by a hearings examiner that was relied on by a school board to revoke the certificate of a teacher accused of sexual misconduct and properly reversed the certificate revocation because: (1) the hearings examiner improperly allowed testimony of an expert concerning general statements about the behavior of victims of sexual abuse; (2) the hearings examiner's findings of sexual abuse were not supported by substantial evidence; (3) when the expert's testimony was properly disregarded, other findings by the hearings examiner did not support a conclusion that the teacher was not of good moral and professional character; and (4) the hearings examiner's findings and conclusions contained sufficient independent statements from which the court could reverse the school board's decision without requiring new findings and conclusions from the record. In re Renewal of Teaching Certificate of Thompson, 270 M 419, 893 P2d 301, 52 St. Rep. 200 (1995).

Filing More Than Thirty Days After Oral Decision but Within Thirty Days of Written Decision: The Public Employees' Retirement Board decision denying disability retirement benefits became final and was served on the day that the Board issued the decision in writing and sent it to the former employee, not on the day of the hearing when the Board orally announced its decision while the former employee and his attorneys were present. Thus, the petition for judicial review filed within 30 days of the written decision, but more than 30 days after the oral announcement of the decision at the hearing, was timely. Weber v. Pub. Employees' Retirement Bd., 270 M 239, 890 P2d 1296, 52 St. Rep. 162 (1995).

Judicial Review of Agency Paternity Action — Failure to Serve Attorney General and Agency as Real Party in Interest — Service Void — Lack of Jurisdiction: The Child Support Enforcement Division (CSED) sought to compel Fife to submit to paternity testing for purposes of determining child support obligations. Fife sought judicial review of the administrative action by serving process by mail upon the mother and CSED but failed to properly name CSED as respondent or to serve the Attorney General or CSED in the manner required under the provisions of Rule 4(D), M.R.Civ.P. (Title 25, ch. 20). The District Court correctly held that it was without jurisdiction and properly dismissed the petition for judicial review for failure to effectuate valid service of process. Fife v. Martin, 261 M 471, 863 P2d 403, 50 St. Rep. 1414 (1993), overruled in Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469, 53 St. Rep. 664 (1996).

Issue Not Raised Before Agency Not Allowed to Be Raised on Judicial Review: Lincoln County argued in District Court that Sanders County had not objected to an impact plan before the Hard-Rock Mining Board and therefore had no standing to appeal the Board's decision in District Court. The Supreme Court held that Lincoln County had not argued that Sanders County was without standing when the issue was before the agency; therefore, Lincoln County could not raise the standing issue for the first time in District Court. Lincoln County v. Sanders County, 261 M 344, 862 P2d 1133, 50 St. Rep. 1352 (1993), followed in Hilands Golf Club v. Ashmore, 2002 MT 8, 308 M 111, 39 P3d 697 (2002).

Time for Filing of Petition for Judicial Review — Time of "Service" of Final Agency Decision Defined: Following proceedings in an administrative action before the Public Service Commission, the Commission mailed a copy of its decision to MCI on May 19, 1992, but MCI did not receive the decision until May 21, 1992. On June 19, 1992, MCI filed its petition for judicial review under this section. The District Court dismissed the petition as being untimely filed. The Supreme Court held that this section did not define the time of "service" at which the 30-day period for filing a petition for review began to run. Section 2-4-106 requires that Rule 6(e), M.R.Civ.P. (Title 25, ch. 20), be applied to define when service by mail is complete for administrative decisions. Rule 6(e) requires that when service is made by mail, an additional 3 days must be added to the time for taking action. Thus, the time for judicial review began to run on May 23, and MCI's petition was filed within the 30-day time period provided by this section. MCI Telecommunications Corp. v. Dept. of Public Service Regulation, 260 M 175, 858 P2d 364, 50 St. Rep. 989 (1993), distinguished in In re Support of McGurran, 1999 MT 192, 295 M 357, 983 P2d 968, 56 St. Rep. 741 (1999).

Order Staying Enforcement of Board's Order Pending Judicial Review — No Abuse of Discretion: The Board of Nursing issued an order placing hospice nurses on probation. When a District Court granted the nurses' petition for a stay of enforcement of the Board's final order, the Board appealed, alleging that the nurses were required to first apply for a stay from the Board. On appeal by the Board, the Supreme Court held that without a showing by the Board that there existed a danger that the nurses would continue the conduct addressed in the Board's order, the District Court did not abuse its discretion by issuing the stay order pending judicial review. Brackman v. Bd. of Nursing, 250 M 368, 820 P2d 1314, 48 St. Rep. 1039 (1991).

Declaratory Judgment Not Substitute for Administrative Procedure: The plaintiffs initiated an action to obtain a declaratory judgment from the District Court granting relief from an agency's ruling. The Supreme Court ruled that the lower court did not have the discretion to proceed under the Uniform Declaratory Judgments Act when the Montana Administrative Procedure Act provided a remedy for the party alleging a grievance. Roeber v. St., 243 M 437, 795 P2d 424, 47 St. Rep. 1293 (1990).

Failure to Follow Procedure for Review of Administrative Ruling — Dismissal Proper: The Board of Labor Appeals upheld a decision regarding assessments made by the Unemployment Insurance Division relating to classification of three corporation workers as employees. About the same time, the employer requested a contested case hearing before the Division of Workers' Compensation. Following an adverse decision by the Division of Workers' Compensation, the employer filed a complaint in District Court alleging bad faith and seeking damages. The proper procedure was to file a petition in District Court seeking review of the Board of Labor Appeals'

decision. Dismissal of the complaint, based on failure to follow the proper procedure for judicial review, was proper. Cottonwood Hills, Inc. v. St., 238 M 404, 777 P2d 1301, 46 St. Rep. 1371 (1989).

Standing of Attorney General to Appeal P.S.C. Order — P.S.C. Appeal Untimely: The Montana Power Company (M.P.C.) applied to the Public Service Commission (P.S.C.) for a rate increase of over $96.3 million. The P.S.C. granted only $4.1 million and denied in toto M.P.C.'s request to recover costs associated with Colstrip Unit 3. The M.P.C. appealed to District Court for review under 2-4-701. The judge reversed the P.S.C. order. The Attorney General filed notice of appeal. More than 60 days after the judge's order was entered, the P.S.C. also filed notice of appeal. The M.P.C. filed a motion to dismiss the appeal of the Attorney General for lack of standing and the appeal of the P.S.C. as untimely. The Supreme Court granted the motion, holding that the Attorney General had no standing to represent the state on appeal since it was not an aggrieved party or a party to the proceedings before the District Court and because, in his official capacity, the Attorney General may not appeal a decision that is within the discretion of the P.S.C. as a party to the action. The appeal of the P.S.C. was untimely, although within 7 days of the notice of appeal filed by the Attorney General. The latter appeal being invalid, the P.S.C. appeal would have to fall within the 60-day rule. Mont. Power Co. v. Dept. of Public Service Regulation, 218 M 471, 709 P2d 995, 42 St. Rep. 1750 (1985).

Administrative Boards Not Indispensable Parties for Judicial Review: The construction and general laborer's union filed an unfair labor practice charge with the Board of Personnel Appeals. A hearing was held in which the hearings examiner confirmed the unfair labor practice charge. The Board of Personnel Appeals reviewed the hearings examiner's conclusions and confirmed the recommended order. Appellant petitioned the District Court for judicial review of the Board's order. The appellant failed to name the Board as a party as provided in 2-4-702. The court found that the administrative boards are not indispensable parties for purposes of judicial review. Young v. Great Falls, 194 M 513, 632 P2d 1111, 38 St. Rep. 1317 (1981).

"Promptly" Relating to Service of Petition Not Unconstitutionally Vague: The use of the word "promptly" as requirement for service of a petition for administrative review is not unconstitutionally vague. Its plain meaning is sufficient; a person's right of due process is not violated by its use even though clearer or more precise language might have been used. Rierson v. St., 188 M 522, 614 P2d 1020 (1980).

Prompt Service on Agency Not Violative of Equal Protection: The requirement for prompt service on the agency that rendered the decision to be reviewed applies with equal force on private individuals and government agencies who seek review of adverse administrative decisions; thus, there is no unconstitutional discrimination favoring the government violative of equal protection. Rierson v. St., 188 M 522, 614 P2d 1020 (1980).

Relation Back Not Applicable to Amended Petition When Original Petition Was Never Served: The relation back of an amended petition under Rule 15(c), M.R.Civ.P., operates only when the original petition was served so that the opposing party has notice of the action, allowing an amended petition, even when filed after the running of the Statute of Limitations, to relate back to the date of the original filing of the petition. Therefore, an amended petition for judicial review, filed and served 16 months after the original petition was filed, cannot relate back to avoid dismissal for failure to promptly serve the petition as required by this section if the original petition was never served. Rierson v. St., 188 M 522, 614 P2d 1020 (1980).

Service on Agency of Petition for Judicial Review — 30 Days From Time of Filing Sufficient: When petitioner filed a petition for judicial review in a timely fashion but didn't serve this petition, then 16 months later filed an amended petition and served that petition on the agency, there was no prompt service within the meaning of this section. However, service of a petition for judicial review within about 30 days of filing the petition in District Court is sufficient. Rierson v. St., 188 M 522, 614 P2d 1020 (1980).

Date of Requested Rehearing — Running of Judicial Review Period: The 30-day period under 2-4-702 began to run when the Human Rights Commission issued its final order, not when the Commission denied a requested rehearing, since the Commission has no rule allowing rehearing. Bradco Supply Co. v. Larsen, 183 M 97, 598 P2d 596 (1979).

CONTESTED CASE

Venue Versus Jurisdiction — Failure to Move for Change of Venue at Initial Appearance Constituting Waiver of Right to Later Object to Venue: A mother filed in District Court in Judith Basin County for review of a child support modification consent order by the Department of Public Health and Human Services Child Support Enforcement Division (CSED) reducing the father's child support obligation. CSED moved for dismissal, claiming that the mother had failed

to exhaust her administrative remedies. The District Court granted the motion based on lack of jurisdiction, concluding that the petition should have been filed in a different county. The mother appealed, contending that the court confused the concepts of venue and jurisdiction and contending that dismissal of the petition for lack of jurisdiction was erroneous as a matter of law. The Supreme Court agreed and reversed. The District Court's interpretation of this section as a requirement that a petition for judicial review must be filed in the correct venue for the court to obtain jurisdiction was incorrect as a matter of law. Jurisdiction is a court's authority to hear and determine a case that goes to the power of the court and cannot be waived or conferred by consent of the parties when there is no basis for jurisdiction under the law, while venue refers to the place where a case is to be heard or where the power of the court is to be exercised and is a personal privilege of defendant that may be waived and that is considered waived pursuant to Rule 12(b), M.R.Civ.P. (Title 25, ch. 20), unless a motion to change venue is made at defendant's initial appearance. Thus, the mother's petition for judicial review vested the Judith Basin County District Court with jurisdiction under this section. Whether venue was proper in the county where the petition was filed was an entirely different issue. This section also sets forth the proper place where a contested administrative decision can be heard, providing that the petition must be filed in the District Court for the county where the petitioner resides or has a principal place of business or where the agency maintains its principal office. Upon proper motion, the matter should have been transferred to the proper county, but CSED failed to move for a change of venue at the initial appearance, thereby waiving its right to later object to venue, opting instead to move to dismiss for lack of jurisdiction. Therefore, Judith Basin County was a proper place for trial absent agreement by the parties to transfer venue. In re Support Obligation of McGurran, 2002 MT 144, 310 M 268, 49 P3d 626 (2002).

No Evidence That Use of Siphon Tube to Regulate Temperature of Dam Outlet Water Satisfied Water Quality Standards: The Board of Health and Environmental Sciences (now Board of Environmental Review) issued "401 certifications" to the Milk River Irrigation District and the city of Gillette, Wyoming, regarding a hydroelectric generating facility at the Tiber Dam that provided in part for the placing of a siphon 60 feet below the auxiliary outlet in order to regulate the temperature of outlet water and protect the downstream fishery. As part of its contested case review, the District Court correctly concluded that the "401" application had never been amended to include the siphon scheme and that there was no evidence to support the Board's conclusion that withdrawing water from 60 feet below the auxiliary outlet satisfied applicable water quality standards, the nondegradation requirements of the Water Quality Act, Board rules, and state public policy. The court properly determined that due process would be violated if the certification could be issued without an amendment to the original application and without the holding of public hearings respecting the siphon scheme. Hi-Line Sportsmen Club v. Milk River Irrigation District, 241 M 182, 786 P2d 13, 47 St. Rep. 184 (1990).

Action to Enforce Distinguished From Action for Judicial Review of Contested Case — No Timely Exceptions or Appeal Filed: In an action based upon an order of the Board of Personnel Appeals regarding reclassification, Walch disputed parts of the order but failed to make a timely appeal or exception to the order and instead filed a petition to enforce in District Court. In upholding the District Court's dismissal, the Supreme Court distinguished an action to enforce under 2-18-1013 from an action for judicial review of a contested case under 2-4-702, noting that the latter action must be brought within 30 days after service of a final agency decision and allows the petitioner to contest the decision. However, in an action to enforce, the petitioner may not contest the decision; therefore, Walch could prevail only if the employer was not paying him according to the order. Upon a finding that Walch was being paid accordingly, the District Court's dismissal of the petition to enforce was affirmed. Walch v. Univ. of Mont., 221 M 52, 716 P2d 640, 43 St. Rep. 629 (1986).

P.S.C. Motor Carrier Certificate Issuance Not Contested Case: Where District Court nullified Public Service Commission (P.S.C.) Class D motor carrier certificate and appellant contends the court had no jurisdiction since the judicial review leading to the nullification had not been initiated within 30 days of the administrative action, as required by 2-4-702(2)(a), Supreme Court held that 2-4-702 applies only to contested cases, that P.S.C. certificate issuing process is not a contested case, and that hence 30-day limitation did not apply in this case. In re Application of Galt, 196 M 534, 644 P2d 1019, 39 St. Rep. 106 (1982).

No Right to Judicial Review When No Right to Hearing: Under this chapter, the right of judicial review attaches only to a contested case proceeding. The court found no statutory or constitutional right of a terminated state employee to a hearing, although she had been given one; hence, the grievance proceeding was not a contested case under this chapter and no right of judicial review attached. Nye v. Dept. of Livestock, 196 M 222, 639 P2d 498, 39 St. Rep. 49 (1982).

Necessity of Prior Opportunity for Hearing: Petition for judicial review of an administrative order was properly dismissed where there had been no opportunity for administrative hearing in the matter. Under this chapter, judicial review may be had only of a final decision in a contested case, and a contested case is, among other things, one in which there has been an opportunity for a hearing. In re Selon v. Bd. of Personnel Appeals, 194 M 73, 634 P2d 646, 38 St. Rep. 1676 (1981).

EXHAUSTION

Failure to Exhaust Administrative Remedies in Adjudicating Particular Issue — Lack of Jurisdiction for Judicial Review: Art hired Mason as a personal care attendant for Art's elderly mother. After the mother died, Mason filed a claim for unemployment benefits and a separate claim for unpaid overtime. Art contested both claims on grounds that Mason was an independent contractor. A compliance specialist determined that Mason was an employee, and that decision was affirmed in Workers' Compensation Court. However, the court stated that it lacked jurisdiction to decide issues regarding the overtime claim, so that claim went back to the administrative process. A second compliance specialist found that Art owed Mason overtime pay, but Art moved to suspend the administrative appeals process pending judicial review. The District Court dismissed the appeal for lack of jurisdiction, and Art appealed. The Supreme Court affirmed. By failing to pursue an administrative appeal of the compliance specialists' determinations with the Hearings Bureau and then with the Board of Personnel Appeals, Art failed to exhaust all administrative remedies as required by this section, so the District Court's dismissal based on lack of jurisdiction was correct. Art v. Dept. of Labor and Industry, 2002 MT 327, 313 M 197, 60 P3d 958 (2002).

Issue of Whether Excess Resources Precluded Medicaid Eligibility Never Adjudicated — Motion to Declare Eligibility and Compel Medicaid Payments Properly Dismissed: Marble lived in a nursing home beginning in 1993. The Department of Public Health and Human Services determined in 1994 that Marble was eligible for Medicaid benefits. Following the death of her husband in 1996, Marble's guardian filed for a continuation of eligibility, which the Department denied because of excess resources, including a bank account with slightly more than $3,000 and about $31,000 in life insurance proceeds that Marble received, and because of her late husband's transfer of the family home to the children, which was considered a transfer of resources because her husband never received adequate compensation for the property. Marble challenged the denial of eligibility based on the transfer of resources determination, and the nursing home also became involved, seeking compensation for expenses dating back to 1996. A hearings officer determined that the transfer of resources did not disqualify Marble from receiving benefits, but the issue of excess resources was not addressed. The Department appealed the hearings officer's finding to the Board of Public Assistance, which reversed the decision and held that the house transfer did make Marble ineligible. Marble appealed to District Court for judicial review. In the meantime, the Department reversed its determination and informed the court that it would draft a settlement agreement for Marble's signature. However, because Marble insisted on attorney fees, the settlement agreement was never executed. Based on the Department's concession, both Marble and the nursing home moved the District Court to declare Marble eligible for Medicaid, compel payment of benefits, and award attorney fees. At a hearing, the Department explained that Marble remained ineligible based on the unresolved issue of excess resources, and the court agreed, denying the motions to declare Marble eligible for Medicaid, compel payment of benefits, and award attorney fees. Marble and the nursing home then appealed to the Supreme Court, asserting that because the Department had failed to raise the excess resources issue prior to the appeal, it could not now deny her eligibility. The Supreme Court affirmed. The issue of excess resources was never addressed by the hearings officer, nor was the issue before the District Court, so the court properly refrained from ruling on Marble's eligibility. The excess resources issue was never properly raised, argued, or adjudicated pursuant to the administrative process and therefore never ripe for judicial review; thus, it was necessary for that issue to be first challenged at the administrative level. Marble and the nursing home did not exhaust all administrative remedies, so there was no final decision upon which the District Court could assume jurisdiction. Marble v. St., 2000 MT 240, 301 M 373, 9 P3d 617, 57 St. Rep. 1002 (2000).

Proper Notice of Violation and Opportunity for Discovery Required by Statute and Due Process — Remand to Exhaust Administrative Remedies: Wilsons, who operated a garbage transport business under a certificate granted by the Public Service Commission, were served by the P.S.C. with a complaint and order to show cause why their certificate should not be terminated. The complaint and order did not refer to any particular rule, statute, or previous

order of the Commission that was alleged to have been violated. Later, after the Commission denied an opportunity for Wilsons to discover the evidence to be used against them, the District Court granted Wilsons' motion to amend their application for a review of the P.S.C. order to include immediate review under 2-4-701. The Supreme Court held that the notice used by the P.S.C. did not comply with the requirements of 69-12-327, in that the notice did not specify the rule, statute, or order alleged to have been violated, and held that basic procedural due process was not followed by the P.S.C. in its denial of the Wilsons' request for discovery. The Supreme Court also held that judicial review of the final agency decision was not an adequate remedy when the record on which the final decision of the agency will be based contained no evidence of the statute, rule, or order violated; when no discovery was allowed; when there was no evidence that Wilsons had been notified of who would testify against them; and when, cumulatively, it appeared that Wilsons had been denied fundamental fairness. Wilson v. Dept. of Public Service Regulation, 260 M 167, 858 P2d 368, 50 St. Rep. 985 (1993).

Lack of District Court Jurisdiction in Claim for Damages — Failure to Exhaust Administrative Remedies: Gilpins initiated suit for damages resulting from temporary suspension of their day-care license by the Department of Family Services (now Department of Public Health and Human Services), contending that, under 3-5-302, jurisdiction was in the District Court because the action involved a civil claim against the state for payment of money. However, the court properly dismissed the claim for lack of jurisdiction because Gilpins failed to exhaust all administrative remedies available within the agency, as required by this section, and because there was no showing made pursuant to 2-4-701 that a review of the agency decision by a hearings examiner would not provide an adequate remedy. Gilpin v. St., 249 M 37, 812 P2d 1265, 48 St. Rep. 567 (1991).

Change in Point of Use — Judicial Review of Procedural Orders Improper: Pursuant to 1973 water use law, appellant applied for Department of Natural Resources and Conservation (DNRC) approval to change the point of use of its pre-1973 water right. DNRC hearing examiner ordered objectors to respond to appellant's discovery request, yet refused to dismiss the objections of objectors who failed to respond. Upon review, the Water Court reversed the DNRC denial. Appellant appealed, arguing review was inappropriate. The Supreme Court agreed, stating that judicial review of the hearing examiner's procedural order was improper as there had been no final decision or exhaustion of administrative remedies. Kingsbury Ditch Co. v. Dept. of Natural Resources and Conservation, 223 M 379, 725 P2d 1209, 43 St. Rep. 1805 (1986).

Employment Discrimination Complaint — Exhaustion of Administrative Remedies: Petitioner filed a sex discrimination complaint with the Montana Human Rights Commission. The Commission's hearings officer recommended that the petition be dismissed. The petitioner filed written exceptions to the hearings officer's finding that gender was a bona fide occupational qualification (BFOQ) but not to the findings of facts as to damages. The Commission found petitioner was unlawfully discriminated against and ordered payment of lost salary. Petitioner petitioned for judicial review on amount of damages, and school district petitioned for judicial review of BFOQ issue. The District Court denied the petition for judicial review of petitioner on the grounds that petition had failed to exhaust administrative remedies. On appeal, the Supreme Court held that petitioner did exhaust administrative remedies by raising two issues of error in his petition for judicial review even though only one of those issues was raised in petitioner's written exceptions to the administrative hearings officer's findings. The incorporation by reference of damages was sufficient to bring the issue before the Commission. The Supreme Court affirmed the District Court's reversal of the Commission on the issue of BFOQ and the District Court's order to vacate findings and dismiss the charge of sex discrimination. The Supreme Court held there was substantial credible evidence to support the District Court's finding of a substantial privacy issue making gender a BFOQ for the school guidance counselor position. Stone v. Belgrade School District, 217 M 309, 703 P2d 136, 41 St. Rep. 2436 (1984).

Contested Case — Requirement for Judicial Review — Exhaustion of Administrative Remedies: Plaintiff, a nursing home operator, was notified by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) that it was disallowing certain nursing care costs claimed by plaintiff. The Department notified plaintiff that a hearing could be requested under the Department's administrative rules. Plaintiff requested time extensions in which to submit objections, and the Department agreed. The Department finally set a time limitation that plaintiff did not meet. The Department then filed its reimbursement rate for plaintiff. Plaintiff filed a complaint in District Court for judicial review of the Department's determination. The District Court dismissed the case. On appeal, the Supreme Court held that only a party who has exhausted all administrative remedies is entitled

to judicial review if aggrieved in a contested case. A contested case is a determination of legal rights after an opportunity for hearing. Because there was no hearing in this case, dismissal was proper. B.G.M. Enterprises v. St., 673 P2d 1205, 40 St. Rep. 1827 (1983) (apparently not reported in Montana Reports).

Original Action Involving Interpretation of Statute Allowed Without Exhaustion of Administrative Remedies: Game warden mandatorily retired under 19-8-601 lost a complaint proceeding before the Montana Commission for Human Rights, did not pursue further administrative remedies, and brought a District Court action to declare the statute invalid. The exhaustion of administrative remedies doctrine did not preclude redress because: (1) the court action was an original action and not a judicial review of an administrative action, and (2) the Commission ruling was an interpretation of law that must be made by the judiciary. Taylor v. Dept. of Fish, Wildlife, & Parks, 205 M 85, 666 P2d 1228, 40 St. Rep. 1112 (1983).

Denial of Permit to Construct Trailer Court — Mandamus Denied for Failure to Exhaust Remedies: Where the appellant brought an action in 1979 for mandamus to compel the county to issue a permit for the construction of additions to a trailer park, after such permits were denied in 1973 and 1974, the District Court did not err in holding that the appellant had failed to exhaust his administrative remedies and that the writ would therefore not be issued. After learning of the denial of the permit in 1973 and 1974, the appellant should have appealed the denial through administrative channels rather than 6 years later begin a pro se legal action in District Court. Bailey v. Dept. of Health and Environmental Sciences, 204 M 253, 664 P2d 325, 40 St. Rep. 825 (1983).

Exhaustion of Administrative Remedy Generally: If an administrative remedy is provided by statute, that relief must be sought from the administrative body and the statutory remedy exhausted before relief can be obtained by judicial review. Barnicoat v. Comm'r of Dept. of Labor and Industry, 201 M 221, 653 P2d 498, 39 St. Rep. 2070 (1982); State ex rel. Jones v. Giles, 168 M 130, 541 P2d 355 (1975).

Exhaustion of Administrative Workers' Compensation Remedies: Where (1) a claim for a $6,000 advance of workers' compensation benefits was made to the Workers' Compensation Division in a dispute between the Division and the claimant; (2) a petition for a hearing was made to the Workers' Compensation Court asking for a $19,622.72 advance; and (3) the Division argued on appeal from that court that the larger advance should not have been considered because it was not presented to the Division and because the Workers' Compensation Court hearing was an appeal from an agency requiring claimant to raise all issues before the agency and exhaust administrative remedies before being heard in court, the court properly entertained the question of the $19,622.72 advance because the Division had stated that the dispute was over the method of repayment and not the amount of the advance. Therefore, a dispute as to repayment method did in fact exist. There was no failure to exhaust administrative remedies as the Workers' Compensation Court is an administrative court deciding benefits disputes in a de novo hearing, and the Division had adequate notice and opportunity to defend. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Exhaustion of Administrative Remedies — Exception for Nonparty: Plaintiffs are citizens of Great Falls who expended money for construction and improvement in reliance on the city's MELDA (Montana Economic and Land Development Act) plan. The Department of Revenue ruled that the city's plan did not conform to MELDA's provisions, and thus persons acting in reliance upon the city's plan would not receive MELDA tax treatment. The court found that the plaintiffs were nonparties even though they appeared at the administrative hearing and therefore could not appeal the Department's decision to the State Tax Appeal Board. Their remedy is in the District Court. This is an exception to the general rule that administrative remedies must be exhausted before applying for judicial review. Keller v. Dept. of Revenue, 182 M 478, 597 P2d 736 (1979).

SCOPE OF REVIEW

Challenge of Environmental Assessment — No Jurisdiction for Administrative Review: A grain company sought a permit to build a high-speed grain loading terminal near Pompeys Pillar national monument. The permit was granted and plaintiff, a nonprofit association supporting the monument's preservation, began administrative proceedings in an effort to overturn the permit issuance on grounds that the Department of Environmental Quality erred in its preparation of the environmental assessment related to the permit. An administrative law judge concluded that the Department acted arbitrarily and capriciously by issuing a permit without preparing an environmental impact statement. The Department filed exceptions to the administrative law judge's conclusions with the Board of Environmental Review. The Board

ultimately affirmed the Department's decision to issue the permit, and plaintiff appealed to District Court. The Department contended that because the challenge to the administrative decisions did not contain any air quality issues, but only addressed environmental assessment issues governed by the Montana Environmental Policy Act (MEPA), and that because MEPA does not provide for administrative review of challenges to MEPA compliance, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. The District Court agreed and dismissed plaintiff's petition for lack of subject matter jurisdiction. Plaintiff appealed, but the Supreme Court affirmed. Had plaintiff challenged air quality issues, it would have been entitled to administrative proceedings. However, plaintiff's challenge pertained only to issues related to the environmental assessment, which is governed by MEPA. MEPA requires that a compliance challenge be brought in District Court, rather than through administrative proceedings. Thus, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. Plaintiff's petition was properly dismissed. Pompeys Pillar Historical Ass'n v. Dept. of Environmental Quality, 2002 MT 352, 313 M 401, 61 P3d 148 (2002).

Independent Contractor Issue Not Raised During Administrative Proceedings — Judicial Review Precluded: After review of the proceedings of an administrative hearing, the District Court concluded that the Department of Labor and Industry possessed jurisdiction to award wages to a claimant seeking pay earned as a housekeeper. Employer maintained that the Department lacked jurisdiction because the housekeeper was not an employee but an independent contractor. However, because the issue of employment status was not raised at the administrative level, the employer was precluded from raising the issue upon judicial review. Searight v. Howell, 248 M 122, 809 P2d 588, 48 St. Rep. 370 (1991).

Judicial Review — Treatment of Gain and Cost of Equity Capital: After receiving a $7,917,936 rate increase from the Public Service Commission (P.S.C.), Montana-Dakota Utilities Company (M.D.U.) requested reconsideration of the P.S.C.'s assignment of a 13.35% rate on return of capital and its order that the gain on reacquired debt be amortized over the remaining life of the indebtedness, the amortized amount to reduce interest expense to M.D.U. The P.S.C. denied reconsideration. On appeal, the District Court held that the P.S.C. correctly authorized the 13.35% rate return on equity capital but that its treatment of gain constituted a confiscation without due process. After appeal by both the P.S.C. and M.D.U., the Supreme Court held that the P.S.C.'s assignment of a 13.35% rate on return of equity capital was not arbitrary or capricious. However, the Supreme Court reversed the District Court, ruling that the P.S.C.'s order to amortize the gain on reacquired debt over the remaining life of the indebtedness was not confiscatory to either M.D.U. or its shareholders. Montana-Dakota Util. Co. v. Dept. of Public Service Regulation, 223 M 191, 725 P2d 548, 43 St. Rep. 1648 (1986).

Action to Enforce Distinguished From Action for Judicial Review of Contested Case — No Timely Exceptions or Appeal Filed: In an action based upon an order of the Board of Personnel Appeals regarding reclassification, Walch disputed parts of the order but failed to make a timely appeal or exception to the order and instead filed a petition to enforce in District Court. In upholding the District Court's dismissal, the Supreme Court distinguished an action to enforce under 2-18-1013 from an action for judicial review of a contested case under 2-4-702, noting that the latter action must be brought within 30 days after service of a final agency decision and allows the petitioner to contest the decision. However, in an action to enforce, the petitioner may not contest the decision; therefore, Walch could prevail only if the employer was not paying him according to the order. Upon a finding that Walch was being paid accordingly, the District Court's dismissal of the petition to enforce was affirmed. Walch v. Univ. of Mont., 221 M 52, 716 P2d 640, 43 St. Rep. 629 (1986).

District Court Bound by Factual Findings of Board of Personnel Appeals — Wrongful Discharge — Reinstatement — No Backpay: An employee of the state was discharged from employment because he used a state-owned vehicle for private purposes. He appealed the decision of the Department of Fish, Wildlife, and Parks, and the Board of Personnel Appeals ruled that though his discharge was properly justified, the Department had never adopted a policy regarding such use of vehicles and had not punished similar usage; thus, the discharge was wrongful and he was entitled to reinstatement. He was offered a substantially equivalent position but appealed the Board's denial of backpay and benefits and, upon losing the District Court appeal, pursued the issues before the Supreme Court. The court upheld the District Court on all issues, observing that both courts were bound by factual findings of the Board and stipulations by the parties. The District Court was not obligated to hold a hearing on the facts. Hutchin v. St., 213 M 15, 688 P2d 1257, 41 St. Rep. 1916 (1984).

District Court Order Granting Relief Beyond Issues Addressed by Administrative Agency: Where the District Court reversed an order of the Office of Public Instruction (OPI) and found that the plaintiff was a teacher subject to the tenure laws of the state, the Supreme Court found on appeal that the District Court erred in that its order went beyond the scope of the issues determined in the OPI order. The Superintendent of Public Instruction did not address the issue of the reinstatement of the plaintiff or award him backpay, and the District Court can review only those issues determined by the agency. The District Court should have reversed the Superintendent on the issue of teacher tenure and remanded the case for negotiations between the plaintiff and the school district. Harris v. Bauer, 206 M 480, 672 P2d 26, 40 St. Rep. 1793 (1983).

Issues Subject to Review on Appeal: Sorlie argued that the school district could not appeal a salary decision made by the Superintendent of Public Instruction because it did not directly petition the District Court for review. The Supreme Court disagreed. Issues brought before the agency proceeding automatically become subject to judicial review. The salary issue was raised at the agency level and reviewed by the District Court. The school district, as an aggrieved party, can appeal from the decision of the District Court. Sorlie's petition for judicial review raised the salary question, and the school district was aggrieved by the District Court decision on that question. Consequently the school district can appeal on that basis. Sorlie v. School District, 205 M 22, 667 P2d 400, 40 St. Rep. 1070 (1983).

Issue Raised Before Agency: Where District Court nullified Public Service Commission (P.S.C.) motor carrier certificate and appellant contends under 2-4-702(1)(b) that validity had not been an issue in the administrative hearing and that the court was therefore precluded from reviewing question of validity, Supreme Court held that record shows that issue of validity had been raised before the P.S.C. and therefore court did not exceed its scope of judicial review. In re Application of Galt, 196 M 534, 644 P2d 1019, 39 St. Rep. 106 (1982).

Exhaustion of Administrative Workers' Compensation Remedies: Where (1) a claim for a $6,000 advance of workers' compensation benefits was made to the Workers' Compensation Division in a dispute between the Division and the claimant; (2) a petition for a hearing was made to the Workers' Compensation Court asking for a $19,622.72 advance; and (3) the Division argued on appeal from that court that the larger advance should not have been considered because it was not presented to the Division and because the Workers' Compensation Court hearing was an appeal from an agency requiring claimant to raise all issues before the agency and exhaust administrative remedies before being heard in court, the court properly entertained the question of the $19,622.72 advance because the Division had stated that the dispute was over the method of repayment and not the amount of the advance. Therefore, a dispute as to repayment method did in fact exist. There was no failure to exhaust administrative remedies as the Workers' Compensation Court is an administrative court deciding benefits disputes in a de novo hearing, and the Division had adequate notice and opportunity to defend. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Nonadministrative Question to Be Decided on Judicial Review: The Department of Revenue ruled that the Great Falls MELDA (Montana Economic and Land Development Act) plan did not conform to MELDA provisions. Plaintiffs acted in reliance on the city's plan, but because of the Department's decision they did not receive MELDA tax treatment. In appealing the administrative decision, the plaintiffs were challenging the Department's decision not to utilize MELDA in assessing plaintiff's property and seeking a determination of the effect of MELDA's repeal. Clearly these are not administrative questions, and plaintiffs should not be required to present their case to the State Tax Appeal Board. Keller v. Dept. of Revenue, 182 M 478, 597 P2d 736 (1979).

Legality of Regulation: There was no merit to appellant's challenge to the validity of the Banking Board's rulemaking process. Furthermore, such a question must have been raised first before the administrative agency unless there was good cause for failure to do so. W. Bank of Billings v. St. Banking Bd., 174 M 331, 570 P2d 1115 (1977), followed in In re Sorini, 220 M 459, 717 P2d 7, 43 St. Rep. 526 (1986).

Law Review Articles

Montana Supreme Court Survey: Administrative Law, Reep, 42 Mont. L. Rev. 329 (1981).

Montana Supreme Court Survey: Administrative Law, Snyder, 41 Mont. L. Rev. 151 (1980).

A Roadmap to the Administrative Appeals Process, Lindley, 34 Rocky Mtn. Min. L. Inst. 14.1 (1988).

Collateral References

Administrative Law *key* 651.

73A C.J.S. Public Administrative Law and Procedure §172, et seq.

2 Am. Jur. 2d Administrative Law §553, et seq.

Doctrine of res judicata or collateral estoppel as barring relitigation in state criminal proceedings of issues previously decided in administrative proceedings. 30 ALR 4th 856.

2-4-703. Receipt of additional evidence.

Compiler's Comments

Source: 1961 Revised Model Act, sec. 15(e).

Case Notes

Presentation of Additional Evidence to Trial Court After Agency Hearing: The plaintiff sued the defendant for back overtime pay. The defendant argued that no overtime was due because the plaintiff had been an executive employee, as defined in ARM 24.16.201. The Department of Labor and Industry determined that the plaintiff was not an executive employee and that he was owed overtime pay. The defendant appealed the decision to District Court and moved to enter additional testimony from one of the owners of the defendant business as to the employment status of the plaintiff. The only reason given for the failure to introduce the testimony earlier was that the owner was unable to attend the hearing. The Supreme Court ruled that the mere statement by the owner that she could not attend the original hearing was inadequate, particularly since she had requested the hearing. Holbeck v. Stevi-West, Inc., 240 M 121, 783 P2d 391, 46 St. Rep. 1990 (1989).

Presentation of Additional Evidence in Contested Cases: Under this section, when the court has allowed additional evidence, it may be presented to the agency but not to the court. This limitation accords with the standard of review of contested MAPA cases under 2-4-704, which confines court review to the record. O'Neill v. Dept. of Revenue, 227 M 226, 739 P2d 456, 44 St. Rep. 1037 (1987).

Review of STAB Decision — Additional Evidence: When additional evidence is presented during review of a STAB decision under 15-2-303, such evidence may be introduced before the court rather than the agency. Findings of fact and conclusions of law are then required to be made by the court. If the court does not permit or receive additional evidence, written findings and conclusions by the court are not required. Hi-Line Radio Fellowship v. Dept. of Revenue, 227 M 150, 737 P2d 886, 44 St. Rep. 955 (1987).

Additional Evidence Denied: In an appeal by a school district from an administrative order reinstating and compensating a discharged school principal, the District Court did not err in denying the school district's motion to order receipt of additional evidence. The court had properly determined that the Superintendent of Public Instruction correctly used his discretion when previously denying the school district's request to submit additional evidence. The affidavits in question were not subject to cross-examination and were of questionable quality. The county-level hearing was a thorough hearing, and the evidence supports the county-level decision. Pryor School District v. Supt. of Pub. Instruction, 218 M 73, 707 P2d 1094, 42 St. Rep. 1405 (1985).

Scope of Agency Review: This section and 2-4-621 indicate a legislative intent that in reviewing a hearing examiner's decision the agency's determination should be based on a review of all material evidence. Billings v. Mont. Human Rights Comm'n, 209 M 251, 681 P2d 33, 41 St. Rep. 688 (1984).

Collateral References

Administrative Law *key* 746.

73A C.J.S. Public Administrative Law and Procedure §§218, 219.

2 Am. Jur. 2d Administrative Law §747.

2-4-704. Standards of review.

Compiler's Comments

2003 Amendment: Chapter 361 inserted (3) relating to constitutional challenges under Title 75 or Title 82; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

1989 Amendment: At beginning of (2)(b) deleted "because" and reoutlined subsection (2).

Source: 1961 Revised Model Act, sec. 15(f), (g).

Case Notes

General 123
Finding of Substantial Credible Evidence 135
Lack of Substantial Credible Evidence — Clearly Erroneous. 139

GENERAL

Business Owner's Burden of Proof in Showing Independent Contractor Status Not Considered Unfair or Unconstitutional: The District Court held that a business owner had the burden of proof to rebut a presumption of employee status, that the burden was constitutionally valid, and that the employer failed to demonstrate that application of the presumption implicated any fundamental liberty or property interests. The Supreme Court affirmed. Requiring the business owner to show independent contractor status did not create an irrebuttable presumption, but rather placed the burden of proof on the workers—those individuals who could most effectively demonstrate whether they were employees or independent contractors. Here, the business owner did not attempt to have its workers testify or try to obtain tax information, thus failing to meet the burden of showing that several of its workers were independent contractors. Spain v. Dept. of Revenue, 2002 MT 146, 310 M 282, 49 P3d 615 (2002).

Standard of Review for Statutes Applicable to Administrative Rules — Rules of Statutory Construction Inapplicable Absent Ambiguity in Statute or Rule — Deference Afforded Longstanding Agency Interpretation of Administrative Rule: The Supreme Court generally applies the same principles in construing administrative rules as it applies to statutes. If the

plain meaning of a statute or rule can be determined from the language used, the court is not at liberty to add or detract from the language, and absent ambiguity in the language, the court may not consider legislative history or other means of statutory construction. When an agency's interpretation of an administrative rule or statute has stood unchallenged for a considerable length of time, it will be regarded as having great importance in arriving at the proper construction. However, even when a particular meaning has been ascribed to a statute by an agency through a long and continuous course of consistent interpretation, that interpretation will be afforded respectful consideration but is still not binding on the courts. Glendive Medical Center, Inc. v. Dept. of Public Health and Human Services, 2002 MT 131, 310 M 156, 49 P3d 560 (2002).

Standard of Appellate Review of Administrative Decision in Contested Case: When reviewing a District Court order affirming or reversing an administrative decision in a contested case, the Supreme Court employs the same standard applied by the District Court to determine whether the findings of fact are clearly erroneous and whether the agency correctly interpreted the law. O'Neill v. Dept. of Revenue, 2002 MT 130, 310 M 148, 49 P3d 43 (2002). See also Glendive Medical Center, Inc. v. Dept. of Public Health and Human Services, 2002 MT 131, 310 M 156, 49 P3d 560 (2002).

Substitution of District Court Property Valuation for That of Tax Appeal Board Improper — Remand for Reinstatement of State Tax Appeal Board Assessment Absent Clear Error or Abuse of Discretion: The O'Neills contested the valuation ascribed to two parcels of property. The Department of Revenue had applied the market data approach in valuing one parcel, and the cost approach method in valuing the other parcel. The State Tax Appeal Board (STAB) ultimately granted further reductions to the land values and ordered that the properties be entered into the county tax rolls. Dissatisfied with the STAB reduction, the O'Neill appealed the STAB ruling to the District Court. The court applied the comparable sales method of valuation, and concluded that an even lower value should have been applied. The court then vacated the STAB valued and assigned significantly lower values to the properties. The Department of Revenue appealed. The Supreme Court applied this section, holding that the section does not contemplate a wholesale substitution of the District Court's opinion for that of the agency. The District Court could have reversed or modified the STAB decision and remanded the case for further proceedings if the O'Neills' substantial rights had been prejudiced because the administrative findings were clearly erroneous, but the court did not reach that conclusion, and instead simply applied its own analysis in place of the STAB analysis. Absent findings of clear error or abuse of discretion required in this section, the STAB valuation will be upheld. Thus, the Supreme Court reversed and remanded for reinstatement of the STAB assessments. O'Neill v. Dept. of Revenue, 2002 MT 130, 310 M 148, 49 P3d 43 (2002).

Erroneous Determination That Public Service Commission Interpretation of Electric Utility Deregulation Act Unconstitutional Taking — Issue Not Ripe for Adjudication Given Speculation Regarding Utility's Future Loss: As part of the deregulation process, the Montana Power Company (MPC) submitted a transition cost recovery plan to the Public Service Commission (PSC). Foreseeing imminent uncertainty in the costs of electricity, MPC proposed that a current estimation of some transition costs be deferred, or tracked, for as long as 25 to 30 years, so that a more accurate figure of those costs could be determined in the future. Thus, with regard to certain assets, MPC in essence offered no estimation of any transition costs, proposing instead that those costs be determined and recovered at a later time. The PSC determined that a tracking system that would adjust transition costs in the future as the costs occurred, rather than reaching a current estimated fixed sum, was not consistent with Title 69, ch. 8, and that in order for the MPC plan to be approved, transition costs must be reduced to a fixed net amount. The PSC ordered MPC to amend its transition plan to specifically identify and demonstrate all transition costs that it sought to recover, and not to rely on a future tracking mechanism. MPC sought judicial review, arguing that the PSC improperly precluded the use of trackers in its plan, and requested that the District Court reverse the PSC's decision and permanently enjoin the PSC from enforcing its interpretation. The court reasoned that the PSC's interpretation had great potential for unconstitutionally depriving MPC or Montana consumers of property, and ordered the PSC to allow the tracking system. The PSC appealed. The Supreme Court found that MPC's claim to an unconstitutional taking at the hands of the PSC's ruling on the proposed tracking mechanism was as hypothetical and speculative as the future of electricity costs in Montana. The PSC action had yet to deprive MPC of any property, and the court refused to interpret the law and enjoin state action to preserve a property interest that did not, and might not ever, exist. The very likely potential of an unconstitutional taking was distinguishable from the imminent and very real violations of constitutional rights and remedies at risk in past cases

in which the Supreme Court has held that a taking occurred, such as Yurkovich v. Indus. Accident Bd., 132 M 77, 314 P2d 866 (1957), and its progeny, holding that the District Court erred in finding that the PSC's interpretation produced a taking that prejudiced MPC's substantial rights. Mont. Power Co. v. Pub. Serv. Comm'n, 2001 MT 102, 305 M 260, 26 P3d 91 (2001).

Finality of Costs Considered Overarching Intent of Electric Utility Industry Restructuring and Customer Choice Act — PSC Denial of System That Would Allow Charging Future Transition Costs Correct Interpretation of Act: As part of the deregulation process pursuant to the Electric Utility Industry Restructuring and Customer Choice Act, the Montana Power Company (MPC) submitted a transition cost recovery plan to the Public Service Commission (PSC) that would have allowed the future recovery of certain transition costs as they became known over a period of 25 to 30 years. The PSC ordered MPC to amend its transition plan to specifically identify and demonstrate all transition costs that it sought to recover and not to rely on a future tracking mechanism. Upon judicial review, the District Court ordered the PSC to allow the tracking system. The Supreme Court was subsequently asked to determine whether the PSC interpretation of the Act was correct. The court held that MPC's proposed cost-tracking method, whereby some, but not all, transition costs would be unknown and therefore subject to the caprice of future events, was entirely inconsistent with the principle of finality and with statutory mandates in the Act placed on the PSC that all costs be determined to be: (1) verifiable; (2) unrecoverable; (3) affirmatively shown; (4) reasonably mitigated; (5) reasonably demonstrable; (6) reduced to a net sum; and (7) reduced to an amount in a final order. The principle of finality was also expressed in 69-8-211, which declared that PSC approval of transition costs, as well as the subsequent collection of those costs through transition charges, was a settlement of all transition costs claimed by a public utility. This finality was the overarching intent of the Act, in that the needs of consumers to effectively plan today takes precedence over precise cost analysis extending for years or even decades into the future. It is the PSC that assumes the role of arbiter in determining and fixing a utility's transition costs, if any, that will be discharged at the consumers' expense. Thus, the PSC's interpretation of the Act was correct, and the District Court's mandate requiring the PSC to allow the use of trackers would require the PSC to bend if not violate the law and could not be sustained. The District Court was reversed, and the PSC order was reinstated. Mont. Power Co. v. Pub. Serv. Comm'n, 2001 MT 102, 305 M 260, 26 P3d 91 (2001).

New Circumstances Requiring Supplemental Environmental Impact Statement — Arbitrary Agency Decision to Not Prepare Supplemental Constituting Reversible Error: Under ARM 18.2.247, an agency is required to prepare a supplemental EIS when there are significant new circumstances that change the basis for the agency's decision and the supplement is required to describe any impacts, alternatives, or other items that were not covered in the original statement or that must be revised based on the new information or circumstances concerning the proposed agency action. When an agency action is challenged for failure to prepare a supplemental EIS, the reviewing court must consider whether the agency made a reasoned decision based on its evaluation of the significance or lack of significance of the new information, whether the decision was based on a consideration of the relevant factors, and whether there has been a clear error of judgment. Here, the decision of the Department of Transportation to build the Forestvale interchange in the Helena Valley was challenged on grounds that the Department did not comply with the supplemental EIS requirements of ARM 18.2.247. The Department conducted an in-house review and determined in 1999 that a supplemental EIS to the original 1991 draft EIS was not necessary because the changes in the proposed project's scope of work and the new information did not result in any significant environmental impacts. The Supreme Court disagreed. The change in traffic patterns, the development around the Capitol interchange, the patterns of development in Helena, and the proposed alternatives to the Forestvale interchange were all significant new circumstances that required a supplemental EIS, and the Department's decision not to prepare one was arbitrary, constituting reversible error. Mont. Envtl. Information Center, Inc. v. Dept. of Transportation, 2000 MT 5, 298 M 1, 994 P2d 676, 57 St. Rep. 18 (2000), following N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862, 46 St. Rep. 1409 (1989), and Marsh v. Oreg. Natural Resources Council, 490 US 360 (1989).

Employee Who Spent Eighty Percent of Time on Nonmanagerial Work Considered Manager Exempt From Overtime Requirements: Showers sued Kemp for unpaid wages allegedly owed for Showers' work as a chef. The Board of Personnel Appeals found that Kemp owed $5,820.15 in unpaid overtime, and the District Court affirmed. On appeal, Kemp maintained that Showers was employed in an executive capacity under 29 U.S.C. 213(a)(1) and was thus exempt from the overtime provisions of the Fair Labor Standards Act. The Supreme Court considered the factors

in 29 CFR 541.103 in determining whether Showers' primary duty was management: (1) time spent performing managerial duties; (2) the relative importance of the employee's managerial duties as compared with other duties; (3) the frequency with which the employee exercises discretionary powers; (4) the employee's relative freedom from supervision; and (5) the relationship between the employee's salary and wages paid to subordinates for the nonexempt work performed by the employee. Generally, an employee who spends 50% or more of time in management would have management as the primary duty, but time is not the sole test. An employee may spend less than 50% of time on management and still be considered a manager if other factors support that conclusion. Here, Showers spent only 20% of her time performing managerial work and 80% of her time cooking, but the managerial duties were more important than her other duties because they needed to be done so that her subordinates could work and so the kitchen could operate successfully. Further, Showers frequently exercised discretionary powers by making weekly, if not daily, decisions concerning operation of the kitchen, was relatively, if not totally, free from supervision, and was compensated better than her subordinates. Although exemptions from the Fair Labor Standards Act are to be narrowly construed against the employer asserting the exemption and the employer has the burden of proving that the employee fits plainly and unmistakably within the terms of the exemption, the Supreme Court found that, considering the other factors in the federal regulations, Showers was an exempt employee whose primary duty was management, even though she spent 80% of her time performing nonmanagerial work. Kemp v. Bd. of Personnel Appeals, 1999 MT 255, 296 M 319, 989 P2d 317, 56 St. Rep. 1015 (1999).

District Court Error in Substituting Its Judgment for That of Factfinder in Nonrenewal of Principal's Contract: The contract of a tenured assistant high school principal was not renewed by the school board of trustees. Appeal was made to the County Superintendent of Schools, who affirmed the trustees' decision. The County Superintendent's decision was affirmed by the State Superintendent of Schools, whose decision was in turn appealed to District Court. The court reviewed the County Superintendent's decision and determined that the findings were supported by reliable, probative, substantial evidence and that none of the County Superintendent's conclusions were in error, but then reversed the agency decision and ordered the principal to be reinstated and paid back wages and benefits on grounds that the County Superintendent failed to consider the principal's due process and first amendment rights pursuant to Pickering v. Bd. of Educ., 391 US 563, 20 L Ed 2d 811, 88 S Ct 1731 (1968). The Supreme Court reversed, noting that the policy used in determining that the principal's due process rights were violated was inapplicable and that a Pickering analysis was not necessary because the principal was not terminated because of the exercise of free speech, but rather for other good causes. It was error for the court to substitute its judgment for that of the factfinder regarding the weight of the evidence. Quick v. Bozeman School District No. 7, 1999 MT 175, 295 M 240, 983 P2d 402, 56 St. Rep. 682 (1999).

Employee Handbook — Adoption by Employer After Employee Began Work — Consideration Found in Continuation of Employment — Part of "Bargained" Contract — Gates Distinguished — Remand Unnecessary: After Langager went to work for Crazy Creek Products (CCP), CCP distributed an employee handbook that Langager felt changed the terms of her oral contract regarding earning and using paid vacation days by requiring that she be present to work immediately before and after a paid vacation. At a meeting of CCP employees that was held after distribution of the handbook, CCP supervisors asked if there were any comments from employees concerning the handbook. After Langager went on a 2-week vacation but was refused pay for her vacation weeks because she quit her job and was not at work the shift following her vacation, she filed an action to recover her wages earned while she was on vacation. The Supreme Court held that because Langager remained an employee at CCP after the handbook was distributed, there was sufficient consideration for the change in her contract represented by the handbook and that because employees were asked for their input concerning the handbook, the change in the employment contract represented by the handbook had been "bargained" for. In so holding, the Supreme Court distinguished Gates v. Life of Mont. Ins. Co., 196 M 178, 638 P2d 1063 (1982), in which an employee handbook was adopted many years after some employees commenced employment, was not bargained for, and constituted a unilateral amendment of an employment contract. The Supreme Court also held that since there was general evidence throughout the District Court record that the terms of the handbook were bargained for and that new consideration was given for the change, it was unnecessary, in response to CCP's argument that the District Court substituted its judgment for that of the Board of Personnel Appeals in violation of this section, to remand the case to the District Court. In re Wage Claim of Langager v. Crazy Creek Products, Inc., 1998 MT 44, 287 M 445, 954 P2d 1169, 55 St. Rep. 169 (1998).

Reviewing Court May Look Beyond Record During Judicial Review: In deciding whether the lower court erred in holding that the agency acted properly in making its decision, the Supreme Court stated that the standard of review for an informal agency decision is whether the agency's decision was arbitrary, capricious, or unlawful and that, in addition, unless the reviewing court looks beyond the record to determine what matters the agency should have considered, it is impossible for the court to determine if the agency took into consideration all relevant factors in reaching its decision. Skyline Sportsmen's Ass'n v. Bd. of Land Comm'rs, 286 M 108, 951 P2d 29, 54 St. Rep. 1326 (1997).

Summary Judgment Holding Board of Land Commissioners' Decision Approving Land Exchange Not Arbitrary, Capricious, or Unlawful Found Improper: The plaintiffs, various environmental groups, sought a preliminary injunction to prevent the exchange of certain properties during the pendency of their lawsuit challenging the action of the Board of Land Commissioners. The District Court denied the injunction and entered a summary judgment in favor of the Board, holding that the Board's decision to make the exchange was based on an adequate consideration of the requirements set forth in 77-2-203(2) and therefore was not arbitrary, capricious, or unlawful. The Supreme Court vacated and remanded the lower court's decision, finding that the plaintiffs had raised genuine issues of material fact, including whether the streams on the land to be given to the state have a significant public use value; whether a "potential to" provide significant public use value is equivalent to providing significant public use value; and the weight, if any, to be accorded an increase in stream mileage. The Supreme Court held that as a result of the material issues of fact raised by the plaintiffs, a material issue of fact also existed as to whether the Board's decision approving the proposed land exchange was arbitrary, capricious, or unlawful. Skyline Sportsmen's Ass'n v. Bd. of Land Comm'rs, 286 M 108, 951 P2d 29, 54 St. Rep. 1326 (1997).

Improperly Perfected Petition for Judicial Review of Administrative Decision Beyond Scope of Judicial Remedy: Following an administrative hearing, Davis was found delinquent on his child support obligation in the amount of $44,975. Davis filed a petition with the District Court naming the State of Montana and the Child Support Enforcement Division (CSED) as respondents, but CSED was not properly served with the petition. Davis requested that the court invalidate his divorce decree and support order because of fraud. The petition also made claims against persons who were not involved with the administrative action and sought money damages from the state. The District Court dismissed the petition, finding that the Court did not have the power to grant the relief sought by Davis and that the Montana Rules of Civil Procedure do not allow conversion of an appeal of an administrative decision into a lawsuit against the agency that made the decision. On appeal, the Supreme Court noted that Davis had the opportunity to appeal his original divorce decree or to request modification of the support provisions in the order, but instead of pursuing those remedies, he became delinquent in his support payments. The petition for judicial review of the administrative decision did not comply with 2-4-702 and this section and sought relief beyond that which a court could grant and was properly dismissed. In re Marriage of Davis, 277 M 188, 921 P2d 275, 53 St. Rep. 727 (1996).

Board's Rejection of Hearings Examiner's Findings Abuse of Discretion: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) denied Shodair's claim for reimbursement for certain psychiatric care on the basis that the treatment was not medically necessary. Shodair requested a hearing, and the hearings examiner entered findings denying the claim. The Department then appealed to the Board of Social and Rehabilitation Services Appeals (now Board of Public Assistance), which summarily reversed the hearings examiner's findings based on the "undisputed facts" of the record. The District Court reversed. The Supreme Court held that the Board abused its discretion because it could not reject or modify the hearings examiner's findings unless it stated with particularity that the findings were not based on competent substantial evidence. St. v. Shodair Hosp., 273 M 155, 902 P2d 21, 52 St. Rep. 879 (1995). See also St. Personnel Div. v. Child Support Investigators, 2002 MT 46, 308 M 365, 43 P3d 305 (2002).

Classification of Oil Refinery Equipment as Class Eight Property — Standard of Review: An industrial appraiser for the Department of Revenue properly classified and appraised as class eight property, rather than class four property, certain new oil refinery equipment, including a boiler house fuel gas manifold, cooling tower header improvements, a coal filter bed upgrade, three parts of a hydrocarbon loss recovery system, a plant air drier, an opticrom ADV gasoline chromatograph, a Grabner CCA-V, an alky unit KOH scrubber, two oxygen analyzers, asphalt product handling improvements, a crude truck unloading system for tank storage, a heavy product flash point tester, two spare fuel oil pumps, eight hydrogen sulfide and carbon dioxide monitors, a breathing air compressor, a manlift, and tank level gauges. Class eight property is

not limited to property used directly in a manufacturing process. Despite the fact that the District Court applied the "clearly erroneous" standard of review rather than the proper "correct interpretation" standard, the correct result was reached and the decision was affirmed on appeal. Farmers Union Cent. Exch., Inc. v. Dept. of Revenue, 272 M 471, 901 P2d 561, 52 St. Rep. 810 (1995), distinguishing United Grain v. Dept. of Revenue, 248 M 297, 811 P2d 555 (1991). See also Winchell v. Dept. of Natural Resources and Conservation, 1999 MT 11, 293 M 89, 972 P2d 1132, 56 St. Rep. 48 (1999).

Initial Agency Decision Subject to Judicial Review: As clarified in Baldridge v. Rosebud County School District No. 19, 264 M 199, 870 P2d 711 (1994), in multilevel proceedings and reviews under the Montana Administrative Procedure Act, the agency decision to be scrutinized on judicial review is that of the agency that issued the initial decision. Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

Standard of Review for Decisions of County Superintendents: Baldridge appealed his dismissal by the school board to the acting County Superintendent, Barrick. Barrick reinstated Baldridge, and the school board appealed to the State Superintendent, Keenan. Keenan reviewed Barrick's reinstatement order and remanded it to Barrick, with instructions to assess the credibility of witnesses testifying as to other incidents of wrongdoing by Baldridge. Barrick again reinstated Baldridge in an order much the same as the first order. The school board again appealed. In the second review, Keenan stated that Barrick had acted in an arbitrary and capricious manner in reinstating Baldridge when the transcript indicated that there was sufficient evidence to reach a conclusion that the board had a standard of good cause for dismissal. Baldridge appealed to the District Court, which affirmed Keenan on the basis that the State Superintendent had found that good cause existed for Baldridge's dismissal. The Supreme Court held that Barrick had not set out sufficient findings of fact for her conclusions, as required by statute and rule. The Supreme Court stated that Keenan's standard of review was whether or not the findings were sufficient to support the County Superintendent's conclusions. If the findings were not sufficient, then the State Superintendent's only proper recourse was to again remand the case with instructions to set out more fully a statement of facts in support of the County Superintendent's conclusions. Keenan was in error in interpreting the facts to see if there was a standard of good cause to support the board's dismissal of Baldridge. The Supreme Court also held that the lower court was in error in supporting Keenan's finding of good cause for termination and that the lower court was also limited to determining if the findings of fact reached by the County Superintendent were sufficient to support her conclusions. Baldridge v. Rosebud County School District No. 19, 264 M 199, 870 P2d 711, 51 St. Rep. 166 (1994).

Failure to Provide Adequate Grounds for Rejecting Hearing Examiner's Determination of Witness Credibility: The District Court held that the Board of Nursing failed to provide adequate grounds for rejecting the hearing examiner's determinations of the credibility of witnesses. The Board asserted that this section prohibits not only the court but the hearing examiner from making any judgment that is binding on the Board as to the weight of witness testimony. However, the hearing examiner had the best opportunity to judge the credibility of the witnesses. The District Court did not err in finding that the Board's review of the hearing examiner's proposed findings was substantially impaired by the Board's improper rejection of the examiner's opinion. Brackman v. Bd. of Nursing, 258 M 200, 851 P2d 1055, 50 St. Rep. 497 (1993). Petition for rehearing denied, 258 M 200, 851 P2d 1055, 50 St. Rep. 501A (1993). Brackman followed in Moran v. Shotgun Willies, Inc., 270 M 47, 889 P2d 1185, 52 St. Rep. 71 (1995). See also In re Grievance of Brady, 1999 MT 153, 295 M 75, 983 P2d 292, 56 St. Rep. 600 (1999).

Holding That Statute Elaborates on Standard of Judicial Review of Unemployment Insurance Benefits Claim Overturned: The Supreme Court overturned that portion of the decision in Slayter v. Employment Sec. Div., 208 M 166, 676 P2d 220 (1984), that held that this section elaborates on the judicial review provisions of the unemployment insurance laws. Schneeman v. Dept. of Labor and Industry, 257 M 254, 848 P2d 504, 50 St. Rep. 256 (1993).

Applicability of Attorney-Client Privilege to Inadvertently Released Documents: Pacificorp inadvertently produced eight documents during discovery that it claimed were subject to the attorney-client privilege. The Supreme Court held that Pacificorp took immediate steps to protect its privilege upon learning of the inadvertent disclosure and that therefore it had not relinquished its rights. Because the privileged documents might have contributed to the decision, the lower court erred in allowing the State Tax Appeal Board to consider the documents. Pacificorp v. Dept. of Revenue, 254 M 387, 838 P2d 914, 49 St. Rep. 774 (1992).

Statutory Due Process Safeguards for Police Officers Met — Continuance Properly Denied: Ex-wife served a citizen's complaint with the police department against her former husband

Wong, a police officer, alleging an ongoing pattern of harassment against herself, her babysitters, certain friends, and others that took place while Wong was on duty. A formal complaint alleging 39 charges was served on Wong 22 days before the police commission hearing was scheduled to begin. Following problems in retaining counsel, Wong moved for a continuance before the hearing, but the motion was denied. Wong subsequently appeared at the hearing pro se. The District Court held that the notice for hearing was statutorily sufficient but that the commission's denial of a continuance was arbitrary, capricious, and an abuse of discretion that denied Wong of procedural due process. The District Court reversed and remanded for another hearing based on the commission's failure to grant a continuance. The Supreme Court reversed the lower court after finding that the statutory safeguards for police officers were met, including provision of proper notice and a hearing at which Wong appeared and presented witnesses in his defense. Wong's appearance without counsel was due to his own actions. Denial of the continuance was not error. In re Termination of Wong v. Billings, 252 M 111, 827 P2d 90, 49 St. Rep. 158 (1992).

"Clearly Erroneous" Test Applicable to Review of Agency Decision: In reviewing the findings of a trial court sitting without a jury, the Supreme Court will apply the following three-part test to determine if the trial court's findings on an agency decision are clearly erroneous: (1) the record will be reviewed to see if the findings are supported by substantial evidence; (2) if the findings are supported by substantial evidence, it will be determined whether the trial court misapprehended the effect of evidence; and (3) if substantial evidence exists and the effect of evidence has not been misapprehended, the Supreme Court may still decide that a finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed. St. Comp. Mut. Ins. Fund v. Lee Rost Logging, 252 M 97, 827 P2d 85, 49 St. Rep. 102 (1992), following Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285, 48 St. Rep. 986 (1991), overruling any conflicting standard delineated in Billings v. Billings Firefighters Local No. 521, 200 M 421, 651 P2d 627 (1982), and followed in Synek v. St. Comp. Mut. Ins. Fund, 272 M 246, 900 P2d 884, 52 St. Rep. 651 (1995), Weitz v. Dept. of Natural Resources and Conservation, 284 M 130, 943 P2d 990, 54 St. Rep. 807 (1997), Waste Management Partners of Bozeman, Ltd. v. Dept. of Public Service Regulation, 284 M 65, 944 P2d 210, 54 St. Rep. 866 (1997), and Total Mechanical Heating & Air Conditioning v. Employment Relations Div., 2002 MT 55, 309 M 84, 50 P3d 108 (2002). See also St. Personnel Div. v. Child Support Investigators, 2002 MT 46, 308 M 365, 43 P3d 305 (2002).

Director's Rejection of Grievance Committee Recommendations Without Further Hearing or Review of Complete Record — Abuse of Discretion: The unanimous recommendations of a grievance committee were passed along to the Director of the Department of Institutions, who rejected two of the committee's factual findings without conducting an additional hearing or receiving any additional evidence. Arbitrary rejection of the findings by the Director, who neither heard nor personally observed the testimony, without a review of the complete record, as required in 2-4-621, was an abuse of discretion within the meaning of this section. Brander v. Dept. of Institutions, 247 M 302, 806 P2d 530, 48 St. Rep. 207 (1991), followed in Brackman v. Bd. of Nursing, 258 M 200, 851 P2d 1055, 50 St. Rep. 497 (1993), and Moran v. Shotgun Willies, Inc., 270 M 47, 889 P2d 1185, 52 St. Rep. 71 (1995). See also In re Grievance of Brady, 1999 MT 153, 295 M 75, 983 P2d 292, 56 St. Rep. 600 (1999).

Standards of Judicial Review:

In reviewing a state agency's conclusions of law under this section, the standard is to determine if the state agency's interpretation of the law is correct, rather than the former, and inappropriate, abuse of discretion standard. Steer, Inc. v. Dept. of Revenue, 245 M 470, 803 P2d 601, 47 St. Rep. 2199 (1990), followed in GBN, Inc. v. Dept. of Revenue, 249 M 261, 815 P2d 595, 48 St. Rep. 715 (1991), Tokumoto v. Dept. of Revenue, 264 M 56, 869 P2d 782, 51 St. Rep. 144 (1994), and Baldridge v. Rosebud County School District No. 19, 264 M 199, 870 P2d 711, 51 St. Rep. 166 (1994), which also clarifies Throssel v. Bd. of Trustees, 248 M 392, 812 P2d 767 (1991), and Weitz v. Dept. of Natural Resources and Conservation, 284 M 130, 943 P2d 990, 54 St. Rep. 807 (1997). Steer, Inc., was also followed in Phoenix Physical Therapy v. Unemployment Ins. Div., 284 M 95, 943 P2d 523, 54 St. Rep. 791 (1997), Waste Management Partners of Bozeman, Ltd. v. Dept. of Public Service Regulation, 284 M 65, 944 P2d 210, 54 St. Rep. 866 (1997), Ulrich v. State ex rel. Bd. of Funeral Serv., 1998 MT 196, 289 M 407, 961 P2d 126, 55 St. Rep. 822 (1998), and Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999). See also Prairie County Co-op St. Grazing District v. Kalfell Ranch, Inc., 269 M 117, 887 P2d 241, 51 St. Rep. 1488 (1994).

The standards for judicial review of a determination by an administrative agency are set forth in this section. Findings of fact by an administrative agency are subject to the clearly erroneous standard of review. P.W. Berry Co., Inc. v. Freese, 239 M 183, 779 P2d 521, 46 St. Rep. 1605 (1989).

Overtime Wage Claim — Inadequate Facts — Reversal of Default Judgment in Error: When the District Court was not adequately informed as to reasons for respondent's failure to respond to the Department of Labor's notice, it was error for the court to set aside the Department's default judgment. Under this section, the District Court should have remanded the case back to the Department for further factfinding and decision relative to the default. Smail v. Al's Sales, Inc., 245 M 18, 797 P2d 235, 47 St. Rep. 1808 (1990).

Insufficient Findings to Be Remanded: The District Court ruled that the findings of the hearing examiner for the Department of Labor and Industry were incorrect and substituted its findings for those of the agency. The Supreme Court held that it was reversible error to fail to remand the case to the Department for suitable findings of fact. Stewart v. Region II Child & Family Serv., 242 M 88, 788 P2d 913, 47 St. Rep. 572 (1990).

Termination Procedures Not Followed — Termination Upheld on Other Grounds: The school trustees decided, prior to any hearing, to terminate a tenured teacher due to lack of funds. The Supreme Court agreed that the termination violated the statutory procedures but upheld the trustees' action because the firing was for economic reasons and did not reflect on the personal qualifications of the teacher. Birrer v. Trustees, 241 M 262, 786 P2d 1161, 47 St. Rep. 247 (1990).

Standard of Review Applicable to Noncontested Cases — Approval of Plan for Drilling Exploratory Well: The District Court incorrectly applied the "clearly erroneous" standard set out in this section when reviewing whether the Department of State Lands (now Department of Environmental Quality) properly approved a plan proposing drilling of an exploratory well on a leased tract near Glacier Park. The court found that shortcomings in the approval procedure, coupled with the fact that information gathered by the Department indicating that the well would generate a significant environmental impact, necessitated preparation of an environmental impact statement. However, this section was inapplicable because the case was not truly contested. No hearing was requested or held before the Department, there was no action initiated until after the Department had approved the operating plan, and there was no evidentiary record against which to measure the Department's decision and determine whether it was clearly erroneous. Rather, the proper standard of review was whether the record established that the Department acted arbitrarily, capriciously, or unlawfully. The fact that the Department conducted two preliminary environmental reviews, conditioned approval on 42 protective stipulations, and considered the concerns raised in the approval process and took significant steps to address them indicated that the decision to forego preparation of an environmental impact statement was not arbitrary, capricious, or illegal. N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862, 46 St. Rep. 1409 (1989), distinguishing Conner v. Burford, 605 F. Supp. 107 (D.C. Mont. 1985), and followed in Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995), Mont. Envtl. Information Center, Inc. v. Dept. of Transportation, 2000 MT 5, 298 M 1, 994 P2d 676, 57 St. Rep. 18 (2000), and Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000), in which omission of a cumulative impact analysis was directly related to the "unlawful" portion of the MEPA standard of review. See also Winchell v. Dept. of Natural Resources and Conservation, 1999 MT 11, 293 M 89, 972 P2d 1132, 56 St. Rep. 48 (1999), and Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

Issuance of License — Off-the-Record Site Visit Improper: After an administrative hearing, the Director of the Department of Revenue awarded a beer and wine license to one of two parties after unannounced site visits to the premises of each party. On appeal, the District Court overruled the Director's decision and reinstated the order of the hearing examiner, which proposed award of the license to the other party. The Supreme Court affirmed the District Court's order vacating the Director's order because it was founded on an unlawful procedure that violated the appellant's due process interests. Whether the conduct prejudiced both contenders' rights equally is irrelevant. Lack of prior notice, coupled with lack of any documentation, is fatal to an ordinarily permissible inspection. This type of conduct under a Montana Administrative Procedure Act proceeding violates certain other safeguards built in by statute: the right to respond and present evidence and argument on all relevant issues and the right to conduct a cross-examination sufficient for full and true disclosure of facts. However, the trial judge erred in ordering the adoption of the hearing examiner's proposal. This was not an alternative authorized

by statute. The case was remanded to the Department for final determination. Frascell, Inc. v. St., 235 M 152, 766 P2d 850, 45 St. Rep. 2267 (1988).

Remand of Teacher Tenure Question — Collective Bargaining Agreement Admissible: After finding a collective bargaining agreement to be admissible on the question of teacher tenure, the District Court abused its discretion in not remanding the case to the County Superintendent for resolution of the issue of tenure rights. Beck v. Bd. of Trustees, 233 M 319, 760 P2d 83, 45 St. Rep. 1520 (1988).

Structured Interviews Not Sole Determination of Teacher Competence When Other Means Available: The District Court improperly substituted its judgment for a finding by the State Superintendent of Public Instruction that the school district board of trustees failed to prove a tenured teacher was incompetent. The board relied solely on the teacher's performance in four structured interviews but failed to consider 13 years of satisfactory classroom evaluations. Bd. of Trustees v. Anderson, 232 M 501, 757 P2d 1315, 45 St. Rep. 1232 (1988).

Inclusion of Tax Deferrals in Stock and Debt Indicator: The State Tax Appeal Board (STAB) found that a tax deferral account was a true liability. The District Court reversed after finding the account was merely an accounting device that reflected value owed on the books but could not be included under ARM 42.22.113 because it was neither an instrument traded on the financial market nor a true liability as required by the regulation. The Supreme Court reversed the decision as an incorrect substitution of the trial court's judgment for that of STAB on a question of fact, holding that the District Court should not have interpreted the Department's regulation so narrowly as to frustrate the mandate for finding market value. Further, use of the words "outstanding debt" in the regulation was sufficiently comprehensive to include an account that must serve to offset the loss of depreciation deductions that may be experienced in the future. Puget Sound Power & Light Co. v. Dept. of Revenue, 232 M 314, 761 P2d 336, 45 St. Rep. 1078 (1988).

Offset of Jury Award — Pretrial Agreement: Parties agreed prior to trial that any amount awarded by the jury for lost wages would be offset by the amount of the grievance panel award and the amount of unemployment benefits received. Therefore, the District Court properly reduced a jury award of $850 by the grievance panel award of $671.05 and unemployment compensation of $178.95. Myers v. Dept. of Agriculture, 232 M 286, 756 P2d 1144, 45 St. Rep. 1056 (1988).

Award of Teacher's Backpay — Income of Second Job Not Offset: Income earned at a second job should not offset an award of backpay for a teacher unless it can be shown that the recipient of the award would have been unable to hold the second job at the same time as the job for which he is receiving backpay. Harris v. Bauer, 230 M 207, 749 P2d 1068, 45 St. Rep. 147 (1988).

Presentation of Additional Evidence in Contested Cases: Under 2-4-703, when the court has allowed additional evidence, it may be presented to the agency but not to the court. This limitation accords with the standard of review of contested MAPA cases under this section, which confines court review to the record. O'Neill v. Dept. of Revenue, 227 M 226, 739 P2d 456, 44 St. Rep. 1037 (1987).

Review of STAB Decision — Additional Evidence: When additional evidence is presented during review of a STAB decision under 15-2-303, such evidence may be introduced before the court rather than the agency. Findings of fact and conclusions of law are then required to be made by the court. If the court does not permit or receive additional evidence, written findings and conclusions by the court are not required. Hi-Line Radio Fellowship v. Dept. of Revenue, 227 M 150, 737 P2d 886, 44 St. Rep. 955 (1987).

Tuition Transfer — School Board Decision Improperly Reversed — Reviewing Agency Analysis: It was improper for the State Superintendent of Public Instruction to reverse school board denial of a tuition transfer by including findings that were not part of the record, were irrelevant, or were conjectures or conclusions rather than facts. Findings of the reviewing agency may not be properly included as facts when they are not part of the record below, and the reviewing agency must confine itself to an analysis of whether the findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or whether they are arbitrary, capricious, or characterized by abuse of discretion. Frazer School District v. Flynn, 225 M 299, 732 P2d 409, 44 St. Rep. 248 (1987). This holding is dispositive of a later appeal in a companion case, Frazer School District v. Forsness, 226 M 244, 734 P2d 1218, 44 St. Rep. 624 (1987).

Ambiguous Statutory Interpretation — Agency Interpretation Rejected as Leading to Absurd Results: Where the grandfather clause for licensure of used video poker machines was found susceptible to two interpretations and the agency implementing the statute chose an interpretation that would lead to absurd results, rejection by the District Court of the agency

interpretation was proper. Further, evidence gleaned by court examination of the legislative history to determine legislative intent was properly admitted when the intent could not be determined from the statutory language. Mont. Tavern Ass'n v. St., 224 M 258, 729 P2d 1310, 43 St. Rep. 2180 (1986).

Appellant's Burden of Showing Prejudice: Appellant has the burden of showing prejudice from a clearly erroneous decision. Carruthers v. Bd. of Horse Racing, 216 M 184, 700 P2d 179, 42 St. Rep. 729 (1985), followed in Terry v. Bd. of Regents 220 M 214, 714 P2d 151, 43 St. Rep. 304 (1986) and in Hoven, Vervick, & Amrine, P.C. v. Comm'r of Labor, 237 M 525, 774 P2d 995, 46 St. Rep. 1024 (1989).

District Court Reversal of Board of Nursing Decision Upheld: White was refused licensing by endorsement under 37-8-417 (now repealed) by the Board of Nursing (Board) because although he was licensed as a practical nurse by New York State, he had not graduated from a practical nursing school. Instead, as is permitted in New York, he had taken the licensed practical nurse examination after completion of a substantial portion of a registered nursing program. The Supreme Court affirmed the District Court's ruling that the Board must issue the license. The Board's interpretation of 37-8-415 is hypertechnical. Section 37-8-415 should be interpreted to mean the applicant's education has been approved and authorized by the state in which he has been licensed. Further, the Board's interpretation defeats the intention of the Legislature as expressed in 37-8-101(2). In re White, 220 M 36, 712 P2d 1344, 43 St. Rep. 151 (1986).

State Tax Appeal Board — Standard of Review: The District Court, as a reviewing court, may reverse or modify the decisions of the State Tax Appeal Board and remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record. The same is true for actions of the Board found to be arbitrary, capricious, or characterized by an abuse of discretion. Dept. of Revenue v. Grouse Mtn. Dev., 218 M 353, 707 P2d 1113, 42 St. Rep. 1642 (1985). (But see case note on Steer, Inc. v. Dept. of Revenue, under above catchline "Standards of Judicial Review".) Further, reversal or modification of a STAB decision may be warranted if substantial rights of the appellant have been prejudiced because findings of fact, upon issues essential to the decision, were not made, although requested. Devoe v. Dept. of Revenue, 233 M 190, 759 P2d 991, 45 St. Rep. 1414 (1988).

Oral Argument Not Heard — No Request in Record: The District Court did not err in reaching a decision without hearing oral argument when the record on appeal did not reflect a request for oral argument. The court's decision reflected a review of the record. Carruthers v. Bd. of Horseracing, 216 M 184, 700 P2d 179, 42 St. Rep. 729 (1985).

Human Rights Commission Award of Backpay Contrary to Legal Conclusion of Hearing Examiner: It was not error for the Montana Human Rights Commission to award backpay when the hearing examiner, as a matter of law, refused to do so. After reviewing the record, the Commission may, under 2-4-621, reject or modify an examiner's conclusions of law. The Commission also has the authority under 49-2-506 to use its discretion to rectify harm done a person discriminated against. European Health Spa v. Human Rights Comm'n, 212 M 319, 687 P2d 1029, 41 St. Rep. 1766 (1984).

District Court's Finding of Fact Different From Agency's — Restatement by Judge of Unclear Agency Finding: The District Court's findings of fact appeared to conflict with the administrative agency's hearing examiner's findings of fact, thus exceeding the standards of judicial review set forth in this section, but a reading of the record disclosed that the hearing examiner's finding was not clearly stated. The District Court acted correctly when it merely translated the hearing examiner's finding of fact without substituting its judgment for that of the agency on the weight of the evidence on questions of fact. In re the Wage Appeal of Highway Patrol Officers v. Bd. of Personnel Appeals, 208 M 33, 676 P2d 194, 41 St. Rep. 154 (1984).

MAPA Inapplicable to Pre-1977 County School Superintendent Decision — Substantial Evidence: Plaintiff was terminated from her tenured teaching position by the County Board of Trustees in 1977. The decision was reviewed and upheld by the County Superintendent of Schools, the State Superintendent of Public Instruction, and the District Court. On appeal to the Supreme Court, plaintiff contended that the County Superintendent had not complied with the Montana Administrative Procedure Act (MAPA) since he failed to include statements of underlying facts supporting his findings and failed to rule on plaintiff's proposed findings. The Supreme Court noted that MAPA was made applicable to school districts by a 1977 amendment. The court, relying on sec. 26, Ch. 2, Ex. L. 1971, which provided that the adoption of MAPA would not affect pending proceedings, held that MAPA did not apply to this case, which was begun prior to the 1977 amendment. The court determined that the school district's decision was supported

by substantial evidence and was not clearly erroneous, the standard for review under 2-4-704. Donnes v. State ex rel. Supt. of Pub. Instruction, 206 M 530, 672 P2d 617, 40 St. Rep. 1834 (1983).

District Court Order Granting Relief Beyond Issues Addressed by Administrative Agency: Where the District Court reversed an order of the Office of Public Instruction (OPI) and found that the plaintiff was a teacher subject to the tenure laws of the state, the Supreme Court found on appeal that the District Court erred in that its order went beyond the scope of the issues determined in the OPI order. The Superintendent of Public Instruction did not address the issue of the reinstatement of the plaintiff or award him backpay, and the District Court can review only those issues determined by the agency. The District Court should have reversed the Superintendent on the issue of teacher tenure and remanded the case for negotiations between the plaintiff and the school district. Harris v. Bauer, 206 M 480, 672 P2d 26, 40 St. Rep. 1793 (1983).

Methodology of Determination Substantiated by Record — Failure to Object in Administrative Proceeding: The Public Service Commission (P.S.C.) did not commit error in the application of the "rate of return" methodology, rather than the "market value" methodology, in determining the reasonableness of contract cost for the purchase of coal by the Montana Power Company (MPC) from a wholly-owned subsidiary. While the Supreme Court stated a preference for the "market value" methodology in Montana-Dakota Util. Co. v. Bollinger, 193 M 508, 632 P2d 1086 (1981), the court did not prohibit the P.S.C. from using a different methodology if the evidence warrants its use. In this case, the evidence introduced by the P.S.C. was not challenged by MPC. Rather, MPC seeks to do so for the first time on appeal. Limited review of the administrative record is appropriate, and that record supports the findings of the Commission. Mont. Power Co. v. Dept. of Public Service Regulation, 204 M 224, 665 P2d 1121, 40 St. Rep. 805 (1983).

Union Contract as Implied Part of Employment Relationship: Bishop was hired by petitioner to be head of his wine department. The specifics of the employment were not discussed. Bishop was given a copy of a union contract covering other employees although he was not a union member. After his discharge, Bishop filed a wage claim with the Department of Labor and Industry. The hearings officer found the union contract to be the best indicator of the employment relationship and awarded back wages. The District Court reversed, saying there was no mutual consent as to overtime or holiday pay. On appeal, the Supreme Court reinstated the hearing officer's findings because they were supported by substantial evidence. There were a number of correlations between the parties' actual conduct and the union contract. The union contract was held to be an implied part of the employment relationship between Bishop and the petitioner. Bronken's Goodtime Co. v. Bishop, 201 M 360, 664 P2d 292, 39 St. Rep. 2165 (1982).

Agency Factual and Legal Decisions — Clarification of Standard of Review: The standard of review to be applied to findings of fact by an agency is whether they are "clearly erroneous". Factual findings will be upheld if supported by substantial credible evidence. If there is substantial credible evidence in the record, the findings are not "clearly erroneous". If the record supports the factual determinations of the agency, the reviewing court may not weigh the evidence but is bound by the agency's findings. Billings v. Billings Firefighters Local No. 521, 200 M 421, 651 P2d 627, 39 St. Rep. 1844 (1982), and overruled with regard to any inconsistencies to the standard set out in St. Comp. Mut. Ins. Fund v. Lee Rost Logging, 252 M 97, 827 P2d 85, 49 St. Rep. 102 (1992), and followed in Stansberry v. Argenbright, 227 M 123, 738 P2d 478, 44 St. Rep. 935 (1987), Hammerquist v. Employment Sec. Div., 230 M 347, 749 P2d 535, 45 St. Rep. 261 (1988), Swan Corp. v. Dept. of Revenue, 232 M 210, 755 P2d 1388, 45 St. Rep. 998 (1988), Dept. of Revenue v. Gallatin Outpatient Clinic, Inc., 234 M 425, 763 P2d 1128, 45 St. Rep. 2025 (1988), Ramage v. Dept. of Revenue, 236 M 69, 768 P2d 864, 46 St. Rep. 187 (1989), W.R. Grace & Co. v. Dept. of Revenue, 238 M 439, 779 P2d 470, 46 St. Rep. 1399 (1989), and in V.K. Putnam, Inc. v. McFarlane, 239 M 300, 779 P2d 905, 46 St. Rep. 1699 (1989).

Grandfather Clause — Supervisory Personnel Allowed to Remain in Unit — Two-Part Test: The city of Billings and its firefighters' union requested the Board of Personnel Appeals (BPA) to conduct a hearing to clarify the membership of the bargaining unit. At issue was whether Local No. 521, the bargaining unit since 1968, fell within the grandfather clause of 39-31-109, or whether the unit contained supervisory personnel in violation of 39-31-201. The hearing officer recommended an order concluding the unit fell within the grandfather clause's protection. The city appealed the recommendation to the BPA. The BPA remanded the case to use a two-part test: (1) a determination of the nature of each position; and (2) whether the inclusion of the position would create an actual substantial conflict. The BPA then adopted the recommended order. The city appealed to the District Court, which overturned the decision, finding it to be arbitrary and capricious because inclusion of supervisory personnel in the unit created an inherent conflict. On appeal, the Supreme Court held that BPA's interpretation of 39-31-109 was

rational and did not involve an abuse of discretion. (But see case note on Steer, Inc. v. Dept. of Revenue, under above catchline "Standards of Judicial Review".) The decision recognized a violation of 39-31-201, but in light of 39-31-109, the two-part test applied by BPA was a rational approach for determining unit membership. The hearing officer's findings relating to each position were supported by substantial credible evidence. There was no arbitrary or capricious action. The order of the BPA was reinstated. Billings v. Billings Firefighters Local No. 521, 200 M 421, 651 P2d 627, 39 St. Rep. 1844 (1982).

Unfair Labor Practice — Statute of Limitations Not a Rule of Evidence: Carlson, an animal warden employed by defendant, was terminated allegedly because of insubordination and noncooperation resulting from an incident involving a schnauzer and because of earlier noncooperation. Carlson filed an unfair labor practice complaint with the Board of Personnel Appeals (BPA) alleging that the actual reason for her termination was her union activity. BPA ruled in favor of Carlson and ordered her reinstated with backpay. On appeal, the District Court reversed on the basis of unlawful procedure, contending that BPA gave primary weight to incidents occurring more than 6 months prior to the filing of Carlson's claim in violation of 29-31-404. The Supreme Court held that 39-31-404 requires an employee to file a charge within 6 months after an alleged unfair labor practice; it does not forbid the introduction of relevant evidence bearing on the issue of whether a violation has occurred during the 6-month period. Bd. of Personnel Appeals v. Billings, 199 M 302, 648 P2d 1169, 39 St. Rep. 1414 (1982).

Environmental Impact Statements — Scope of Appellate Review of Findings of Sufficiency of Statement: The Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate of environmental compatibility and public need under the Montana Utility Siting Act of 1973 (now the Montana Major Facility Siting Act of 1975) for the construction of several powerlines, following the completion of an environmental impact statement under the Montana Environmental Policy Act. The Supreme Court refused to apply a de novo standard of review of the District Court's finding that the impact statement was sufficient. The court held that the correct scope of appellate review of agency decisions was stated in N. Plains Resources Council v. Bd. of Natural Resources and Conserv., 181 M 500, 594 P2d 297 (1979), to be whether the agency's decision was clearly erroneous in light of substantial evidence on the whole record. Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv., 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

Unfair Labor Practice — Scope of Judicial Review Exceeded: A decision by the Board of Personnel Appeals found that the refusal of a school district to arbitrate whether the procedural steps for nonrenewal of a nontenured teacher were followed was a breach of the collective bargaining agreement and constituted an unfair labor practice. On appeal, the District Court went on to decide the broader issue of whether the school district was required to arbitrate the substantive basis of nontenured teacher renewal. The District Court exceeded the proper scope of judicial review. Savage Pub. Schools v. Savage Educ. Ass'n, 199 M 39, 647 P2d 833, 39 St. Rep. 1192 (1982).

Agency Default Does Not Suspend Standard of Review: The Department of Revenue audited respondent's corporate license tax returns and assessed additional taxes. Respondent protested the assessment and appealed to the State Tax Appeal Board (STAB). After a hearing, STAB affirmed the Department's decision. Respondent filed for judicial review of the STAB decision in District Court. Respondent mailed a copy of the summons and petition to the attorney who represented the Department at the hearing and to STAB. The respondent received a default judgment and a reversal of STAB's final order. Separate standards of review for STAB decisions are not provided, with the exception of 15-2-303 which states that the District Court may permit additional evidence notwithstanding 2-4-704. The District Court reversed STAB's determination and granted the relief requested by respondent based on the Department's failure to answer and appear. The failure to appear does not suspend the standard of review. The District Court was not entitled to enter a default judgment reversing STAB without reviewing the record and complying with the standard of review contained in 2-4-704. Dept. of Revenue v. Davidson Cattle Co., 190 M 326, 620 P2d 1232, 37 St. Rep. 2074 (1980).

Findings to Be Proposed: A surveyor whose license was revoked contended that the hearings examiner failed to make proper findings of fact. The findings made by the hearings examiner were supported by the evidence presented. Findings raised on appeal were not included in proposed findings at the hearing level. The findings not having been requested, the Supreme Court could not rely on them to overturn the license revocation. In re Shaw, 189 M 310, 615 P2d 910 (1980).

Workers' Compensation — Factual Findings:
Where there is sufficient credible evidence in the record to support the decision of the workers' compensation court, the Supreme Court on appeal is bound by the workers' compensation court's decision on the facts. Catteyson v. Glacier Gen. Assurance Co., 183 M 284, 599 P2d 341 (1979), following McGee v. Becktel Corp., 182 M 149, 595 P2d 1156 (1979).

The findings and conclusions of the workers' compensation court, like those of District Courts, may not stand if there is a preponderance of the evidence against them when viewed in the light most favorable to the prevailing party. The findings of fact will not be set aside unless they are clearly erroneous. However, the Supreme Court is in as good a position to judge record testimony, as opposed to oral testimony, as the trial court. Hert v. Lumberman Mut. Cas. Co., 178 M 355, 584 P2d 656 (1978), clarified and rehearing denied in Hert v. Lumberman Mut. Cas. Co., 179 M 160, 587 P2d 11 (1978). Hert was held to no longer be authority for admissibility of medical records, in light of the 1990 adoption of ARM 24.5.317, in Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Burden of Appellant: The burden resting on an appealing party to a District Court from an agency decision is a substantial one. N. Plains Resource Council v. Bd. of Natural Resources & Conservation, 181 M 500, 594 P2d 297 (1979).

Legality of Banking Board Rule — Issue to Be Raised Before Agency: There was no merit to appellant's challenge to the validity of the State Banking Board's rulemaking process. Furthermore, such a question must have been raised first before the administrative agency unless there was good cause for failure to do so. W. Bank of Billings v. St. Banking Bd., 174 M 331, 570 P2d 1115 (1977), followed in In re Sorini, 220 M 459, 717 P2d 7, 43 St. Rep. 526 (1986).

FINDING OF SUBSTANTIAL CREDIBLE EVIDENCE

Board Modification of Hearings Examiner Findings Warranted Regarding Classification of Child Support Enforcement Investigators: Under St. v. Shodair Hosp., 273 M 155, 902 P2d 21 (1995), and this section, a reviewing court may reverse a decision by the Board of Personnel Appeals if it was arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. Here, the Board properly rejected a portion of a hearings examiner's findings that 80% of child support enforcement investigators' work involved case monitoring, and, absent substantial evidence, it was error for a District Court to find that the Board's rejection was improper. Further, the Board was correct in concluding that the hearings examiner mistakenly omitted the investigators' proposed findings regarding establishment duties, and the District Court erred in holding that the Board's modified findings failed to reflect the investigators' predominant duties under the predominant duty rule. St. Personnel Div. v. Child Support Investigators, 2002 MT 46, 308 M 365, 43 P3d 305 (2002).

Agency's Findings of Fact — Not Overturned Unless Clearly Erroneous: The plaintiff sued the defendant for past wages and overtime. The defendant argued that no overtime was owed on the grounds that the plaintiff was an executive employee as set out in ARM 24.16.201. The Department of Labor and Industry determined that the plaintiff was not an executive employee and was entitled to overtime pay. The Supreme Court ruled that the Department's findings were supported by substantive evidence and therefore could not be overturned by the District Court. Holbeck v. Stevi-West, Inc., 240 M 121, 783 P2d 391, 46 St. Rep. 1990 (1989), followed in Searight v. Howell, 248 M 122, 809 P2d 588, 48 St. Rep. 370 (1991). See also St. v. Shodair Hosp., 273 M 155, 902 P2d 21, 52 St. Rep. 879 (1995).

"Liquor" to Include Table Wine — Fine for Possession of Untaxed Table Wine Affirmed: A $1,500 fine was properly assessed against an all-beverages licensee found in possession for sale of table wine upon which no Montana tax had been paid, because the wine came within the definition of "liquor" as the term was used in 16-6-301 prior to 1987 amendment. The District Court was constrained by this section to affirm the penalty, absent a showing of abuse of discretion by the Department of Revenue. (But see case note on Steer, Inc. v. Dept. of Revenue, under above catchline "Standards of Judicial Review".) Swan Corp. v. Dept. of Revenue, 232 M 210, 755 P2d 1388, 45 St. Rep. 998 (1988).

Findings of Fact Not Requested by Appellant — Standard of Review: An order transferring territory from one elementary district to another did not contain a finding that the four elements of a valid petition listed in 20-6-213 (now repealed) were met, nor did the order contain findings that the transfer was in the best interests of the residents of the affected territory. Although 2-4-623 requires that a final decision in a contested case must include findings of fact, the Supreme Court found substantial credible evidence supporting the transfer, including unanimous favorable testimony from residents of the affected territory. Additionally, the court noted that appellants failed to request findings of fact from the County Superintendent or the

Board of County Commissioners and that such failure barred court reversal for lack of factfindings, pursuant to 2-4-704(2)(g). Bd. of Trustees, Clinton School District v. Bd. of Trustees, Bonner School District, 221 M 341, 719 P2d 1240, 43 St. Rep. 877 (1986).

Determining Property Value — Function of Administrative Body: In considering the decision of the State Tax Appeal Board relating to the method of determining the taxable valuation of the respondents' golf course, the District Court overstepped its bounds when it usurped the function of the administrative body and determined the value of the property. Dept. of Revenue v. Grouse Mtn. Dev., 218 M 353, 707 P2d 1113, 42 St. Rep. 1642 (1985).

Employment Discrimination Complaint — Exhaustion of Administrative Remedies: Petitioner filed a sex discrimination complaint with the Montana Human Rights Commission. The Commission's hearings officer recommended that the petition be dismissed. The petitioner filed written exceptions to the hearings officer's finding that gender was a bona fide occupational qualification (BFOQ) but not to the findings of facts as to damages. The Commission found petitioner was unlawfully discriminated against and ordered payment of lost salary. Petitioner petitioned for judicial review on amount of damages, and school district petitioned for judicial review of BFOQ issue. The District Court denied the petition for judicial review of petitioner on the grounds that petition had failed to exhaust administrative remedies. On appeal, the Supreme Court held that petitioner did exhaust administrative remedies by raising two issues of error in his petition for judicial review even though only one of those issues was raised in petitioner's written exceptions to the administrative hearings officer's findings. The incorporation by reference of damages was sufficient to bring the issue before the Commission. The Supreme Court affirmed the District Court's reversal of the Commission on the issue of BFOQ and the District Court's order to vacate findings and dismiss the charge of sex discrimination. The Supreme Court held there was substantial credible evidence to support the District Court's finding of a substantial privacy issue making gender a BFOQ for the school guidance counselor position. Stone v. Belgrade School District, 217 M 309, 703 P2d 136, 41 St. Rep. 2436 (1984).

Reasonable Diligence in Seeking Interim Employment: Once the Board of Personnel Appeals has established the amount of backpay owed a wrongfully discharged employee, the burden is upon the employer to produce evidence to mitigate its liability. Here, the evidence of Young's job-hunting efforts and the detrimental effect of weather and economic conditions on the job market were uncontroverted. The City did not demonstrate how the available evidence could reasonably be interpreted as indicative of indifference, insincerity, or slothfulness on Young's part in his search for employment. There is substantial evidence to support the finding of the Board that Young had exercised reasonable diligence. Great Falls v. Young, 211 M 13, 686 P2d 185, 41 St. Rep. 1174 (1984).

Public Service Commission Methodology of Rate Structure:

The Public Service Commission (P.S.C.) adopted a marginal cost method rate structure in determining how the increased rates were to be allocated to residential, business, irrigation, and industrial users. That order was reviewed by the District Court, which reversed the orders of the P.S.C. On appeal, the Supreme Court reversed the District Court and reinstated the P.S.C. rate structure. The District Court substituted its own judgment for that of the P.S.C. While the District Court may disagree with the opinion of the experts the P.S.C. chose to follow, it is beyond the scope of review to reverse the P.S.C. on this ground. State ex rel. Dept. of Public Service Regulation v. Mont. Irrigators, Inc., 209 M 375, 680 P2d 963, 41 St. Rep. 768 (1984).

The Public Service Commission (P.S.C.) did not commit error in the application of the "rate of return" methodology, rather than the "market value" methodology, in determining the reasonableness of contract cost for the purchase of coal by the Montana Power Company (MPC) from a wholly-owned subsidiary. While the Supreme Court stated a preference for the "market value" methodology in Montana-Dakota Util. Co. v. Bollinger, 193 M 508, 632 P2d 1086 (1981), the court did not prohibit the P.S.C. from using a different methodology if the evidence warrants its use. In this case, the evidence introduced by the P.S.C. was not challenged by MPC. Rather, MPC seeks to do so for the first time on appeal. Limited review of the administrative record is appropriate, and that record supports the findings of the Commission. Mont. Power Co. v. Dept. of Public Service Regulation, 204 M 224, 665 P2d 1121, 40 St. Rep. 805 (1983).

Review of Human Rights Commission Decision: A District Court's choice of the substantial evidence standard as the proper standard of review of a decision of the Human Rights Commission was proper. Billings v. Mont. Human Rights Comm'n, 209 M 251, 681 P2d 33, 41 St. Rep. 688 (1984).

Selective Treatment of Record Prohibited: Wessell was terminated from her position with plaintiff. Wessell filed for unemployment benefits. Plaintiff alleged Wessell had been terminated

for misconduct. A claims examiner determined there was no evidence of misconduct and approved Wessell's application. Plaintiff appealed, and a hearing appeals referee affirmed the award of benefits, finding Wessell had been terminated for reasons other than misconduct. The Board of Labor Appeals affirmed the referee. Plaintiff then appealed to District Court, which concluded that Wessell had been fired for misconduct and terminated her benefits. On appeal, the Supreme Court found that although testimony was sometimes conflicting and equivocal, there was substantial credible evidence to support the Board's determination. The District Court's determination could be supported only by selective treatment of certain aspects of the record. The court also had to weigh testimony and credibility differently from the referee and the Board. Because the Board's finding was not clearly erroneous in view of the whole record, the decision of the District Court was reversed. Slater v. Employment Sec. Div., 208 M 166, 676 P2d 220, 41 St. Rep. 243 (1984).

District Court's Finding of Fact Different From Agency's — Restatement by Judge of Unclear Agency Finding: The District Court's findings of fact appeared to conflict with the administrative agency's hearing examiner's findings of fact, thus exceeding the standards of judicial review set forth in this section, but a reading of the record disclosed that the hearing examiner's finding was not clearly stated. The District Court acted correctly when it merely translated the hearing examiner's finding of fact without substituting its judgment for that of the agency on the weight of the evidence on questions of fact. In re the Wage Appeal of Highway Patrol Officers v. Bd. of Personnel Appeals, 208 M 33, 676 P2d 194, 41 St. Rep. 154 (1984). See also St. v. Shodair Hosp., 273 M 155, 902 P2d 21, 52 St. Rep. 879 (1995).

Public Service Commission — Telephone Service Not Reasonably Adequate: The Public Service Commission's finding that service provided by telephone company was not reasonably adequate was supported by substantial credible evidence where 20 area residents testified to the poor quality of the service. Order stating that the service was not reasonably adequate was not overturned on appeal. Intermountain Tel. and Power Co. v. Dept. of Public Service Regulation, 201 M 74, 651 P2d 1015, 39 St. Rep. 1962 (1982).

Agency Factual and Legal Decisions — Clarification of Standard of Review: The standard of review to be applied to findings of fact by an agency is whether they are "clearly erroneous". Factual findings will be upheld if supported by substantial credible evidence. If there is substantial credible evidence in the record, the findings are not "clearly erroneous". If the record supports the factual determinations of the agency, the reviewing court may not weigh the evidence but is bound by the agency's findings. Billings v. Billings Firefighters Local No. 521, 200 M 421, 651 P2d 627, 39 St. Rep. 1844 (1982), followed in V.K. Putnam, Inc. v. McFarlane, 239 M 300, 779 P2d 905, 46 St. Rep. 1699 (1989). See also Carruthers v. Bd. of Horseracing, 216 M 184, 700 P2d 179, 42 St. Rep. 729 (1985).

Interpretation of Employment Contract — No Error of Law: Claiming that ambiguities in his employment contract were interpreted incorrectly, an employee appealed the District Court's affirmance of a decision of the Labor Standards Division. Even when the contract was interpreted most strongly against the employer, the District Court order was neither clearly erroneous nor based on an error of law. Landon v. Labor Standards Div., 200 M 153, 649 P2d 1341, 39 St. Rep. 1641 (1982).

Certificate of Environmental Compatibility and Public Need: The Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate of environmental compatibility and public need for the construction of a powerline, following completion of an environmental impact statement under the Montana Environmental Policy Act. The Supreme Court upheld the judgment of the District Court that there was substantial evidence supporting the Board's findings that a need for the powerline existed and that conservation measures and alternative energy sources would not reduce the need for the powerline so as to make its construction unnecessary. Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv., 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

Discrimination — Reference to Federal Law Proper: Petitioner filed an employment discrimination claim with the Human Rights Commission alleging that he was forced to resign from his position as a welder with respondent because of racial harassment. The hearing examiner found no discrimination, and petitioner appealed. The District Court and the Supreme Court affirmed the hearing examiner's determination and held that Title VII of the federal Civil Rights Act of 1964 and reference to pertinent federal case law in determining claims under Title 49 (MCA) are both useful and appropriate. Where the hearing examiner's findings were supported by substantial credible evidence and petitioner had failed to make a prima facie showing of discrimination, the court could not substitute its judgment and the hearing

examiner's findings were upheld. Snell v. Montana-Dakota Util. Co., 198 M 56, 643 P2d 841, 39 St. Rep. 763 (1982).

Termination of Tenured Teacher — Standard of Review: A tenured teacher was not offered a new contract. The decision of the Board of Trustees not to rehire was upheld by the County Superintendent and State Superintendent. The Board of Trustees based its decision on findings that defendant demonstrated a lack of fitness for teaching in statements made to his junior high class to the effect that his "girlfriend" had to move out of his house because some people did not like his living arrangements. The Trustees also concluded that defendant demonstrated a lack of moral values by cohabiting in Polson with a female teacher, not his wife, which adversely affected his performance as a teacher. The County Superintendent found that although the discussion of abortion and display of fetuses were not in themselves sufficient grounds for dismissal, together with the resultant controversy, they were indicative of the adverse impact defendant's living arrangements were having on his teaching. The State Superintendent did not discuss the abortion or fetus findings. The Supreme Court found that the County Superintendent's findings allowed them to consider the issues. The District Court held that the finding that the cohabitation was a matter of public knowledge was clearly erroneous. The Supreme Court held that the County Superintendent was in the position of the trier of fact and so was able to hear and evaluate the evidence of the various witnesses. Where the evidence was conflicting and the County Superintendent and State Superintendent both found that the Trustees' reasons were supported by the evidence, the Supreme Court, applying the standard of 2-4-704, found the findings not clearly erroneous and reversed the District Court. Yanzick v. School District, 196 M 375, 641 P2d 431, 39 St. Rep. 191 (1982). See also Booth v. Argenbright, 225 M 272, 731 P2d 1318, 44 St. Rep. 227 (1987), and Trustees, Carbon County School District No. 28 v. Spivey, 262 M 513, 866 P2d 208, 50 St. Rep. 1664 (1993), in which the State Superintendent erred in reversing the County Superintendent's decision to terminate a teacher.

Human Rights Commission — District Court's Redetermination of Facts Held Improper: Upon reviewing a decision of the Human Rights Commission, which found the complainant had been subject to employment discrimination by a county welfare department, the District Court erred in redetermining the credibility of witnesses who appeared before the Commission and the weight given to evidence by the Commission. The effect of 2-4-704 is to limit a reviewing District Court to a determination of whether or not substantial evidence exists to support the agency decision. Conflicts in the evidence regarding the complainants prima facie case were decided in favor of the complainant by the Commission. An attempt to review and redecide these conflicts would exceed the statutory authority of the District Court. Martinez v. Yellowstone County Welfare Dept., 192 M 42, 626 P2d 242, 38 St. Rep. 474 (1981).

Determination of Employment Status — Administrative Finding Upheld: In determining whether salesmen for a livestock product manufacturer were independent contractors and therefore exempt from the unemployment compensation tax, the court will uphold an administrative agency's finding where there is sufficient credible evidence in the record to support its holding. Where there are several factors weighing on both sides of the issue, the court will look to 39-51-203(4)(c) as controlling. This subsection concerns whether an individual is customarily engaged in an independently established trade, occupation, profession, or business. Here, the court found that the salesmen had no business apart from their relationship with the company, were dependent upon the company for their employment, had no authority to hire subordinates, had no liability for a peremptory termination of their relationship, and therefore found the salesmen to be employees rather than independent contractors. Standard Chem. Mfg. Co. v. Employment Security Div., 185 M 241, 605 P2d 610 (1980).

Workers' Compensation — Award Justified:

The workers' compensation court did not err in affirming the Workers' Compensation Division order that awarded compensation for permanent total disability under 39-71-116 since there was sufficient evidence to justify the award. Claimant was not required to make a reasonable effort to find regular employment; it was only necessary that the Division find that he had no reasonable prospect of finding regular employment. Brurud v. Judge Moving & Storage, Inc., 172 M 249, 563 P2d 558 (1977), followed in Larson v. Cigna Ins. Co., 276 M 283, 915 P2d 863, 53 St. Rep. 394 (1996).

After considering law and evidence on temporary disability, the holding of workers' compensation court refusing to extend temporary total disability was upheld. Substantial rights were not denied plaintiff because of the administrative findings. McAlear v. McKee, 171 M 462, 558 P2d 1134 (1976).

Welfare Assistance — Unsolicited Opinion: In an appeal from an order of District Court finding respondents eligible for county medical assistance, the Supreme Court found that

evidence in the form of an unsolicited opinion voiced by an interested party, with no foundation, did not constitute substantial evidence which would render the decision clearly erroneous. Wheatland County v. Bleeker, 175 M 478, 575 P2d 48 (1978).

No Evidence on One Allegation — Substantial Rights Not Prejudiced: An application for a certificate of authorization to organize a new Montana bank was sufficient to give respondent board justification to proceed with the hearing and appellant was not prejudiced, even if the application omitted evidence on one point as alleged. W. Bank of Billings v. St. Banking Bd., 174 M 331, 570 P2d 1115 (1977).

Findings Adequate Based on Reasonable Inferences — Wage Claim: Worksheet used to compute wage claim was an adequate "finding". Inferences as to hours worked were reasonable when employer offered no evidence or records, and proof was reliable, probative, and substantial. Garsjo v. Dept. of Labor & Industry, 172 M 182, 562 P2d 473 (1977).

LACK OF SUBSTANTIAL CREDIBLE EVIDENCE
CLEARLY ERRONEOUS

Improperly Working Commission for Human Rights Fax Machine Rendering Attempt to File Appeal Brief Untimely — Commission's Dismissal of Appeal Clearly Erroneous: Sprow contended that CenTech Corporation (CenTech) discriminated against her on the basis of gender, and filed a complaint with the Department of Labor and Industry. A contested case hearing was held, and the Department found in Sprow's favor. CenTech filed a timely notice of appeal with the Commission for Human Rights. The appeal brief was due May 15, 2000. CenTech attempted to fax the brief to the Commission on that date, but because of communication errors with the Commission's fax machine, only one page of the brief was received by the Commission. CenTech attempted to fax the brief again the next day, but again the fax equipment was not functioning. A CenTech representative contacted the Commission and was told that the communication error was likely due to the long-distance connection, so CenTech mailed the brief instead, but it was received 2 days after the filing deadline. Nevertheless, the Commission declined to consider CenTech's brief because it was considered untimely, and maintained that the Commission was not responsible for communication errors. CenTech appealed to District Court, and the court upheld the Commission's findings that numerous other faxes were received on May 15 and that the fax machine was working properly. The court concluded that by waiting until "almost literally the last minute" to file the brief, CenTech assumed the risk associated with the late filing and today's technology. CenTech appealed, and the Supreme Court reversed. Substantial evidence indicated that CenTech attempted to fax the entire brief within the allotted time but was prevented from doing so because of communication errors with the Commission's own fax machine. Thus, the District Court erred in holding that the Commission's findings and conclusions were not clearly erroneous in view of the reliable, probative, and substantial evidence on the record. Further, Commission regulations allow the suspension, waiver, or modification of its rules to prevent manifest injustice to a party, ensure a fair hearing, or afford substantial justice. Failure to do so in this case unreasonably elevated form over substance and prejudiced CenTech. CenTech did not have to assume the risk of a fax malfunction, and given its good faith effort to file the brief, justice required that its attempt be honored. CenTech Corp. v. Sprow, 2001 MT 298, 307 M 481, 38 P3d 812 (2001).

Agency Interpretation Held Clearly Erroneous: The Department of Natural Resources and Conservation concluded that the defendants were engaged in recreational use of state lands. The Supreme Court upheld the District Court's decision that noted that the hearings examiner had acknowledged that no elk or deer had been killed, shot at, or pursued on leased state land by the defendants and therefore reversed the hearings examiner's decision as being based upon faulty reasoning, conjecture, and speculation. Weitz v. Dept. of Natural Resources and Conservation, 284 M 130, 943 P2d 990, 54 St. Rep. 807 (1997).

Court Review and Reversal of School Board Decision Revoking Teacher's Certificate Proper: The District Court reviewed the entire record of proceedings by a hearings examiner that was relied on by a school board to revoke the certificate of a teacher accused of sexual misconduct and properly reversed the certificate revocation because: (1) the hearings examiner improperly allowed testimony of an expert concerning general statements about the behavior of victims of sexual abuse; (2) the hearings examiner's findings of sexual abuse were not supported by substantial evidence; (3) when the expert's testimony was properly disregarded, other findings by the hearings examiner did not support a conclusion that the teacher was not of good moral and professional character; and (4) the hearings examiner's findings and conclusions contained sufficient independent statements from which the court could reverse the school board's decision

without requiring new findings and conclusions from the record. In re Renewal of Teaching Certificate of Thompson, 270 M 419, 893 P2d 301, 52 St. Rep. 200 (1995).

Ambiguous Statutory Interpretation — Agency Interpretation Rejected as Leading to Absurd Results: Where the grandfather clause for licensure of used video poker machines was found susceptible to two interpretations and the agency implementing the statute chose an interpretation that would lead to absurd results, rejection by the District Court of the agency interpretation was proper. Further, evidence gleaned by court examination of the legislative history to determine legislative intent was properly admitted when the intent could not be determined from the statutory language. Mont. Tavern Ass'n v. St., 224 M 258, 729 P2d 1310, 43 St. Rep. 2180 (1986).

Appellant's Burden of Showing Prejudice: Appellant has the burden of showing prejudice from a clearly erroneous decision. Carruthers v. Bd. of Horse Racing, 216 M 184, 700 P2d 179, 42 St. Rep. 729 (1985), followed in Terry v. Bd. of Regents 220 M 214, 714 P2d 151, 43 St. Rep. 304 (1986).

Erroneous Reversal of Department Order — Wage Claim: Chagnon brought a wage claim against the Hardy Construction Company before the Department of Labor and Industry. A hearing was held, after which the Department dismissed the claim. On judicial review, the District Court reversed the Department and awarded wages, penalties, costs, and attorney fees. On appeal, the Supreme Court found that there was sufficient evidence before the hearings officer to support his dismissal of the claim. The District Court committed error in reversing the Department order. The District Court cannot properly substitute its own judgment for that of the agency. Chagnon v. Hardy Constr. Co., 208 M 420, 680 P2d 932, 41 St. Rep. 441 (1984). See also Foster v. Comm'r of Labor & Indus., 225 M 246, 731 P2d 1313, 44 St. Rep. 207 (1987).

Incorrect Legal Conclusion in Agency's Finding of Fact — Finding "Clearly Erroneous": An agency's hearing examiner's finding of fact contained legal conclusions implicit in the findings. In determining whether the District Court erred in modifying the finding, the Supreme Court must have a definite and firm conviction that a mistake has been made. Although there is evidence to support the finding, it must also have a reasonable basis in law; if as a matter of law the legal conclusions are incorrect, the findings are "clearly erroneous" and may be modified as provided in this section. In re the Wage Appeal of Highway Patrol Officers v. Bd. of Personnel Appeals, 208 M 33, 676 P2d 194, 41 St. Rep. 154 (1984).

Unfair Labor — Merit Increase Not to Preclude Consideration of Prior Work History: Carlson, an animal warden employed by defendant, was terminated allegedly because of insubordination and noncooperation resulting from an incident involving a schnauzer and because of earlier noncooperation. Carlson filed an unfair labor practice complaint with the Board of Personnel Appeals (BPA) alleging that the actual reason for her termination was her union activity. BPA ruled in favor of Carlson and ordered her reinstated with backpay. On appeal, the District Court reversed on the basis of unlawful procedure, contending that BPA failed to consider Carlson's conduct prior to the time that she received a merit increase in salary. The District Court's position was correct, and BPA was instructed to consider evidence of events prior to the merit increase on remand. The fact of a merit increase does not cause prior work history to vanish; it remains relative and to ignore it is to place an unwarranted artificial limitation on the employer's review process. Bd. of Personnel Appeals v. Billings, 199 M 302, 648 P2d 1169, 39 St. Rep. 1414 (1982).

Substantial Credible Evidence Supporting Claimant: Where the only credible substantial evidence in the entire record concerning causation and injury supports the claimant, the findings, conclusions, and judgment of the workers' compensation court to the contrary are not supported by the record. Termination of claimant's benefits was improper, and the decision was reversed. Hume v. St. Regis Paper Co., 187 M 53, 608 P2d 1063 (1980).

Law Review Articles

Montana Supreme Court Survey: Administrative Law, Reep, 42 Mont. L. Rev. 329 (1981).

Montana Supreme Court Survey: Administrative Law, Snyder, 41 Mont. L. Rev. 151 (1980).

Judicial Review of Interpretation of Administrative Regulations, Renz, 38 Mont. L. Rev. 417 (1977).

A Speed-Bump Along the Highway of Judicial Deference to Agency Determinations, Quandt, 11 Vill. Envtl. L.J. 425 (2000).

Collateral References

73 C.J.S. Public Administrative Law and Procedure §198, et seq.

2-4-711. Appeals — staying agency decision.

Compiler's Comments

Source: 1961 Revised Model Act, sec. 16.

Case Notes

Finality of Costs Considered Overarching Intent of Electric Utility Industry Restructuring and Customer Choice Act — PSC Denial of System That Would Allow Charging Future Transition Costs Correct Interpretation of Act: As part of the deregulation process pursuant to the Electric Utility Industry Restructuring and Customer Choice Act, the Montana Power Company (MPC) submitted a transition cost recovery plan to the Public Service Commission (PSC) that would have allowed the future recovery of certain transition costs as they became known over a period of 25 to 30 years. The PSC ordered MPC to amend its transition plan to specifically identify and demonstrate all transition costs that it sought to recover and not to rely on a future tracking mechanism. Upon judicial review, the District Court ordered the PSC to allow the tracking system. The Supreme Court was subsequently asked to determine whether the PSC interpretation of the Act was correct. The court held that MPC's proposed cost-tracking method, whereby some, but not all, transition costs would be unknown and therefore subject to the caprice of future events, was entirely inconsistent with the principle of finality and with statutory mandates in the Act placed on the PSC that all costs be determined to be: (1) verifiable; (2) unrecoverable; (3) affirmatively shown; (4) reasonably mitigated; (5) reasonably demonstrable; (6) reduced to a net sum; and (7) reduced to an amount in a final order. The principle of finality was also expressed in 69-8-211, which declared that PSC approval of transition costs, as well as the subsequent collection of those costs through transition charges, was a settlement of all transition costs claimed by a public utility. This finality was the overarching intent of the Act, in that the needs of consumers to effectively plan today takes precedence over precise cost analysis extending for years or even decades into the future. It is the PSC that assumes the role of arbiter in determining and fixing a utility's transition costs, if any, that will be discharged at the consumers' expense. Thus, the PSC's interpretation of the Act was correct, and the District Court's mandate requiring the PSC to allow the use of trackers would require the PSC to bend if not violate the law and could not be sustained. The District Court was reversed, and the PSC order was reinstated. Mont. Power Co. v. Pub. Serv. Comm'n, 2001 MT 102, 305 M 260, 26 P3d 91 (2001).

P.S.C. Appeal Untimely — Standing of Attorney General to Appeal P.S.C. Order: The Montana Power Company (M.P.C.) applied to the Public Service Commission (P.S.C.) for a rate increase of over $96.3 million. The P.S.C. granted only $4.1 million and denied in toto M.P.C.'s request to recover costs associated with Colstrip Unit 3. The M.P.C. appealed to District Court for review under 2-4-701. The judge reversed the P.S.C. order. The Attorney General filed notice of appeal. More than 60 days after the judge's order was entered, the P.S.C. also filed notice of appeal. The M.P.C. filed a motion to dismiss the appeal of the Attorney General for lack of standing and the appeal of the P.S.C. as untimely. The Supreme Court granted the motion, holding that the Attorney General had no standing to represent the state on appeal since it was not an aggrieved party or a party to the proceedings before the District Court and because, in his official capacity, the Attorney General may not appeal a decision that is within the discretion of the P.S.C. as a party to the action. The appeal of the P.S.C. was untimely, although within 7 days of the notice of appeal filed by the Attorney General. The latter appeal being invalid, the P.S.C. appeal would have to fall within the 60-day rule. Mont. Power Co. v. Dept. of Public Service Regulation, 218 M 471, 709 P2d 995, 42 St. Rep. 1750 (1985).

Law Review Articles

Standing of Third Parties to Challenge Administrative Agency Actions, 76 Calif. L. Rev. 1061 (1988).

CHAPTER 5
MONTANA NEGOTIATED RULEMAKING ACT

Chapter Law Review Articles

Negotiated Rulemaking: Involving Citizens in Public Decisions, McKinney, 60 Mont. L. Rev. 499 (1999).

Alternative Dispute Resolution With Emphasis on Rulemaking Negotiations, 4 Admin. L.J. 83 (1990).

Understanding Unreviewability in Administrative Law, Levin, 74 Minn. L. Rev. 689 (1990).

Part 1
General Provisions

Part Compiler's Comments

Preamble: The preamble attached to Ch. 400, L. 1993, provided: "WHEREAS, negotiated rulemaking is a process that reflects an agency's recognition that regulatory objectives, consistent with legislative directives, can be accomplished in more than one way; and

WHEREAS, negotiated rulemaking brings together the regulating agency and regulated and other interested parties during the development of a rule to negotiate and resolve potential problems with the rulemaking in order to develop a rule acceptable to all parties; and

WHEREAS, negotiated rulemaking may improve the substance of a proposed rule, shorten the length of time necessary to implement a final rule, and reduce litigation, thereby effectuating legislative purposes and aiding in the prompt delivery of governmental services; and

WHEREAS, federal agencies and other states have extensive experience with and success at negotiating rulemaking."

Source: Chapter 400, L. 1993, which enacted this part, was based on federal law that appears at Title 5, chapter 5, subchapter III, of the U.S.C., 5 U.S.C. 561 through 570.

CHAPTER 6
PUBLIC RECORDS

Part 1
Public Records Generally

Part Law Review Articles

Struggling With the Application of the Freedom of Information Act to Computerized Government Records, Dillon, 13 J. Marshall J. Computer & Info. L. 123 (1994).

2-6-101. Definitions.

Compiler's Comments

2001 Amendment: Chapter 77 in (2)(b) and (3)(d) after "writings" inserted "including electronic mail". Amendment effective July 1, 2001.

1999 Amendment: Chapter 485 in (2)(a) and (2)(b) at end inserted exception clause. Amendment effective October 1, 1999.

Severability: Section 4, Ch. 485, L. 1999, was a severability clause.

1991 Amendment: In (2)(b) inserted reference to 22-3-807. Amendment effective July 1, 1991.

1985 Amendment: In (2)(b) at end inserted exception clause.

Case Notes

Dissemination of Incomplete Document Used to Make Decision — Right to Participate Entails Complying With Right to Know: A school district assembled a group of people to research and advise the district on the closure of schools, and a member of the group summarized the closure research information on a computer-generated spreadsheet and delivered various versions of the spreadsheet to various people and groups. The version given the school district contained a system rating the schools and explaining the rating system, but the group of parents that plaintiff belonged to was given a version not containing the rating system when a member of the group requested a copy. The school district told the group that a spreadsheet comparing the schools did not exist. The spreadsheet was a document of a public body subject to public inspection prior to the time that the school district's board met and used the spreadsheet to help determine which schools to close. The school district violated plaintiff's right to examine public documents. At a minimum, the "reasonable opportunity" standard articulated in Art. II, sec. 8, Mont. Const., and 2-3-111 for the right to participate demands compliance with the right to know contained in Art. II, sec. 9, Mont. Const. When the school district violated plaintiff's right to know, it reduced what should have been a genuine interchange into a mere formality. Bryan could and did voice her opinion to the school district, but did so without the ratings information contained on the version of the spreadsheet used by the school district. Therefore, the school district also violated her Art. II, sec. 8, Mont. Const., right of participation. The Supreme Court stated that this violation tainted the entire process from start to finish and ruled that the school district's closure decision was void. The court stated that on remand, the school district should allow plaintiff an opportunity to rebut the closure decision and should then reexamine the

decision and affirm or modify it. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

Standing of Parent Who Did Not Request Information on Proposed School Closure but Belonged to Group Another Member of Which Did: School district parents, including Bryan, worked in concert to rebut a school closure recommendation, delegating duties among themselves. Schroeder, but not Bryan, requested information from the school authorities, which was not received. Bryan sued as a result of the school closure. That Bryan did not personally request the information did not prevent her from having standing to claim a violation of Art. II, sec. 9, Mont. Const. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

Public Hearing — Public Document: Plaintiffs filed a libel action against the state of Montana, its agents, and its agencies for alleged libelous statements published in various Montana newspapers. The newspaper articles were based on a letter written by a state employee and submitted into evidence in a relicensure hearing. The District Court granted summary judgment for defendants, and the Supreme Court affirmed. When the letter was submitted into evidence in a public hearing, it became a public writing. All statements made by defendants were communications made in the proper discharge of their official duties. Plaintiffs did not sustain their burden of proof that genuine issues of material fact existed to be tried; therefore, defendants were entitled to summary judgment as a matter of law. Denny Driscoll Boys Home v. St., 227 M 177, 737 P2d 1150, 44 St. Rep. 991 (1987).

Preliminary Court Pleadings — Public's Right to Know: In a defamation case, an affirmative defense based on the privilege under 27-1-804(4) extends to newspaper accounts of preliminary pleadings. The Supreme Court acknowledged that the public has a right to know what happens in the judicial system, including the filing of civil suits. Cox v. Lee Enterprises, Inc., 222 M 527, 723 P2d 238, 43 St. Rep. 1476 (1986), followed, with respect to Commission on Practice investigation, in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993).

Land Records: A certified copy of portions of the minutes of the State Board of Land Commissioners relating to lands involved in a boundary action and reciting, in effect, that the federal government survey thereof had been incorrectly made, that the Board had ordered a resurvey by the state engineer, that adjustments were made to correct acreage inaccuracies in outstanding land contracts, etc., was admissible as an exhibit under this section and 93-1001-5, R.C.M. 1947 (now 2-6-102), as copies of public records. Nemitz v. Reckards, 98 M 229, 38 P2d 980 (1934).

Requirement for Report: A public officer cannot by incorporating in a report something the law does not require to be incorporated therein make the writing admissible in evidence as a public writing. St. v. Yegen, 74 M 126, 238 P 603 (1925), distinguished in St. v. Ray, 88 M 436, 294 P 368 (1930).

Verification of Reports: Reports made to the State Bank Examiner (now State Banking Board, Department of Administration) by his deputies as to a private bank's financial condition, not verified or signed, were not admissible in evidence in a prosecution of the owner for receiving deposits while the bank was insolvent as public writings in the absence of proof of their contents. St. v. Yegen, 74 M 126, 238 P 603 (1925).

Attorney General's Opinions

Lists of Destroyed Personal Property Not Subject to Disclosure: Lists of destroyed personal property, generated by an individual for no governmental function or purpose and not as the result of the fulfillment of a public employee's duty or for documenting government business, do not constitute public writings or records subject to disclosure laws. 45 A.G. Op. 17 (1993).

Buyer's Affidavit and Certification Subject to Public Disclosure: The buyer's affidavit and certification submitted to the Board of Housing pursuant to the mortgage credit certificate program is subject to public disclosure. 43 A.G. Op. 25 (1989).

Property Record Cards — Public Inspection: The Department of Revenue may not withhold property record cards from public inspection. Although property record cards might not be "public writings", 2-6-102, concerning "public writings", is not controlling with respect to questions of public access. 39 A.G. Op. 17 (1981).

Collateral References

Evidence *key* 325, 350.

31A C.J.S. Evidence §316; 32 C.J.S. Evidence §§727 through 729, 731, 732.

Defamation: privilege accorded state or local governmental administrative records relating to private individual member of public. 40 ALR 4th 318.

2-6-102. Citizens entitled to inspect and copy public writings.

Compiler's Comments

2001 Amendment: Chapter 77 in (2) inserted second sentence providing that the certified copy provision does not apply to the public record of electronic mail in an electronic format. Amendment effective July 1, 2001.

1999 Amendment: Chapter 485 in (1) inserted "or subsection (3) of this section"; inserted (3) regarding records, materials, and information constitutionally protected from disclosure; inserted (4) authorizing public officer to withhold certain information from public scrutiny; and made minor changes in style. Amendment effective October 1, 1999.

Severability: Section 4, Ch. 485, L. 1999, was a severability clause.

1991 Amendment: In (1) inserted reference to 22-3-807. Amendment effective July 1, 1991.

1985 Amendment: In (1) after "except", inserted "as provided in 22-1-1103 and".

Case Notes

Dissemination of Incomplete Document Used to Make Decision — Right to Participate Entails Complying With Right to Know: A school district assembled a group of people to research and advise the district on the closure of schools, and a member of the group summarized the closure research information on a computer-generated spreadsheet and delivered various versions of the spreadsheet to various people and groups. The version given the school district contained a system rating the schools and explaining the rating system, but the group of parents that plaintiff belonged to was given a version not containing the rating system when a member of the group requested a copy. The school district told the group that a spreadsheet comparing the schools did not exist. The spreadsheet was a document of a public body subject to public inspection prior to the time that the school district's board met and used the spreadsheet to help determine which schools to close. The school district violated plaintiff's right to examine public documents. At a minimum, the "reasonable opportunity" standard articulated in Art. II, sec. 8, Mont. Const., and 2-3-111 for the right to participate demands compliance with the right to know contained in Art. II, sec. 9, Mont. Const. When the school district violated plaintiff's right to know, it reduced what should have been a genuine interchange into a mere formality. Bryan could and did voice her opinion to the school district, but did so without the ratings information contained on the version of the spreadsheet used by the school district. Therefore, the school district also violated her Art. II, sec. 8, Mont. Const., right of participation. The Supreme Court stated that this violation tainted the entire process from start to finish and ruled that the school district's closure decision was void. The court stated that on remand, the school district should allow plaintiff an opportunity to rebut the closure decision and should then reexamine the decision and affirm or modify it. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

Standing of Parent Who Did Not Request Information on Proposed School Closure but Belonged to Group Another Member of Which Did: School district parents, including Bryan, worked in concert to rebut a school closure recommendation, delegating duties among themselves. Schroeder, but not Bryan, requested information from the school authorities, which was not received. Bryan sued as a result of the school closure. That Bryan did not personally request the information did not prevent her from having standing to claim a violation of Art. II, sec. 9, Mont. Const. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

Unconstitutionality of Department of Revenue Rule Concerning Confidentiality of Coal Severance Tax Information: Plaintiffs sought information regarding coal severance tax payments that had been routinely supplied to the Department of Revenue by coal mine operators prior to adoption of ARM 42.2.701, which declared certain information, such as tax returns that taxpayers are required to submit to the Department and Department-prepared documents that identify taxpayers, to be confidential. Plaintiffs challenged the rule on grounds that it violated constitutional and statutory rights to public information. The Department asserted that the rule was adopted to protect taxpayers' constitutional right to privacy and to inform the public of the Department's procedures regarding the confidentiality of tax information. The District Court found that the rule was adopted after balancing the public's right to know with the coal producers' right to privacy and that the producers had a reasonable and ongoing expectation of privacy that outweighed the public's right to know. On appeal, the Supreme Court disagreed, finding ARM 42.2.701 unconstitutional on its face. The rule presumes a wholesale constitutionally protected right to privacy for all taxpayers that prevails over public disclosure without balancing the taxpayers' right to privacy with the public's right to know. Prior to adoption of the rule, coal producers did not have an actual or subjective expectation of privacy in

revenue information submitted to the Department. After the rule was adopted, the producers could assert a subjective expectation of privacy. However, based on a facially unconstitutional rule, the expectation was not one society would be willing to recognize as reasonable, especially when the information had been routinely available for nearly 20 years before ARM 42.2.701 was adopted. Neither prong of the two-part privacy test in Great Falls Tribune Co., Inc. v. Day, 1998 MT 133, 289 M 155, 959 P2d 508 (1998), having been met, a constitutionally protected privacy interest in the information was ruled out. Assoc. Press, Inc. v. Dept. of Revenue, 2000 MT 160, 300 M 233, 4 P3d 5, 57 St. Rep. 657 (2000).

Economic Advantage Inadequate Reason for Denial of Public Right to Observe Government Deliberations in Corrections Vendor Process: A newspaper company sought to restrain the Department of Corrections from excluding the public from meetings of the committee that reviewed proposals for operating private prison facilities. The District Court held that the public had no right to observe the negotiation phase of the committee's work, but that once negotiations were completed, the process by which the conclusions were arrived at must be open to public observation. Both parties appealed. The Supreme Court noted that as part of an Executive Branch agency, the Department and the committee were considered governmental bodies pursuant to 2-15-104 for purposes of procurement and that under the constitutional right to know, proposals submitted by private vendors were considered documents of a public body or agency that, under this section, the public has a right to inspect. Under the two-part test in Missoulian v. Bd. of Regents, 207 M 513, 675 P2d 962 (1984), the only exception to the constitutional provision arises when the demand of individual privacy clearly exceeds the merits of public disclosure. The state contended that the meetings at issue were closed for economic advantage, but economic advantage is neither a privacy interest nor a sufficient reason for denying the public the opportunity to observe deliberations of public bodies or to examine public documents, including proposals submitted to the public body by a vendor, unless the proposal concerns a privacy interest involving legitimate trade secrets or individual safety. A public agency's desire for privacy does not provide an exception to the public's constitutional right to observe its government at work. To the extent that provisions in 18-4-304 or ARM 2.5.602 require exclusion of the public from the competitive bid process, those provisions are unconstitutional and unenforceable. Great Falls Tribune Co., Inc. v. Day, 1998 MT 133, 289 M 155, 959 P2d 508, 55 St. Rep. 524 (1998), following Mtn. States Tel. & Tel. Co. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181 (1981), State ex rel. Great Falls Tribune Co., Inc. v. District Court, 238 M 310, 777 P2d 345 (1989), Great Falls Tribune Co., Inc. v. Great Falls Pub. Schools, 255 M 125, 841 P2d 502 (1992), and Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604 (1994). See also Assoc. Press, Inc. v. Dept. of Revenue, 2000 MT 160, 300 M 233, 4 P3d 5, 57 St. Rep. 657 (2000).

National Honor Society Records Not "Documents of Public Body" — Writ of Mandate Properly Denied: The father of a high school student sought a writ of mandate to obtain names and rankings of teachers who evaluated the student and whose low rankings prevented the student from being admitted into the National Honor Society. The Supreme Court held that because the teachers acted voluntarily and the school did not keep records related to Honor Society membership, the documents sought were not "documents of a public body" as provided in the Montana Constitution. Therefore, the District Court's denial of the writ of mandate was correct. Becky v. Butte-Silver Bow School District No. 1, 274 M 131, 906 P2d 193, 52 St. Rep. 1154 (1995).

Affidavit — Public Document: The provisions of Art. II, sec. 9, Mont. Const., apply to local government. The Clerk of the District Court is an office of local government. An affidavit filed with the Clerk of a District Court in support of a motion for leave to file a criminal charge or warrant is a document of a public body or agency of a subdivision of state government. Assoc. Press v. St., 250 M 299, 820 P2d 421, 48 St. Rep. 958 (1991).

Request of Law Enforcement Records for School Project — Information Beyond Public Reach: The District Court properly refused the request of a student who sought Sheriff's department information for a school project. Information requested included: (1) records of the daily log of phone calls; (2) case files of criminal investigations; (3) preemployment investigation reports; and (4) lists of arrested persons. Persons involved had an actual expectation of privacy, and the interests of society were furthered by recognition of the privacy interest as reasonable. The student had the right to view and record statistical information pursuant to 44-5-103, but the requested information was protected by the Montana Constitution and the Montana Criminal Justice Information Act of 1979 and was beyond the reach of the public sector. Engrav v. Cragun, 236 M 260, 769 P2d 1224, 46 St. Rep. 344 (1989).

Public Hearing — Public Document: Plaintiffs filed a libel action against the state of Montana, its agents, and its agencies for alleged libelous statements published in various

Montana newspapers. The newspaper articles were based on a letter written by a state employee and submitted into evidence in a relicensure hearing. The District Court granted summary judgment for defendants, and the Supreme Court affirmed. When the letter was submitted into evidence in a public hearing, it became a public writing. All statements made by defendants were communications made in the proper discharge of their official duties. Plaintiffs did not sustain their burden of proof that genuine issues of material fact existed to be tried; therefore, defendants were entitled to summary judgment as a matter of law. Denny Driscoll Boys Home v. St., 227 M 177, 737 P2d 1150, 44 St. Rep. 991 (1987).

Preliminary Court Pleadings — Public's Right to Know: In a defamation case, an affirmative defense based on the privilege under 27-1-804(4) extends to newspaper accounts of preliminary pleadings. The Supreme Court acknowledged that the public has a right to know what happens in the judicial system, including the filing of civil suits. Cox v. Lee Enterprises, Inc., 222 M 527, 723 P2d 238, 43 St. Rep. 1476 (1986), followed, with respect to Commission on Practice investigation, in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993).

Trade Secrets — When to Be Disclosed and to Whom — Protectable Property: A telephone utility was required to disclose trade secrets to the Public Service Commission (PSC) to aid in a decision on its rate increase request. The utility was entitled to a protective order preventing access to the secrets by the general public, but the Montana Consumer Counsel and any citizen whose interest related to the ratemaking function of the PSC could have access to the information. Use or disclosure of the trade secrets except for purposes of the ratemaking proceeding was prohibited. Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181, 38 St. Rep. 1479 (1981).

Selective Service Records: Evidence introduced by the state to show that defendant was over 18 years of age in the form of a record of the office of the local selective service board required to be kept by law, showing that defendant, a resident of another state the Governor of which held possession of the original, was registered under the Federal Service Act, was admissible under this section and section 93-1001-2, R.C.M. 1947 (now 2-6-101), there having been no objection made that the record related to a person other than defendant. St. v. Kocher, 112 M 511, 119 P2d 35 (1941).

Land Records: A certified copy of portions of the minutes of the State Board of Land Commissioners relating to lands involved in a boundary action and reciting, in effect, that the federal government survey thereof had been incorrectly made, that the Board had ordered a resurvey by the state engineer, that adjustments were made to correct acreage inaccuracies in outstanding land contracts, etc., was admissible as an exhibit under section 93-1001-2, R.C.M. 1947 (now 2-6-101), and this section as copies of public records. Nemitz v. Reckards, 98 M 229, 38 P2d 980 (1934).

Attorney General's Opinions

District Court Clerk Not Authorized to Charge Nonparty State Agency for Copies and Certification of Public Records: Access to and fees for copying public court records are not absolute and are controlled by state law. Fees allowed by law are enumerated in 25-1-201, and the collection of those fees is mandatory. Fees for preparing copies and for certification of documents are also specified in that section. Section 25-10-405 clarifies that fees are collectible from state agencies that are a party to an action but has no effect in cases in which the agency is not a litigant. In those cases, the rule in 7-4-2516 applies, exempting agencies of state and county government from paying official fees. Therefore, a Clerk of District Court may not charge a nonparty state agency for copies and certification of public District Court records. 47 A.G. Op. 3 (1997).

Lists of Destroyed Personal Property Not Subject to Disclosure: Lists of destroyed personal property, generated by an individual for no governmental function or purpose and not as the result of the fulfillment of a public employee's duty or for documenting government business, do not constitute public writings or records subject to disclosure laws. 45 A.G. Op. 17 (1993).

Property Record Cards — Public Inspection: The Department of Revenue may not withhold property record cards from public inspection. Although property record cards might not be "public writings", 2-6-102, concerning "public writings", is not controlling with respect to questions of public access. 39 A.G. Op. 17 (1981).

Right to Know: The Board of Nurses (now Board of Nursing) must issue lists of registered nurses and licensed practical nurses to members of the public who wish to purchase them. 35 A.G. Op. 27 (1973).

Collateral References

Evidence *key* 341; Records *key* 14, 15.

32 C.J.S. Evidence §651; 76 C.J.S. Records §§60 through 75, 93 through 106, 111.

State freedom of information act requests: right to receive information in particular medium or format. 86 ALR 4th 786.

Restricting access to records of disciplinary proceedings against attorneys. 83 ALR 3d 749.

Statutory construction relating to public access to police records. 82 ALR 3d 19.

Confidentiality of records as to recipients of public welfare. 54 ALR 3d 763.

What preliminary data governed by public departments or officials constitute "public records" within the right of access, inspection, and copying by private persons. 85 ALR 2d 1105.

Right to inspect motor vehicle records. 84 ALR 2d 1261.

2-6-103. Filing and copying fees.

Compiler's Comments

2001 Amendment: Chapter 396 in (1) after "state" deleted "for services performed in the office" and after "fees" deleted "commensurate with costs"; at end of (4) deleted "and must be deposited into an account in the proprietary fund to the credit of the secretary of state. All income and interest earned on money in the account must be credited to the account"; and inserted (5) requiring fees to be set and deposited in accordance with 2-15-405. Amendment effective July 1, 2001.

1999 Amendment: Chapter 125 in (4) at end of first sentence after "deposited into" substituted "an account in the proprietary fund to the credit of the secretary of state" for "a proprietary fund" and inserted second sentence requiring credit of income and interest to the account; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendment: Chapter 406 in (1) substituted "commensurate with costs for filing and copying services" for language specifying dollar amount of fee for various services (see 1997 Session Law for former text); in (4), at end, substituted "into a proprietary fund" for "pursuant to 17-6-105"; deleted (5) that read: "(5) Within 120 days following the end of each fiscal year, the secretary of state shall deposit into the general fund from the proprietary fund any revenue collected in the proprietary fund during the prior fiscal year that is in excess of the amount appropriated from the proprietary fund for the current year"; and made minor changes in style. Amendment effective April 28, 1997.

1993 Amendment: Chapter 411 in (4), after "state", inserted "are not refundable"; inserted (5) requiring the deposit into the general fund of revenue in the proprietary fund that exceeds the amount appropriated from the proprietary fund for the current year; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: Inserted (3) regarding fees chargeable for providing electronic information.

Collateral References

States *key* 58.

81A C.J.S. States §104.

2-6-104. Records of officers open to public inspection.

Compiler's Comments

1999 Amendment: Chapter 485 in middle inserted exception clause. Amendment effective October 1, 1999.

Severability: Section 4, Ch. 485, L. 1999, was a severability clause.

1997 Amendment: Chapter 480 near beginning, after "provided in", substituted "27-18-111 and 42-6-101" for "40-8-126 and 27-18-111".

Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 8, chapter 8 renumbered in Title 52, chapter 8, part 1] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

Internal References: Section 27-18-111 pertains to nondisclosure of complaints involving attachments until after filing the return of service of attachment.

Case Notes

Affidavit — Public Document: The provisions of Art. II, sec. 9, Mont. Const., apply to local government. The Clerk of the District Court is an office of local government. An affidavit filed with the Clerk of a District Court in support of a motion for leave to file a criminal charge or

warrant is a document of a public body or agency of a subdivision of state government. Assoc. Press v. St., 250 M 299, 820 P2d 421, 48 St. Rep. 958 (1991).

Trade Secrets — When to Be Disclosed and to Whom — Protectable Property: A telephone utility was required to disclose trade secrets to the Public Service Commission (PSC) to aid in a decision on its rate increase request. The utility was entitled to a protective order preventing access to the secrets by the general public, but the Montana Consumer Counsel and any citizen whose interest related to the ratemaking function of the PSC could have access to the information. Use or disclosure of the trade secrets except for purposes of the ratemaking proceeding was prohibited. Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181, 38 St. Rep. 1479 (1981).

Referendum Petitions: Whether referendum petitions delivered to Clerk and Recorder for certification to Secretary of State are "public records" and so open to inspection, they are at least "other matters in the office of any officer" within this section, and Clerk and Recorder will be compelled by mandamus to permit inspection of them. State ex rel. Halloran v. McGrath, 104 M 490, 67 P2d 838 (1937).

Attorney General's Opinions

Property Record Cards — Public Inspection: The Department of Revenue may not withhold property record cards from public inspection. Although property record cards might not be "public writings", 2-6-102, concerning "public writings", is not controlling with respect to questions of public access. 39 A.G. Op. 17 (1981).

Public's Right to Know: The salaries of teachers and administrators of a public school district are subject to inspection by the public. 36 A.G. Op. 28 (1975).

Collateral References

Records *key* 14.

76 C.J.S. Records §§60 through 75, 93 through 106, 111.

66 Am. Jur. 2d Records and Recording Laws §§12 through 30.

Payroll records of individual government employees as subject to disclosure to public. 100 ALR 3d 699.

Restricting access to judicial records of concluded adoption proceedings. 83 ALR 3d 800.

2-6-105. Removal of public records.

Collateral References

Records *key* 16.

76 C.J.S. Records §33.

2-6-106. Possession of records.

Collateral References

Officers and Public Employees *key* 110.

67 C.J.S. Officers and Public Employees §234, et seq.

2-6-107. Proceedings to compel delivery of records.

Collateral References

Records *key* 13.

76 C.J.S. Records §§121 through 129.

2-6-109. Prohibition on distribution or sale of mailing lists — exceptions — penalty.

Compiler's Comments

2003 Amendment: Chapter 441 in (4) at end after "chapter 31" inserted "or to lists of persons holding driver's licenses or Montana identification cards provided for under 61-5-127"; and made minor changes in style. Amendment effective October 1, 2005.

Applicability: Section 10, Ch. 441, L. 2003, provided: "[This act] applies to combined jury lists compiled partly from the lists submitted under [section 1] [61-5-127] by the department of justice to the clerks of the district courts on and after the second Monday of May 2006."

2001 Amendments — Composite Section: Chapter 319 in (1) substituted reference to subsection (9) for reference to subsection (8); inserted (9) relating to lists of graduating high school students to be used for military recruitment; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 363 in (4) after "13-2-115" deleted "and 13-38-103" and at end deleted "or to lists of persons holding driver's licenses provided for under 61-5-126"; at end of (6) deleted "or, by

purchase or otherwise, of public records dealing with motor vehicle registration"; and made minor changes in style. Amendment effective April 23, 2001.

1999 Amendment: Chapter 305 at beginning of (3) deleted "Except as provided in 30-9-403". Amendment effective July 1, 2001.

1997 Amendments: Chapter 364 in (5), near middle, substituted "state law or" for "Title 20, chapter 30, or specifically exempted from that chapter as provided in 20-30-102, or".

Chapter 370 in (8), near middle after "on behalf of a", substituted "retiree organization formed for board-administered retirement system participants and" for "third party", after "section" substituted "501(c)(4)" for "501(c)(3)", and at end substituted "organization" for "third party". Amendment effective April 23, 1997.

1995 Amendments: Chapter 379 in (5), at end, inserted "or subject to Title 33, chapter 17"; and made minor changes in style.

Chapter 412 inserted (8) exempting from this section the Public Employees' Retirement Board's use of mailing lists of retirement system participants to send material on behalf of a third party under certain conditions; adjusted subsection references; and made minor changes in style. Amendment effective April 13, 1995.

Severability: Section 99, Ch. 379, L. 1995, was a severability clause.

Section 28, Ch. 412, L. 1995, was a severability clause.

1991 Amendment: In (1) changed subsection reference; and inserted (7) regarding sale of corporate information list by Secretary of State.

1991 Statement of Intent: The statement of intent to Ch. 289, L. 1991, provided: "A statement of intent is required for this bill because [section 1] [2-15-403] authorizes the secretary of state to adopt rules setting fees to be charged for the sale of the corporate information list. It is the intent of the legislature that the fees should be commensurate with the costs of producing the list. Existing fees may be modified to the extent necessary to conform to this statement of intent and [section 1] [2-15-403]."

1989 Amendment: At end of (4) inserted "or to lists of persons holding driver's licenses provided for under 61-5-126".

Severability: Section 5, Ch. 663, L. 1989, was a severability clause.

1985 Amendment: In (3) at beginning inserted exception clause. Amendment effective July 1, 1986 (sec. 10, Ch. 683, L. 1985).

Internal References: Section 13-2-115 refers to preparation of voter registration lists. Section 13-38-103 (now repealed) referred to a list, provided by the Department of Justice from its driver's license file, of persons who have reached or will reach voting age by date of next election.

Administrative Rules

ARM 2.43.308 through 2.43.310 mailings to retirement system participants on behalf of nonprofit organizations.

Attorney General's Opinions

Prohibition Against Distribution of Mailing Lists Applicable Both to Lists of Individuals and Corporations: The prohibition against the distribution of mailing lists by state agencies applies to mailing lists of both individual persons and corporations. 43 A.G. Op. 73 (1990), overruling in part a contrary holding in 38 A.G. Op. 59 (1979).

Original Documents Submitted to Retirement Division Not Subject to Public Inspection for Mailing List Purposes: Original documents submitted by applicants to the Public Employees' Retirement Division of the Department of Administration contain private information about third parties and thus are not open to public inspection for the purpose of compiling a mailing list. 42 A.G. Op. 64 (1988).

State Agency Lists as Mailing Lists: Agencies are prohibited from distributing a list of persons only if the intended use of such list is for unsolicited mass mailings, house calls or distributions, or telephone calls. The prohibition pertains only to lists of natural persons, not businesses, corporations, governmental agencies, or other associations. Agencies are not required to affirmatively ascertain the intended use for which the list is sought; a clear written disclaimer from the agency as to the proscriptions and penalty is sufficient. 38 A.G. Op. 59 (1979), overruled with regard to applicability to corporations in 43 A.G. Op. 73 (1990).

2-6-110. Electronic information and nonprint records — public access — fees.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 77 in (1)(a) near beginning of first sentence before "information" inserted "public"; and in (2)(d) at end inserted "including the retrieval or production of electronic mail". Amendment effective July 1, 2001.

Chapter 396 in (2)(b) after "mainframe" inserted "and midtier"; and inserted (3)(d) requiring fees to be set and deposited in accordance with 2-15-405. Amendment effective July 1, 2001.

1999 Amendment: Chapter 405 in (1)(a) in first sentence inserted language regarding nonprint media and examples of nonprint media and in second sentence near end inserted "or nonprint"; inserted (1)(b) regarding collections of the Montana historical society; inserted (5) concerning charge under subsection (2); inserted (6) regarding quality of copy provided to requester; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendments — Composite Section: Chapter 4 at end of (2)(a) deleted "or"; at end of (2)(d) inserted "and"; at beginning of (2)(e) substituted reference to grade 10, market salary, hourly rate for former language that read: "An agency may also charge an hourly fee" and deleted second sentence that read: "The hourly fee may not exceed the hourly rate for the current fiscal year for a state employee classified as grade 10, market salary, under 2-18-312"; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 484 inserted (2)(c) allowing a fee for providing online computer access; in (3)(a), at end of first sentence, substituted "property valuation and assessment system database from which the information is requested" for "computer-assisted mass appraisal system", in second sentence, near beginning after "persons", inserted "federal agencies, state agencies, and other entities" and at end substituted "any department property valuation and assessment system" for "the mass appraisal system", and inserted third sentence disallowing the charging of the fee to certain state entities; in (3)(b), near beginning after "department", inserted "of revenue" and after "provided from" substituted "any department property valuation and assessment system" for "this"; in (3)(c), after "department", inserted "of revenue" and after "under" inserted "subsection (2) and"; and made minor changes in style. Amendment effective April 14, 1995.

Because both chapters affected the subsection numbering of subsection (2), the codifier has changed the subsection numbering to reflect both chapters.

1993 Special Session Amendment: Chapter 27 in (2) inserted reference to subsection (4); and inserted (4) concerning fee for developing and maintaining computer-assisted mass appraisal system. Amendment effective January 1, 1994.

1993 Statement of Intent: The statement of intent attached to Ch. 27, Sp. L. November 1993, provided: "With the adoption of the 1972 Montana constitution, the state assumed responsibility for the appraisal, assessment, and valuation of property for property tax administration. Although the state was granted this new responsibility and authority by the constitution, county assessors were retained by local governments to assist the state in the assessment function, acting as agents of the department of revenue. Through the implementation and use of electronic data processing and other technological advances, many of the assessment functions previously performed by county assessors have changed dramatically.

Recognizing the need to make state and local government more responsive and efficient, it is the intent of the legislature that all appraisal and assessment duties relating to property taxation be assigned to the department of revenue. This action transfers from county assessors to the department the responsibility and authority to perform any assessment functions.

Acknowledging the talents and skills of county assessors, it is the intent of the legislature that current county assessors may choose to become employees of the department of revenue and that their respective counties may consolidate the office of county assessor with another county office.

If the current county assessor does not choose to become a state employee and the county chooses to retain the separate office of county assessor, the department of revenue shall, with the consent of the county assessor, contract with the county for the county assessor to perform specific duties as assigned by the department. If under this agreement the county assessor produces satisfactory work quality and output for the department, the department may continue the contract as long as the person currently serving as county assessor retains the position. The department may also contract for any successor county assessor in counties that retain the separate office of county assessor to perform duties assigned by the department.

It is further the intent of the legislature that all present deputy county assessors become employees of the department of revenue, with the same preferences and benefits as other state employees.

To allow for the efficient administration of the property tax appraisal and assessment, it is the intent of the legislature that the department of revenue use other efficiency measures, such as creating regional county appraisal and assessment offices, adjusting office hours of department field offices, and restructuring the organizational structure of the property assessment division.

The legislature grants to the department of revenue general rulemaking authority for the accomplishment of these administrative changes."

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1993 Amendment: Chapter 640 in (3) substituted "market salary" for "step 2". Amendment effective July 1, 1993.

Collateral References

State freedom of information act requests: right to receive information in particular medium or format. 86 ALR 4th 786.

2-6-111. Custody and reproduction of records by secretary of state.

Compiler's Comments

1989 Amendment: At end of (2) substituted "reproduced in accordance with rules adopted by the secretary of state in consultation with the state records committee provided for in 2-15-1013" for "recorded by photostatic or microphotographic means, microfilm, or any other mechanical process that produces a clear, accurate, and permanent duplicate of the original record in accordance with standards not less than those approved for permanent records by the American national standards institute"; and made minor changes in phraseology and grammar.

1989 Statement of Intent: The statement of intent attached to Ch. 185, L. 1989, provided: "A statement of intent is required for this bill because it permits the secretary of state to establish by rule methods for archiving documents filed in his office. Because the technology for archiving documents is developing quickly, it is necessary to provide the secretary of state with the flexibility for establishing the method of archiving.

The legislature intends that the rules require the storage of records in a manner that allows the retrieval of clear and accurate duplicates of the original document. The process must be quick and efficient for both reproducing the original and retrieving the duplicate. The process must have adequate safeguards to ensure that the stored documents will be preserved for many years.

The legislature intends that the rules permit the use of appropriate technology that meets these requirements. The rules must allow for the use of microfilm, photostatic or microphotographic means, computerized electronic disc, or other new technologies that may be developed. These rules may permit storage systems that allow public access through computer hookups as long as no person is able to tamper with the stored records."

1987 Amendment: In (1)(e), after "records", deleted "deeds".

Collateral References

States *key* 73.

81A C.J.S. States §132.

Part 2
Public Records Management

2-6-201. Purpose.

Compiler's Comments

1993 Amendment: Chapter 420 near middle, after "Montana", inserted "and political subdivisions" and at end, before "records", inserted "and local". Amendment effective April 20, 1993.

2-6-202. Definitions.

Compiler's Comments

2003 Amendment: Chapter 30 in definition of public records in (a)(i) near middle after "including" deleted "all" and after "the record" inserted "required by law to be kept as part of the official record", in (a)(i)(A) near middle after "agency" substituted "to document" for "in connection with" and after "business and" deleted "preserved for informational value or as evidence of a transaction", inserted (a)(i)(B) concerning a public writing of a state agency, inserted (a)(i)(C) concerning a record designated by the state records committee for retention, and inserted (c) providing that a public record does not include any paper, correspondence, form, book, photograph, microfilm, magnetic tape, computer storage media, map, drawing, or other type of document that is for reference purposes only, a preliminary draft, a telephone messaging slip, a routing slip, part of a stock of publications or of preprinted forms, or a superseded publication; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 77 in definition of public records inserted (b) to include certain electronic mail; and made minor changes in style. Amendment effective July 1, 2001.

Case Notes

Title Insurer Not Obligated to Search City Engineer or Water Department Records — Public Records as Properly Recorded Documents — Reasonable Expectations Doctrine Inapplicable: The Millers sought to hold a title insurance company responsible for costs involved in relocating a neighbor's water and sewer lines that were discovered on the property. The lines were of record with the city engineer and the water department, but their existence was not recorded in the chain of title. The title insurance policy defined public records as "those records which by law impart constructive notice of matters relating to said land". The Supreme Court held that the definition was unambiguous and clearly related to records filed and docketed with the County Clerk and Recorder because it was proper recordation that imparted constructive notice of matters relating to the property. Nothing in Montana recordation law required the title insurer to search city engineer or water department records. For the same reason, the Millers' attempt to apply the reasonable expectations doctrine also failed because the policy did not insure against loss or damage by reason of "easements, or claims of easements, not shown by the public records". Miller v. Title Ins. Co. of Minn., 1999 MT 230, 296 M 115, 987 P2d 1151, 56 St. Rep. 908 (1999). See also Am. Family Mut. Ins. Co. v. Livengood, 1998 MT 329, 292 M 244, 970 P2d 1054, 55 St. Rep. 1336 (1998).

2-6-203. Secretary of state's powers and duties.

Compiler's Comments

1991 Amendment: Throughout substituted references to Secretary of State for references to Department of Administration. Amendment effective July 1, 1991.

2-6-206. Protection and storage of essential records.

Compiler's Comments

2003 Amendment: Chapter 30 in (2) at beginning of second sentence after "Protection" inserted "and storage" and near middle after "archives" inserted "or in an alternative location provided pursuant to 2-6-211(2)"; and made minor changes in style. Amendment effective October 1, 2003.

1991 Amendment: Throughout substituted references to Secretary of State for references to Department of Administration. Amendment effective July 1, 1991.

2-6-207. Certified copies of public records.

Collateral References

State freedom of information act requests: right to receive information in particular medium or format. 86 ALR 4th 786.

2-6-211. Transfer and storage of public records.

Compiler's Comments

2003 Amendment: Chapter 30 inserted (2) allowing alternative storage of transferred permanent public records in locations other than the state records center or the state archives; in (3) near middle of first sentence before "agency" inserted "transferring"; and made minor changes in style. Amendment effective October 1, 2003.

1992 Special Session Amendment: Chapter 6 in (2) inserted last sentence requiring transfer of $20,000 from the proprietary account to the general fund on or before June 30, 1993. Amendment effective January 21, 1992.

Effective Date — Termination: Section 3, Ch. 6, Sp. L. January 1992, provided: "[This act] is effective on passage and approval [approved January 21, 1992] and terminates July 1, 1993."

1991 Amendment: In (3) substituted reference to Secretary of State for reference to Department of Administration. Amendment effective July 1, 1991.

2-6-212. Disposal of public records.

Compiler's Comments

1981 Amendment: Inserted "Except as provided in subsection (2)" at the beginning of (1); inserted (2) allowing categories of records for which no disposal request is required; and made changes to conform to the exception.

Statement of Intent: The statement of intent attached to SB 187 (Ch. 173, L. 1981) provided: "The intent is to have the State Records Committee create by rule categories of records of minor

importance for which agencies would be relieved of the burden of repetitively submitting disposal requests; for example:

(a) motor vehicle applications that are being microfilmed;
(b) inactive teacher certification records that are being microfilmed;
(c) interstate invoices in the statewide budget and accounting system."

2-6-213. Agency responsibilities and transfer schedules.

Compiler's Comments

2003 Amendment: Chapter 30 inserted (6) requiring executive branch agencies to officially designate an agency records custodian to administer record management functions; and made minor changes in style. Amendment effective October 1, 2003.

1991 Amendment: In (1) and (2) substituted references to Secretary of State for references to Department of Administration. Amendment effective July 1, 1991.

2-6-214. Department of administration — powers and duties.

Compiler's Comments

2001 Amendment: Chapter 313 in (1) near beginning substituted "information technology systems" for "computer and telecommunications systems"; and in (3) at end substituted "central computer center and statewide telecommunications system" for "central computer and telecommunications systems". Amendment effective July 1, 2001.

Effective Date: Section 10, Ch. 378, L. 1991, provided: "[This act] is effective July 1, 1991."

Part 3
Records of Elected Executive Branch Officers

2-6-301. Definitions.

Compiler's Comments

2001 Amendment: Chapter 77 in definition of official records inserted (b) to include certain electronic mail; and made minor changes in style. Amendment effective July 1, 2001.

2-6-302. Official records management — powers and duties.

Compiler's Comments

1993 Amendment: Chapter 420 in (2) inserted reference to local government records committee; and made minor changes in style. Amendment effective April 20, 1993.

1991 Amendment: In (2) substituted reference to Secretary of State for reference to Department of Administration. Amendment effective July 1, 1991.

2-6-303. Ownership of records — transfer.

Compiler's Comments

Commissioner Correction: Former subsection (1) was renumbered 2-6-106 by the Code Commissioner, 1979, because the subject matter of that subsection relates to a broader category than executive branch officers.

2-6-304. Outgoing officials — records management duties.

Compiler's Comments

1991 Amendment: In (5) changed "three-fourths vote" to "four-fifths vote". Amendment effective July 1, 1991.

2-6-307. Certified copies of official records.

Collateral References

State freedom of information act requests: right to receive information in particular medium or format. 86 ALR 4th 786.

Part 4
Local Government Records

Part Compiler's Comments

Preamble: The preamble attached to Ch. 420, L. 1993, provided: "WHEREAS, proper maintenance and disposition of local government records are an essential function of government; and

WHEREAS, certain local government records are of substantial historical value to the state and should be retained and preserved, rather than destroyed; and

WHEREAS, coordination of local government recordkeeping policies and procedures will increase their effectiveness and efficiency; and

WHEREAS, it is the view of the Legislature that these goals pertaining to local government records can be best accomplished through the creation of a state-level body; and

WHEREAS, the Legislature of the State of Montana finds it desirable and appropriate to create a local government records committee."

Effective Date: Section 25, Ch. 420, L. 1993, provided: "[This act] [2-6-401 through 2-6-404] is effective on passage and approval." Approved April 20, 1993.

2-6-401. Definitions.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 30 in definition of public records in (a)(i) near middle after "including" deleted "all" and after "the record" inserted "required by law to be kept as part of the official record", in (a)(i)(A) near middle after "government" substituted "to document" for "in connection with" and after "business and" deleted "preserved for informational value or as evidence of a transaction", inserted (a)(i)(B) concerning a public writing of the local government, inserted (a)(i)(C) concerning a record designated by the local government records committee for retention, and inserted (c) providing that a public record does not include any paper, correspondence, form, book, photograph, microfilm, magnetic tape, computer storage media, map, drawing, or other type of document that is for reference purposes only, a preliminary draft, a telephone messaging slip, a routing slip, part of a stock of publications or of preprinted forms, or a superseded publication; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 116 at end of definition of public records in (a)(ii) inserted exception clause; and made minor changes in style. Amendment effective March 25, 2003.

2001 Amendment: Chapter 77 in definition of public records inserted (b) to include certain electronic mail; and made minor changes in style. Amendment effective July 1, 2001.

Case Notes

National Honor Society Records Not "Documents of Public Body" — Writ of Mandate Properly Denied: The father of a high school student sought a writ of mandate to obtain names and rankings of teachers who evaluated the student and whose low rankings prevented the student from being admitted into the National Honor Society. The Supreme Court held that because the teachers acted voluntarily and the school did not keep records related to Honor Society membership, the documents sought were not "documents of a public body" as provided in the Montana Constitution. Therefore, the District Court's denial of the writ of mandate was correct. Becky v. Butte-Silver Bow School District No. 1, 274 M 131, 906 P2d 193, 52 St. Rep. 1154 (1995).

2-6-402. Local government records committee — creation.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 302 in introductory clause in (2) increased membership of local government records committee from seven to eight; inserted (2)(f) requiring a representative of the state genealogical society to be member of the records committee; at beginning of (7) inserted exception clause; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 483 in (2)(c) at end substituted "administration" for "commerce". Amendment effective July 1, 2001.

1995 Amendment: Chapter 179 in (2)(c) substituted "a representative" for "the bureau chief of the local government services bureau"; and made minor changes in style. Amendment effective July 1, 1995.

2-6-403. Duties and responsibilities.

Compiler's Comments

2001 Amendment: Chapter 483 in (2) at end of second sentence substituted "administration" for "commerce"; deleted former (4) that read: "(4) The committee shall establish school records retention schedules by September 1, 1997"; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendment: Chapter 323 in (2), near beginning of first sentence before "committee", inserted "local government records", near beginning of third sentence inserted "or by the retention and disposition schedule", and at end inserted fifth and sixth sentences requiring the issue of disposition of a record to be referred to the records committee if there is not unanimous approval of the subcommittee and providing that when approval is obtained, the records

committee shall consider the inclusion of a new category of record for which a disposal request is not required and shall update the schedule; in (3) substituted "shall establish a retention and disposition schedule for categories of records for which a disposal request is not required" for "may by unanimous approval establish categories of records for which a disposal request is not required, providing that those records are retained for the designated retention period" and at end inserted "The committee shall publish the retention and disposition schedules. Updates to those schedules, if any, must be published at least annually"; inserted (4) requiring the committee to establish school records retention schedules by September 1, 1997; and made minor changes in style.

1995 Amendment: Chapter 179 in (2), in second sentence, substituted "a representative" for "the bureau chief of the local government services bureau". Amendment effective July 1, 1995.

2-6-404. Rulemaking authority.

Compiler's Comments

1993 Statement of Intent: The statement of intent attached to Ch. 420, L. 1993, provided: "A statement of intent is required for this bill because [section 4] [2-6-404] grants rulemaking authority to the secretary of state.

It is the intent of the legislature that the secretary of state have authority to adopt rules to implement and enforce [section 3] [2-6-403], including specific authority to adopt rules regarding procedures and criteria:

(1) for determining which local government records must be preserved because they presently or may at some point in the future have significant historical value;

(2) for determining which local government records must be approved for destruction; and

(3) for evaluating proposed schedules for retention and disposition of local government records."

2-6-405. Destruction of local government public records prohibited prior to offering — central registry — notification.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

CHAPTER 7
STUDIES, REPORTS, AND AUDITS

Part 1
Studies and Reports

2-7-103. Review by governor of executive branch.

Compiler's Comments

1983 Amendment: Deleted former (2), which read: "The governor shall submit a report to each regular legislative session concerning the duties of his office under subsection (1) of this section and his recommendations, if any, for the transfer of functions between agencies, the elimination of unnecessary functions, or other recommendations to improve the manageability of the executive branch."

Collateral References

Confidentiality of proceedings or reports of judicial inquiry board or commission. 5 ALR 4th 730.

2-7-104. Revenue studies — report to governor and legislature.

Compiler's Comments

1993 Amendment: Chapter 349 near beginning, after "shall", deleted "prepare revenue estimates of state revenue from all sources and shall continuously", near end substituted "requested" for "provided in 5-11-210", and after "to the legislature" inserted "a legislative committee, or a member of the legislature".

1991 Amendment: Near end inserted reference to 5-11-210 and after "legislature" deleted "at their request". Amendment effective March 20, 1991.

2-7-105. Tax information submitted.

Collateral References

Taxation *key* 450(1).

84 C.J.S. Taxation §§647 through 653.

Part 5
Audits of Political Subdivisions

Part Compiler's Comments

Transfer of Functions: The functions performed by the state in this part have been transferred between state departments three times. In 1981, as provided in sec. 7, Ch. 274, L. 1981, the Department of Community Affairs was abolished and its functions under this part were transferred to the Department of Administration. In 1983, as provided in sec. 1, Ch. 287, L. 1983, the functions of this part were transferred from the Department of Administration to the Department of Commerce. In 2001, as provided in sec. 8, Ch. 483, L. 2001, the functions of this part were transferred from the Department of Commerce to the Department of Administration.

Part Case Notes

Scope of County Auditor's Duties — Mandate to Provide Adequate Budget Erroneously Issued: Where the petitioner, a County Auditor, brought an action seeking a Writ of Mandamus to compel the respondent Board of County Commissioners to include sufficient funds in the Auditor's budget to allow the Auditor to conduct audits to determine county compliance with applicable statutes, the trial court erred in making findings and conclusions supporting the petitioner and in issuing the Writ. While the Board has a legally enforceable duty to fund the Auditor's office at a level that allows her to perform her duties at the minimum level imposed by law, the language of the applicable statute and a comparison of the Auditor's duty under 7-6-2409 with the duties of the Legislative Auditor and the duties of the Department of Community Affairs (now Department of Administration) indicate that the County Auditor's functions under 7-6-2409 are limited to bookkeeping and account balancing. This conclusion is also indicated by the fact that the Legislature has required no professional qualifications of the County Auditors but has established minimum levels of education and experience for the Legislative Auditor. Reep v. Bd. of County Comm'rs, 191 M 162, 622 P2d 685, 38 St. Rep. 108 (1981).

Part Attorney General's Opinions

Forfeited Appearance Bonds — Credited to Elementary School District Foundation (Now "BASE Funding"): Forfeited appearance bonds should be credited by the County Treasurer to the equalization of the county elementary school district foundation programs (now "BASE funding") in the same manner as fines are credited under 20-9-331. This is the general method practiced as shown by audits of local government units. 38 A.G. Op. 96 (1980).

Part Law Review Articles

Improving the Quality of Government Audits, Hepp & Mengel, 173 J. Acct. 87 (1992).

Revision Proposed of Existing Guide on State and Local Government Audits, 158 J. Acct. 14(1984).

2-7-501. Definitions.

Compiler's Comments

2003 Amendment: Chapter 114 in definition of local government entity in (b)(viii) substituted "county weed management districts" for "county weed control districts". Amendment effective October 1, 2003.

2001 Amendments — Composite Section: Chapter 7 in definition of local government entity in (b)(xviii) substituted "solid waste management districts" for "refuse disposal districts". Amendment effective October 1, 2001.

Chapter 278 in definition of financial report after "means a presentation of" substituted "financial statements, including applicable supplemental notes and supplemental schedules, that are prepared in a format published by the department using the Budgetary Accounting and Reporting System for Montana Cities, Towns, and Counties Manual and that reflect" for "schedules that reflect"; in definition of local government entity in (a)(i) after "power to raise" inserted "revenue or receive, disburse, or expend local, state, or federal government", deleted former (b)(xxv) that read: "(xxv) volunteer fire departments", and inserted (b)(xxvi) regarding miscellaneous and special districts; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 483 in definition of department substituted "administration" for "commerce". Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1991 Amendment: Inserted definitions of audit, Board, financial assistance, financial report, independent auditor, local government entity, and revenues; and made minor changes in style. Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

1983 Amendment: Substituted reference to department of commerce for reference to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs".

2-7-502. Audit purpose.

Compiler's Comments

1991 Amendment: Inserted (1) citation of part; in (2), near beginning before "this part", deleted "the audit of the affairs of the governmental entities as set forth in"; inserted (2)(a) regarding improvement of financial management; inserted (2)(b) regarding establishment of uniform requirements for reports and audits; in (2)(d) and (2)(e), before "entities", inserted "local government"; at beginning of (2)(f) inserted "ensure that local government entities"; inserted (2)(g) regarding efficient use of resources; and made minor changes in style. Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

2-7-503. Financial reports and audits of local government entities.

Compiler's Comments

2001 Amendment: Chapter 278 deleted former (7) that read: "(7) Subsections (1) through (3) do not apply to a local government entity that has adopted the alternative accounting method provided for in Title 7, chapter 6, part 6." Amendment effective July 1, 2001.

Code Commissioner Instruction: Pursuant to sec. 47, Ch. 257, L. 2001, in (6) the code commissioner changed "state treasurer" to "department of revenue".

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1997 Amendments: Chapter 91 in (3)(a), after "$200,000", deleted "or federal financial assistance in excess of $25,000"; and made minor changes in style. Amendment effective March 19, 1997.

Chapter 458 in (1), in third sentence, extended time for report from 4 months to 6 months after end of reporting period. Amendment effective April 30, 1997.

Retroactive Applicability: Section 2, Ch. 91, L. 1997, provided: "[This act] [2-7-503] applies retroactively, within the meaning of 1-2-109, to audits of local government entities for fiscal years beginning after June 30, 1996."

Applicability: Section 31, Ch. 458, L. 1997, provided: "[This act] [2-7-503] applies to municipal budgeting procedures commencing on July 1, 1997."

1995 Amendment: Chapter 430 inserted (7) providing that certain report and financial audit requirements do not apply to local government entity that adopted alternative accounting method provided in Title 7, chapter 6, part 6; and made minor changes in style. Amendment effective April 13, 1995.

1991 Amendment: Substituted present language regarding financial reports and audits of local government entities for former section requiring audits of local governmental entities (see 1989 MCA for former text). Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

1989 Amendment: Inserted (1)(i) that read: "(i) cemetery districts"; inserted (8) relating to audits of cemetery districts; and made minor changes in form. Amendment effective March 18, 1989, and terminates June 30, 1991.

Termination: Section 6, Ch. 14, L. 1989, provided: "[This act] terminates June 30, 1991."

1985 Amendments: Chapter 84 in (1)(h) inserted "except as provided in subsection (6)"; inserted (6)(a)(ii) relating to smaller fire department relief associations; in (6)(b) at beginning of first sentence before "district", inserted "fire"; and inserted (6)(d) relating to filing of accounts and authority of municipality to require an audit.

Chapter 565 in (1)(e) inserted exception clause; near beginning of (6)(a) substituted "as provided in subsection (6)(c)" for "as herein provided"; and inserted (7) relating to audits of smaller irrigation districts.

Chapter 673 in (1)(b) inserted "having a population of more than 300 in the most recent census taken under the direction of congress".

1983 Amendments: Chapter 49, in (1)(g), inserted "except as provided in subsection (6)"; and inserted (6) relating to smaller fire districts.

Chapter 277 substituted reference to enterprise fund for reference to revolving fund.

1981 Amendment: In (1), made minor changes in phraseology; in (2), substituted "every 2 years" for "annually", substituted "2 fiscal years" for "fiscal year", and inserted "unless annual audits are requested by the governmental entity"; in (3), deleted "annual" after "Each", and substituted "24 months" for "12 months"; and in (5), substituted "deposited in the revolving fund to the credit of the department" for "credited to the state general fund".

Attorney General's Opinions

Vocational Education Audits: The auditing of postsecondary vocational-technical centers (now colleges of technology) is the responsibility of the Legislative Auditor, since the centers are best characterized for this purpose as "state agencies" as opposed to "school districts". 37 A.G. Op. 79 (1977).

2-7-504. Accounting methods.

Compiler's Comments

2001 Amendment: Chapter 278 in (2) substituted text regarding rules adopted by department for former text that read: "This section does not apply to a local government entity that has adopted the alternative accounting method provided for in Title 7, chapter 6, part 6." Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1995 Amendment: Chapter 430 inserted (2) providing exception for local government entity that has adopted alternative accounting method provided in Title 7, chapter 6, part 6; and made minor changes in style. Amendment effective April 13, 1995.

1991 Amendment: In first sentence, after "prescribe", inserted "by rule", before "entities" substituted "local government" for "governmental", and after "entities" deleted "referred to in this part" and in second sentence substituted "local government" for "governmental" and before "standards" inserted "accounting". Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

1989 Special Session Amendments: Chapters 1 and 11 at beginning inserted exception clause; and made minor change in phraseology. Amendment effective July 1, 1990.

2-7-505. Audit scope and standards.

Compiler's Comments

2001 Amendment: Chapter 278 in (2) inserted second sentence requiring auditors to use compliance supplement; and inserted (3) regarding compliance tests. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1991 Amendment: In (1), near beginning before "entity", substituted "local government" for "governmental", after "entity" deleted "including comment on the balance sheet, results of operations, compliance with state statutes and regulations, recommendations for improvement, and any other comments deemed pertinent by the auditor, including his expression of opinion as to the adequacy of the financial presentations", near middle, before "auditing", deleted "generally accepted governmental", and after "standards" inserted "and in accordance with federal regulations adopted by the department by rule"; inserted (2) regarding preparation of a compliance supplement; and made minor changes in style. Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

1981 Amendment: Deleted "annual" before "audit" in (1) and (2).

2-7-506. Audit by independent accountant or auditor.

Compiler's Comments

1991 Amendment: Substituted present language regarding independent audit for former section allowing contracting with a public accountant for an audit in lieu of audits required of the Department (see 1989 MCA for former text). Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

1989 Amendment: Inserted last sentence of (1) relating to duration requirements of audit contracts.

1981 Amendment: In (1), deleted "annual" before "audits" in two places.

Collateral References

Liability of public accountant to third parties. 46 ALR 3d 979.

2-7-507. Duty of officers to aid in audit.

Compiler's Comments

1991 Amendment: Near beginning substituted "local government" for "governmental", near middle substituted "provide" for "afford", before "audit" deleted "department's", after "furnish" inserted "all", and at end substituted "independent auditor necessary for the conduct of the audit" for "department under oath in a manner prescribed by the department". Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

2-7-508. Power to examine books and papers.

Compiler's Comments

1991 Amendment: Near beginning substituted "independent auditor" for "department" and near end, before "entity", substituted "local government" for "governmental" and after "entity" deleted "referred to in this part and may send for persons or papers and examine under oath any person concerning them". Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

2-7-509. Audits of school-related organizations — costs — criteria.

Compiler's Comments

Effective Date: Section 3, Ch. 678, L. 1991, provided: "[This act] is effective July 1, 1991."

2-7-511. Access to public accounts — suspension of officer in case of discrepancy.

Compiler's Comments

1991 Amendment: Throughout section substituted reference to independent auditor for reference to Department and before "entity" substituted "local government" for "governmental"; in (3), near beginning after "officer", inserted "of the local government entity" and after "shall" substituted "after notice and the opportunity for a hearing" for "immediately"; in (4), after "shall", substituted "notify" for "file with", at end, before "shortage", deleted reference to final report, and deleted former second sentence that read: "The governing body shall, within 10 days after the filing of the department's final report of the audit, set a date and time for a formal hearing to test the accuracy of the final report of the audit and give notice of the hearing to the officer"; and made minor changes in style. Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

1981 Amendment: Substituted the last sentence of (4), providing for a formal hearing after filing of report, and (5), requiring referral to County Attorney, for language that provided for immediate forfeiture of office, appointment of successor, and right to quo warranto to test final audit report.

Case Notes

Constitutionality: The predecessor to this section, 82-1007, R.C.M. 1947, providing for automatic forfeiture of elective office if a shortage is found to exist in the accounts of the officer, was found to be invalid as denying due process of law in declaring such an office vacant. State ex rel. Ryan v. Norby, 118 M 283, 165 P2d 302 (1946).

Collateral References

What are "records" of agency which must be made available under state freedom of information act. 27 ALR 4th 680.

2-7-512. Exit review conference.

Compiler's Comments

1991 Amendment: Before "each" deleted "the field work of" and before "auditor" substituted "independent" for "in-charge"; and made minor change in style. Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

2-7-513. Content of audit report and financial report.

Compiler's Comments

2001 Amendment: Chapter 278 deleted former (2)(b) that read: "(b) Subsection (2)(a) does not apply to a local government entity that has adopted the alternative accounting method provided for in Title 7, chapter 6, part 6"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1995 Amendment: Chapter 430 inserted (2)(b) providing exception for local government entity that has adopted alternative accounting method provided in Title 7, chapter 6, part 6; and made minor changes in style. Amendment effective April 13, 1995.

1991 Amendment: Substituted present language regarding content of audit report and financial report for former section on content of audit report (see 1989 MCA for former text). Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

2-7-514. Filing of audit report and financial report.

Compiler's Comments

1995 Amendment: Chapter 509 in (2), in third sentence after "be", substituted "paid by the office of public instruction" for "paid by the superintendent of public instruction from the state equalization aid account"; and made minor changes in style. Amendment effective July 1, 1995.

1991 Amendment: Substituted present language regarding filing of audit report and financial report for former section on issuance and filing of audit report (see 1989 MCA for former text). Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

Termination Date: Section 31, Ch. 489, L. 1991, provided: "Section 2-7-514(4), as added in [section 12], terminates June 30, 1997."

1989 Amendment: Inserted (1)(i) relating to issuance of cemetery district audit reports; and made minor changes in form. Amendment effective March 18, 1989, and terminates June 30, 1991.

Termination: Section 6, Ch. 14, L. 1989, provided: "[This act] terminates June 30, 1991."

1985 Amendment: Near beginning of (1) increased time for issuing reports from 60 to 120 days.

2-7-515. Actions by governing bodies.

Compiler's Comments

1991 Amendments: Chapter 128 in (3) ((4) of version effective July 1, 1992) substituted second sentence that reads: "If a written request to do so is received from the department, the county, city, or town attorney shall report the proceedings instituted or to be instituted, relating to the violations of law and nonperformance of duty, to the department within 30 days after receiving the request" for "The county, city, or town attorney shall report to the department within 30 days after receiving the audit report from the department the proceedings instituted or to be instituted relating to the violations of law and nonperformance of duty".

Chapter 489 in (1), near beginning after "audited", inserted "local government"; inserted (3) regarding resolution of findings and implementation of corrective measures; in (4), near end after "department may", substituted "refer the case to the attorney general" for "employ an attorney" and at end, before "entity", substituted "local government" for "respective governmental"; and made minor change in style. Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

2-7-516. Audit fees.

Compiler's Comments

1991 Amendment: Substituted present language regarding compensation to independent auditor for former section on audit fees (see 1989 MCA for former text). Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

1983 Amendment: Substituted reference to enterprise fund for reference to revolving fund.

1981 Amendment: In (1), substituted "administration of this part" for "conduct of each annual audit, except as follows:" [followed by a list of audit fees]; in (2), substituted "deposited in the revolving fund to the credit of the department" for "credited to the state general fund"; and inserted (3) relating to billing by percentage completion of audit and requiring governmental entity to make payment within 60 days.

2-7-517. Penalty.

Compiler's Comments

1997 Amendment: Chapter 42 in (2), near middle of first sentence after "2-7-516", deleted "(1)". Amendment effective March 12, 1997.

1991 Amendment: Inserted (1) establishing penalty for failure to file report or pay filing fee; in (2), in three places, substituted "local government" for "governmental" and inserted reference to subsection (1) of 2-7-516; and made minor change in style. Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

1985 Amendment: Deleted brackets around "2-7-516".

Commissioner Correction — Amendment: Upon enactment, this penalty section made erroneous reference to 2-15-516. There is no such section, but 2-7-516 appears to be the section intended to be cited, and the 1985 amendment corrected this error.

2-7-518. Deposit of fees.

Compiler's Comments

2001 Amendment: Chapter 483 near middle after "department of" substituted "administration" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

1991 Amendment: Near beginning, before "fees", deleted "audit" and before "entities" substituted "local government" for "governmental". Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

1983 Amendments: Chapter 287 substituted reference to department of commerce for reference to department of administration.

Chapter 277 substituted reference to enterprise fund for reference to revolving fund.

2-7-521. Publication.

Compiler's Comments

1991 Amendment: In (1)(a), at beginning of first sentence, deleted exception clause, near middle substituted "local government entity" for "department", before "each" deleted "the general comments section of", and at end inserted "in the area of the local government entity" and in second sentence, before "each", deleted "the general comments section of"; in (1)(b), near beginning of first sentence, substituted "county or an incorporated city or town" for "local government entity provided for in 2-7-503(1)(a) or (1)(b)" and before "shall" substituted "county, city, or town" for "department" and in second sentence substituted "independent auditor" for "auditing agency or firm"; in (2), in introductory clause, substituted "county or incorporated city or town" for "local government entity provided for in 2-7-503(1)(a) or (1)(b)"; in (3), near beginning after "entity", substituted "other than a county or incorporated city or town" for "provided for in 2-7-503(1)(c) through (1)(h)", after "audited" inserted "local", and deleted former second sentence that read: "A copy of the audit report must be sent to the newspaper publishing the statements"; and in (4) substituted "local government" for "governmental". Amendment effective July 1, 1992.

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

1989 Amendments: Chapter 140 near beginning of (3) substituted reference to subsection (1)(i) for reference to subsection (1)(h). Amendment effective March 18, 1989, and terminates June 30, 1991.

Chapter 607 in (1), after "circulation" and "county", deleted "for publication"; inserted (1)(b) requiring Department to send newspaper a summary of significant findings concerning audit report; in (2) inserted language requiring newspaper to publish summary of significant findings of local government audit report; at beginning of (3) substituted "For an" for "A publication concerning" and before "only" substituted "publish" for "contain"; and made minor changes in style, form, and grammar.

Termination: Section 6, Ch. 14, L. 1989, provided: "[This act] terminates June 30, 1991."

1983 Amendment: At beginning of (1), inserted "Except as provided in subsection (3)" and deleted requirement for an annual audit report in two places; and inserted (3) relating to statements required in publication concerning audit report of certain local government entities and requiring that a copy of the report be sent to the newspaper publishing the statement.

2-7-522. Report review.

Compiler's Comments

Estimate of Cost Savings Required in 1993 Budget Request: Section 27, Ch. 489, L. 1991, provided: "The governor shall include in his proposed budget submitted to the 53rd legislature an estimate of cost savings to state agencies resulting from the implementation of [this act]."

Interfund Loan From General Fund for Implementation of Single Audit Act: Section 28, Ch. 489, L. 1991, provided: "Costs incurred by the department of commerce during fiscal year ending June 30, 1992, in adopting rules to implement [this act] and in preparing for the implementation of [this act], up to the approved appropriation for this purpose, are to be funded by an interfund loan from the general fund that must be repaid over a 5-year period from the revenues from the filing fees provided for in [this act]."

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

CHAPTER 8
LEGISLATIVE REVIEW

Part 1
Periodic Agency Evaluation

Part Compiler's Comments

Former "Sunset" Review — 1979-1983: This chapter, as originally enacted in 1977, provided that approximately 47 state agencies were to be reviewed by the Legislative Audit Committee, with the Legislative Auditor to undertake performance audits and to recommend to the Legislature whether the audited entity should continue in existence. Each agency was to automatically terminate on a specific date unless an affirmative bill passed the Legislature reestablishing the agency. Approximately one-third of the entities were reviewed each legislative interim. After one complete 6-year cycle was made, this chapter was amended to halt the automatic termination provisions. The Office of the Legislative Auditor prepared an audit report for each sunset audit they performed. During the operation of the sunset law, the following state agencies were reviewed:

1. For the period ending July 1, 1979:

Reestablished:

In the Department of Commerce (then in the Department of Professional and Occupational Licensing and now the Department of Labor and Industry): Board of Public Accountants; Board of Architects; State Banking Board; State Electrical Board; Board of Professional Engineers and Professional Land Surveyors; Board of Landscape Architects; Board of County Printing; Board of Plumbers; and Board of Physical Therapy Examiners. In the State Auditor's Office: Office of Commissioner of Insurance and Insurance Department; and Office of Securities Commissioner.

Terminated:

In the Department of Professional and Occupational Licensing (now Department of Labor and Industry): Board of Abstracters; Board of Real Estate; and State Board of Warm Air Heating, Ventilation, and Air Conditioning. In the Department of Institutions (now Department of Corrections and Human Services): Board of Institutions.

2. For the period ending July 1, 1981:

Reestablished:

In the Department of Labor and Industry: Commission for Human Rights. In the Department of Commerce (then in the Department of Professional and Occupational Licensing and now the Department of Labor and Industry): Montana State Board of Medical Examiners; Board of Dentistry; Board of Pharmacists; Board of Nursing; Board of Optometrists; Board of Chiropractors; Board of Radiologic Technologists; Board of Speech Pathologists and Audiologists; Board of Hearing Aid Dispensers; Board of Psychologists; Board of Veterinarians (now, the Board of Veterinary Medicine); Board of Morticians; Board of Barbers; Board of Cosmetologists; and Board of Sanitarians. In the Department of Veteran's Affairs (then in the Department of Social and Rehabilitation Services and now the Department of Military Affairs): Board of Veteran's Affairs.

Terminated:

In the Department of Professional and Occupational Licensing (now Department of Labor and Industry): Board of Athletics; Board of Massage Therapists; Board of Osteopathic Physicians; and Board of Podiatry Examiners.

3. In the period ending July 1, 1983:

Reestablished:

In the Department of Commerce: Board of Aeronautics (now allocated to Department of Transportation); Board of Horseracing (now in Department of Livestock); Board of Milk Control (now repealed); Board of Waterwell Contractors (now in Department of Natural Resources and Conservation). In the Department of Agriculture: State Board of Hail Insurance. In the Department of Livestock: Board of Livestock. In the Department of Natural Resources and Conservation: Board of Oil and Gas Conservation. In the Department of Fish, Wildlife, and Parks: Montana Outfitters' Council (now Board of Outfitters, Department of Labor and Industry). In the Department of Public Service Regulation: Public Service Commission. In the Department of Health and Environmental Sciences: Board of Water and Wastewater Operators.

Legal Action to Survive Agency Termination: Section 10, Ch. 562, L. 1977, read: "This act shall not affect the right to institute or prosecute any cause of action by or against an agency terminated pursuant to this act if the cause of action accrued prior to the date the agency was terminated. Any causes of action pending on the date the agency is terminated, or instituted thereafter, shall be prosecuted or defended in the name of the state by the department of justice."

Severability Clause: Section 11, Ch. 562, L. 1977, was a severability clause.

2-8-101. Purpose.

Compiler's Comments

1983 Amendment: Near middle of (2) after "performance of agencies" inserted "or programs"; in (2)(e) after "function" deleted "which licenses or otherwise regulates a profession, occupation, business, industry, or other endeavor".

2-8-102. Definitions.

Compiler's Comments

1983 Amendment: In definition of performance audit, after "audited agency", inserted "or program" and after "other agencies" inserted "or programs"; and inserted definition of program.

2-8-111. Prereview responsibilities of agencies.

Compiler's Comments

1983 Amendment: In introductory clause, after "An agency" inserted "designated for termination or whose program or programs are"; after "designated" deleted "by 2-8-103 or 2-8-104"; in (1) after "delineate" inserted "the"; after "goals of" inserted "the"; after "programs"

deleted "for which it is responsible"; in (2) after "delineate" inserted "the"; after "objectives of" inserted "the"; and inserted (3) requiring furnishing of requested information for conducting performance audit.

2-8-112. Legislative audit committee review and report — review criteria.

Compiler's Comments

1991 Amendment: Near beginning of (4) inserted reference to 5-11-210. Amendment effective March 20, 1991.

1983 Amendment: Near beginning of (1) after "responsible for" substituted "conducting" for "having conducted"; in (1) after "each agency" inserted "or program"; in (1) after "termination" deleted "by 2-8-103"; inserted last sentence of (1) concerning an uncompleted audit; in (2) after "of the agency" substituted "or program, with emphasis on its effect on the public health, safety, and welfare" for "and a thorough examination of the following:"; deleted former (2)(a) through (2)(f), which read: "(a) Would the absence of regulation significantly harm or endanger the public health, safety, or welfare?

(b) Is there a reasonable relationship between the exercise of the state's police power and the protection of the public health, safety, or welfare?

(c) Is there another less restrictive method of regulation available which could adequately protect the public?

(d) Does the regulation have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree?

(e) Is the increase in cost more harmful to the public than the harm which could result from the absence of regulation?

(f) Are all facets of the regulatory process designed solely for the purpose of and have as their primary effect the protection of the public?"; near end of (4) after "parts of statutes" substituted "relating to" for "for which"; and at end of (4) substituted "agency's or program's activities" for "agency reviewed is responsible".

Attorney General's Opinions

Intent of Legislature in Allowing Board of Abstracters to Terminate: The Legislature, by allowing the Board of Abstracters to "sunset", by plain import of the statutory language involved, was not expressing the opinion that a certificate required by 76-3-612 was no longer necessary. Rather, it was a determination that the Board's licensing function did not meet the criteria set forth in 2-8-112. 38 A.G. Op. 48 (1979).

2-8-113. Hearings by standing committee — criteria for termination.

Compiler's Comments

1997 Amendment: Chapter 42 in (3), after "public testimony", deleted "responsive to the questions set forth in subsection (2) of 2-8-112"; and made minor changes in style. Amendment effective March 12, 1997.

1983 Amendment: Near beginning of (1) after "Prior to" substituted "termination" for "abolishment"; after "of an agency" deleted "terminated by 2-8-103 or 2-8-104" and inserted "or program"; near end of (1) after "which the agency" inserted "or program"; near beginning of (2) after "termination" inserted "of an agency or program"; after "the agency" inserted "involved in the termination"; near middle of (2) after "public need for" substituted "the agency's or program's" for "its"; after "of the agency" inserted "or program"; before "public health" substituted "improve" for "increase the protection of the"; at end of (2) deleted "from harm or damage or decrease the adverse effect on the competitive market"; near beginning of (3) after "an agency" inserted "or program".

2-8-121. Effect of termination.

Compiler's Comments

1983 Amendment: Inserted "program" after "agency" in three places.

2-8-122. Reestablishment.

Compiler's Comments

1983 Amendment: Inserted "or program" after "agency" in one place in (1) and twice in (2); in (1) after "by the legislature" deleted "for any period of time specified by law, not to exceed 6 years, at the end of which time the legislature shall again review the agency pursuant to 2-8-112 and may again reestablish, modify, or allow the termination of the agency pursuant to this section".

Part 3
Privatization Plan Review

Part Compiler's Comments

Effective Date: Section 6, Ch. 762, L. 1991, provided that this part is effective July 1, 1991.

2-8-304. Review of privatized programs.

Compiler's Comments

1995 Amendment: Chapter 556 inserted (3) regarding submissions by Office of Budget and Program Planning; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

CHAPTER 9
LIABILITY EXPOSURE AND INSURANCE COVERAGE

Chapter Compiler's Comments

Severability: Section 11, Ch. 360, L. 1977, was a severability clause.

Chapter Law Review Articles

Limitations on Legislative Immunity: A New Era for Montana's Sovereign Immunity Doctrine, Conwell, 54 Mont. L. Rev. 127 (1993).

The Montana Supreme Court in Politics, Lopach, 48 Mont. L. Rev. 267 (1987).

The Passing of Sovereign Immunity in Montana, The King Is Dead, Hjort, 34 Mont. L. Rev. 283 (1973).

Chapter Collateral References

Implied cause of action for damages for violation of provisions of state constitution. 75 ALR 5th 619.

Doctrine of apparent authority as applied to agent of municipality. 77 ALR 3d 925.

"State-created danger," or similar theory, as basis for civil rights action under 42 U.S.C.A. §1983. 159 ALR Fed. 37.

Part 1
Liability Exposure

Part Compiler's Comments

Effective Date — Termination — Special Vote Requirement: Section 1, Ch. 228, L. 1987, extended the effective period of the temporary versions of 2-9-101 and 2-9-108 from June 30, 1987, to June 30, 1991.

Section 2, Ch. 228, L. 1987, provided: "Because this act amends and extends the effect of a statute imposing limited immunity on governmental entities, Article II, section 18, of the Montana constitution may require a two-thirds vote of the members of each house of the legislature to be effective." Chapter 228 was passed by a vote of 90-5 in the House of Representatives and 47-3 in the Senate.

Severability — 1986 Enactment: Section 6, Ch. 22, Sp. L. June 1986, was a severability clause.

Severability — 1977 Enactment: Section 9, Ch. 189, L. 1977, was a severability clause.

Part Case Notes

No State and Local Employee Qualified Immunity for Violation of State Constitution Similar to Qualified Immunity of Federal Employee Violating Federal Constitution: Montana has no immunity for a state or local government employee who violates a person's rights under the Montana Constitution comparable to the federal common-law presumption of qualified immunity of a federal employee for violating a person's rights under the U.S. Constitution and laws. In fact, Art. II, sec. 18, Mont. Const., prohibits immunity unless it is specifically provided for by a two-thirds vote of each house of the Legislature. The Legislature has not provided a qualified immunity for state and local employees who violate a person's rights under the Montana Constitution, and the court need not decide whether it can. Furthermore, Art. II, sec. 16, Mont. Const., provides that courts of justice are open to every person and that speedy remedy is afforded for every injury of person, property, or character. For these reasons, state and local government employees do not have qualified immunity for violation of a person's rights under the Montana Constitution. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Liability of State to Suit — Active Duty U.S. Army Worker Injured While Assigned to National Guard — Tort Claim Not Barred: While in full-time service to the U.S. Army, Trankel was assigned to a Montana Army National Guard unit rebuilding armored vehicles and was injured by toxic chemicals during the rebuilding project. Trankel sued the state, asserting violations of the Occupational Health Act of Montana, the Montana Safety Act, and the Employee and Community Hazardous Chemical Information Act. The state contended that Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950), and Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986), barred a claim that was incident to military service regardless of the substantive law upon which the claim was based, the status of the plaintiff at the time of injury, or the status of the party against whom the claim was made and that the alleged violations of the state Acts did not provide a private cause of action and could be remedied only through the administrative remedies provided for in the Acts. The District Court agreed with the state and dismissed Trankel's complaint with prejudice. On appeal, the Supreme Court distinguished Feres and related federal cases because they were based on federal rather than state tort claims, with little bearing on rights under state law and the Montana Constitution. The Supreme Court overruled the holding in Evans that the National Guard was not a political subdivision subject to suit, finding instead that the National Guard and the Department of Military Affairs were clearly governmental entities within the meaning of 2-9-101 and that the constitutional premise on which Evans was based did not apply. Consistent with other applications of Art. II, sec. 16, Mont. Const., any statute or court decision that deprives an employee of the right to full legal redress, as defined by general Montana tort law against third parties, is absolutely prohibited. Because Trankel was not employed by the Montana Army National Guard or the Department of Military Affairs at the time of injury, Trankel's claim against the state pursuant to the tort claims statutes was not barred. Further, applying the rationale in Pollard v. Todd, 148 M 171, 418 P2d 869 (1966), the Supreme Court held that the statutory state Acts did not give rise to causes of action independent from a claim of negligence subject only to the administrative remedies contained in the Acts, but rather established duties, the violation of which is negligence per se. Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997), distinguishing Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950), U.S. v. Johnson, 481 US 681, 95 L Ed 2d 648, 107 S Ct 2063 (1987), and Stauber v. Cline, 837 F2d 395 (9th Cir. 1988); following Webb v. Mont. Masonry Constr. Co., 233 M 198, 761 P2d 343 (1988), Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488 (1989), and Francetich v. St. Comp. Mut. Ins. Fund, 252 M 215, 827 P2d 1279 (1992); overruling Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986); and followed in Lake v. St., 282 M 484, 938 P2d 698, 54 St. Rep. 442 (1997).

Filing of Tort Claim Against State in District Court Improper — Review Required: A corporation filed a complaint against the state in District Court, seeking damages for breach of the covenant of good faith and fair dealing that attached to its workers' compensation contract. However, under this part, all tort claims against the state must first be filed with and reviewed by the Department of Administration. Upon failure to follow this procedure, the District Court had no jurisdiction to review the matter, and dismissal of the complaint was proper. Cottonwood Hills, Inc. v. St., 238 M 404, 777 P2d 1301, 46 St. Rep. 1371 (1989).

National Guardsman Injured on Weekend Drill — No Right to Sue State — Summary Judgment Upheld: The Supreme Court affirmed summary judgment granted state by District Court because: (1) issues raised on appeal were not genuine issues of material fact but rather questions of law, therefore summary judgment was proper; (2) the National Guard is a military force, not a political subdivision of the state, so appellant had no right to sue under the Tort Claims Act (Title 2, ch. 9, parts 1 through 3); and (3) traditionally, the federal government and state governments have not been held liable in tort for injuries that arise in the course of activity incident to military service (Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950)). Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160, 43 St. Rep. 1930 (1986), distinguished in Grove v. Mont. Army Nat'l Guard, 264 M 498, 872 P2d 791, 51 St. Rep. 366 (1994), and overruled in Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997).

Liability of Municipality: In Montana, a municipality is a government entity and is liable for its acts or omissions like an ordinary private party. Kaiser v. Whitehall, 221 M 322, 718 P2d 1341, 43 St. Rep. 846 (1986).

Evidence of Alteration of Accident Scene After the Accident Excluded: Evidence of subsequent repairs or improvements by a defendant altering the scene of an accident may not be admitted in evidence to show negligence on the part of the defendant. The evidence erroneously admitted here put before the jury the idea that the state, by constructing an additional guardrail at the scene of the accident after the accident, admitted to antecedent negligence. Cech v. St., 183 M 75, 598 P2d 584 (1979), affirmed on rehearing, 184 M 522, 604 P2d 97 (1979).

Part Law Review Articles

The Fall and Rise of Official Immunity, Sikes, 25 Ga. St. B.J. 93 (1988).

2-9-101. Definitions.

Compiler's Comments

Repeal of Termination Date: Section 1, Ch. 239, L. 1993, amended sec. 9, Ch. 22, Sp. L. June 1986, by deleting the June 30, 1987, termination date applicable to this section. Section 2, Ch. 239, L. 1993, amended sec. 1, Ch. 228, L. 1987, by deleting the June 30, 1991, termination date applicable to this section. Section 3, Ch. 239, L. 1993, amended sec. 1, Ch. 803, L. 1991, by deleting the June 30, 1993, termination date applicable to this section. Amendment effective April 1, 1993.

Repealer: Section 4, Ch. 239, L. 1993, repealed sec. 3, Ch. 22, Sp. L. June 1986. The effect of the 1993 act was to repeal the version of this section that would have deleted the reference to the 2-9-108 governmental liability limit in the definition of claim. Repealer effective April 1, 1993.

Effective Date — Termination — Special Vote Requirement: Section 1, Ch. 228, L. 1987, extended the effective period of the temporary versions of 2-9-101 and 2-9-108 from June 30, 1987, to June 30, 1991.

Section 2, Ch. 228, L. 1987, provided: "Because this act amends and extends the effect of a statute imposing limited immunity on governmental entities, Article II, section 18, of the Montana constitution may require a two-thirds vote of the members of each house of the legislature to be effective." Chapter 228 was passed by a vote of 90-5 in the House of Representatives and 47-3 in the Senate.

1986 Amendment: In (1) of temporary version near beginning of second sentence substituted "2-9-108" for "2-9-107". In (1) of version effective July 1, 1987, near beginning of second sentence after "this section", deleted "and the limit of liability contained in 2-9-107".

Effective Date — Termination — 1986 Enactment: The temporary version enacted June 1986 was effective July 10, 1986, and terminates June 30, 1987.

Severability — 1986 Enactment: Section 6, Ch. 22, Sp. L. June 1986, was a severability clause.

1985 Amendment: In (1) inserted second sentence construing what is considered a single claim.

Immunity From Suit: If Ch. 389, L. 1985, is interpreted to be a legislative imposition of immunity from suit within the meaning of Art. II, sec. 18, of the Montana Constitution, then under Art. II, sec. 18, Ch. 389, L. 1985, should have been approved by a 2/3 vote of each house of the Legislature. Chapter 389 was approved by a vote of 65-33 in the House and 42-7 in the Senate.

1983 Amendment: Deleted former (2), which read: "(2) As used in 2-9-104, the following definitions apply:

(a) "Economic damages" means tangible pecuniary losses.

(b) "Noneconomic damages" means those damages not included in economic, punitive, or exemplary damages including, without limitation, damages for pain and suffering, loss of consortium, mental distress, and loss of reputation."

Case Notes

No Obligation to Extinguish Lien Until Debt Fully Satisfied — Summary Dismissal of Action for Slander of Title Proper: Following a business default, defendant sought to enforce a lease agreement and received a judgment in Justice's Court for $7,156.56, including interest. In an effort to satisfy the judgment, plaintiff's wife paid $7,121.14. Plaintiff later attempted to refinance the disputed property and found that defendant's lien had not been extinguished, so plaintiff requested a partial satisfaction of judgment to his wife and release of the lien on the judgment. When defendant refused to release the lien, plaintiff sued for slander of title. Slander of title is an action in which one maliciously publishes false matter that brings into question or disparages the title to property, thereby causing special damages to the owner. Defendant was under no obligation to extinguish the lien until the judgment was fully satisfied. Because the wife's payment was $35.42 short of completely satisfying the judgment, defendant could not be said to have maliciously published false matter regarding the lien, so slander of title was not proved, and summary judgment for defendant was proper. Pryor v. Babcock Bldg. Corp., 2002 MT 68, 309 M 222, 45 P3d 35 (2002). See also First Sec. Bank of Bozeman v. Tholkes, 169 M 422, 547 P2d 1328 (1976), and Felska v. Goulding, 238 M 224, 776 P2d 530 (1989).

Justice Department Investigator Not Entitled to Prosecutorial Immunity for Administrative Acts in Gambling License Application Investigation: Kelman applied to the Department of

Justice for a gambling operator's license in connection with her contractual interest in two casinos. The Department assigned Losleben to investigate and report on the application. Losleben filed a 37-page "offense report" recommending that the Department deny the application and prosecute Kelman and others listed in the report for alleged criminal violations. Kelman filed suit against Losleben, alleging invasion of privacy, injurious falsehood, wrongful use of civil proceedings, tortious interference with contract, and actual fraud. The District Court dismissed the claims, concluding that Losleben was a government official entitled to absolute prosecutorial immunity. On appeal, the Supreme Court focused on whether the alleged wrongful conduct occurred in the course of filing and maintaining criminal charges, in accord with Smith v. Butte-Silver Bow County, 266 M 1, 878 P2d 870 (1994), and whether the conduct was intimately associated with the judicial phase of the criminal process, as set out in Imbler v. Pachtman, 424 US 409, 47 L Ed 2d 128, 96 S Ct 984 (1976). A review of the record showed that Losleben was acting in an administrative capacity while investigating and reporting on Kelman's application as an agent of the Department, rather than in a prosecutorial capacity of filing and maintaining criminal charges. As such, Losleben was not entitled to prosecutorial immunity, and the District Court's dismissal of the claim of civil liability constituted reversible error. Kelman v. Losleben, 271 M 156, 894 P2d 955, 52 St. Rep. 387 (1995).

University as "State" and Not "Political Subdivision" for Purposes of Venue: Minervino filed an action in Cascade County against the University of Montana (now University of Montana-Missoula), claiming that because the University is a political subdivision under 25-2-126(3), the University campus in Great Falls established proper venue in Cascade County. The Supreme Court traced the legislative history of 25-2-126 and concluded that because it was once codified as part of Title 2, ch. 9, the definition of "state" in this section applied. Because the University is part of the state under 25-2-126(1), venue was not proper in Cascade County because Minervino did not claim that she was a resident there nor did the claim arise there. Minervino v. Univ. of Mont., 258 M 493, 853 P2d 1242, 50 St. Rep. 629 (1993).

Failure to State Claim — False Arrest and Imprisonment: The District Court properly dismissed plaintiff's suit when plaintiff was arrested for the offense of custodial interference for returning children to the Department of Family Services (now Department of Public Health and Human Services) rather than to their lawful custodian as required by 45-5-304. Contway v. Camp, 236 M 169, 768 P2d 1377, 46 St. Rep. 270 (1989).

Medical Malpractice — Physicians Treating Inmates Not Department Employees — Not Immune From Suit: A doctor was an independent contractor and thus not entitled to immunity from suit as a state employee even though he: (1) was the only doctor employed by the state to care for state prison inmates; (2) treated inmates in facilities and with medical support services provided by the state; (3) was paid a salary; and (4) participated in the state retirement system. Therefore, his associate, who treated the inmate twice, was likewise not immune from suit. Kyriss v. St., 218 M 162, 707 P2d 5, 42 St. Rep. 1487 (1985).

School District Not Entitled to Protection of Eleventh Amendment — Federal Age Discrimination in Employment Action: Where the plaintiff schoolteacher brought an action against the defendant school district under the federal Age Discrimination in Employment Act and the defendant claimed it was entitled to the protection of the 11th amendment as against the plaintiff's claims for summary damages, the federal District Court held, under the analysis required by Mt. Healthy City Bd. of Educ. v. Doyle, 429 US 274 (1977), and under Montana law, that a school district is not the "alter ego" of the State itself and therefore is not entitled to 11th amendment protection against actions for damages granted to states. Because the court held that the defendant district did not constitute the State, it did not reach the issue of whether the State had waived its 11th amendment immunity. Kenny v. Bd. of Trustees, 563 F. Supp. 95, 40 St. Rep. 940 (D.C. Mont. 1983).

Prosecutorial Immunity: Notwithstanding inclusion of coverage for malicious prosecution, the common-law prosecutorial immunity remains in effect in this state. State ex rel. Dept. of Justice v. District Court, 172 M 88, 560 P2d 1328 (1976).

Negligence of Police Officers — Liability of City: The power in the city to control its policemen in both broad and detailed affairs related to their work brings the policemen squarely within the definition of "employee" and subjects the city to liability for torts committed within the scope of their employment or duties. St. v. District Court, 170 M 15, 550 P2d 382 (1976).

State Not Responsible for Negligence of Municipal Police Officers: City's claim that state is liable under doctrine of respondeat superior where plaintiff sustained injuries allegedly due to negligence of city police was without merit. St. v. District Court, 170 M 15, 550 P2d 382 (1976).

2-9-102. Governmental entities liable for torts except as specifically provided by legislature.

Case Notes

Actionable Section 1983 Claim Under State-Created Danger Theory: A government official who, while acting under color of state law, deprives an individual of constitutionally protected rights may be subject to personal liability for civil damages pursuant to 42 U.S.C. 1983. Generally, a government official's failure to protect an individual from harm does not constitute a due process violation. Inaction by the state, even when a danger is known, does not trigger a due process obligation except under the "state-created danger" theory, derived from DeShaney v. Winnebago County Dept. of Social Services, 489 US 189, 103 L Ed 2d 249, 109 S Ct 998 (1989), which provides that a constitutional duty to protect may be imposed when state actors have affirmatively acted to create plaintiff's danger or to render plaintiff more vulnerable to it. Adopting the test in Huffman v. County of Los Angeles, 147 F3d 1054 (9th Cir. 1998), the Supreme Court held that to assert an actionable 42 U.S.C. 1983 claim under the state-created danger theory, plaintiff must demonstrate that the state acted affirmatively, with deliberate indifference, in creating a foreseeable danger to plaintiff, leading to deprivation of plaintiff's constitutional rights. In the present case, material facts existed as to whether an officer affirmatively and with deliberate indifference placed a woman in danger, increased her vulnerability to danger, or deprived her of her right to life; thus, summary dismissal of her husband's personal liability claim against the officer was reversible error. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999). See also Wood v. Ostrander, 879 F2d 583 (9th Cir. 1989), and Kneipp v. Tedder, 95 F3d 1199 (3rd Cir. 1996).

Public Duty Doctrine as Applied to Law Enforcement Personnel — Exception in Cases of Special Relationship: Trina admitted that she had been drinking when stopped in her vehicle by Officer Driscoll, who nevertheless believed that sufficient probable cause did not exist to arrest the woman. Instead, thinking Trina might be impaired, the officer suggested a ride home or that Trina walk the 2-mile distance and warned Trina about returning to the vehicle. Trina decided instead to walk to a phone and call for a ride and was killed in traffic. Trina's husband brought suit for civil damages under 42 U.S.C. 1983, claiming that the officer breached the duty to protect, in violation of Trina's due process rights. The District Court summarily dismissed the claim, holding that because no probable cause existed for Trina's arrest, the officer had no duty to protect Trina from harm and that without a duty, the action failed. The public duty doctrine provides that a police officer's duty to protect and preserve the peace is owed to the public at large rather than to a particular person, unless a special relationship exists, thus giving rise to a special duty that is more particular than that owed to the public. A special relationship is established: (1) by a statute intended to protect a specific class of persons, of which the plaintiff is a member, from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances when the agency has actual custody of the plaintiff or of a third person who harms the plaintiff. Relying on Stewart v. Standard Publishing Co., 102 M 43, 55 P2d 694 (1936), the Supreme Court agreed that although the officer may not have initially owed Trina a duty to protect, that duty was assumed as a matter of law when the officer prevented the woman from driving her car and ensured that she did not attempt to drive. The question of whether the duty to protect was breached is a question of fact for the jury, so summary dismissal was improper. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999), clarifying and distinguishing Phillips v. Billings, 233 M 249, 758 P2d 772 (1988). See also Krieg v. Massey, 239 M 469, 781 P2d 277, 46 St. Rep. 1839 (1989), and Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996).

Law Not Clearly Established at Time — Qualified Immunity Extended: Police officers searched Dorwart's home pursuant to writs of execution and seized his personal property, but without Dorwart's permission or a search warrant. The District Court held that the officers were entitled to qualified immunity from individual liability for Dorwart's due process claims because the constitutional notice-related rights that were violated were not clearly established at the time of the officers' entry, so the officers could not have known that their actions violated Dorwart's rights. In analyzing whether an official is entitled to qualified immunity, a court must identify the right violated and must determine whether the right was clearly established at the time of the violation and, if so, whether a reasonable person or the official would have known that the conduct violated that right. If plaintiff shows that the right was clearly established at the time of the violation, the burden then shifts to defendant asserting qualified immunity to prove

that the conduct was reasonable even though it violated the law. Under the law as it existed at the time that the officers entered Dorwart's home and levied upon his property, it was not clearly established whether a writ of execution pursuant to which the deputies acted, in and of itself, authorized entry into a private residence or whether the officers' entry pursuant only to the writ violated Dorwart's right to be free from unreasonable search and seizure. Plaintiff Dorwart never satisfied the initial burden of proving that the right that the deputies violated was clearly established at the time of the violation, so the deputies were entitled to qualified immunity from individual liability for Dorwart's search and seizure claim. Dorwart's general assertion of the right to be free from unreasonable search and seizure was too broad for purposes of determining the clearly established right portion of the qualified immunity determination, which requires that violation of the right be established in a more particularized, relevant sense. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Hamilton v. Endell, 981 F2d 1062 (9th Cir. 1992), and Orozco v. Day, 281 M 341, 934 P2d 1009 (1997).

Qualified Immunity Defense Unavailable in Action for Declaratory or Injunctive Relief: Plaintiff did not seek monetary damages for a due process claim, requesting only a declaratory judgment and permanent injunction. Qualified immunity is a defense to damages liability but is not available in actions for declaratory or injunctive relief. The District Court erred in applying qualified immunity in the context of this due process claim. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Am. Fire, Theft & Collision Managers, Inc. v. Gillespie, 932 F2d 816 (9th Cir. 1991).

Sovereign Immunity Bars Tort Action by Individual Against State in Tribal Court: Following a fatal accident on a state-maintained highway located within the exterior boundaries of the Blackfeet Reservation, Gilham, the mother of the victim, filed suit in Blackfeet Tribal Court against the driver and the State of Montana, alleging negligence. After the Blackfeet Tribal Court entered a judgment against the state, Montana filed an action in federal District Court challenging the jurisdiction of the tribal court. The District Court granted the state's motion, ruling that as a sovereign, Montana enjoys immunity from suit in tribal courts and that the waiver of immunity under Art. II, sec. 18, Mont. Const., waives Montana's immunity only from suit in Montana state courts. On appeal, the Ninth Circuit Court affirmed, ruling that states have retained their historic sovereign immunity from suits by individuals and that this immunity is not abrogated by the inherent powers of tribes. The waiver of immunity found in Art. II, sec. 18, Mont. Const., applies only to suits in Montana's own courts. Mont. v. Gilham, 133 F3d 1133 (9th Cir. 1998).

Justice Department Investigator Not Entitled to Prosecutorial Immunity for Administrative Acts in Gambling License Application Investigation: Kelman applied to the Department of Justice for a gambling operator's license in connection with her contractual interest in two casinos. The Department assigned Losleben to investigate and report on the application. Losleben filed a 37-page "offense report" recommending that the Department deny the application and prosecute Kelman and others listed in the report for alleged criminal violations. Kelman filed suit against Losleben, alleging invasion of privacy, injurious falsehood, wrongful use of civil proceedings, tortious interference with contract, and actual fraud. The District Court dismissed the claims, concluding that Losleben was a government official entitled to absolute prosecutorial immunity. On appeal, the Supreme Court focused on whether the alleged wrongful conduct occurred in the course of filing and maintaining criminal charges, in accord with Smith v. Butte-Silver Bow County, 266 M 1, 878 P2d 870 (1994), and whether the conduct was intimately associated with the judicial phase of the criminal process, as set out in Imbler v. Pachtman, 424 US 409, 47 L Ed 2d 128, 96 S Ct 984 (1976). A review of the record showed that Losleben was acting in an administrative capacity while investigating and reporting on Kelman's application as an agent of the Department, rather than in a prosecutorial capacity of filing and maintaining criminal charges. As such, Losleben was not entitled to prosecutorial immunity, and the District Court's dismissal of the claim of civil liability constituted reversible error. Kelman v. Losleben, 271 M 156, 894 P2d 955, 52 St. Rep. 387 (1995).

Limited Application of Nondelegable Duty Exception to Respondeat Superior Doctrine: Application of the nondelegable duty exception to the respondeat superior doctrine is limited to instances of safety in which the subject matter is inherently dangerous. The Supreme Court declined to modify the presently accepted version of the doctrine by adopting the exception, set out in section 214 of Restatement (Second) of Agency, that a master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance or duty to a servant or other person is subject to liability to others for harm caused to them by the failure of the agent to perform the duty. Noting that there are several reasons for and against extending the liability of an employer when an intentional tort is

committed only because or by virtue of the employment situation, the court opted to leave adoption of such a major doctrinal change to the Legislature. Maguire v. St., 254 M 178, 835 P2d 755, 49 St. Rep. 688 (1992), followed in Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996).

Summary Dismissal of Wrongful Discharge Claim Against County Attorney Acting in Official Capacity: When an action is brought against a county based on actionable conduct by an employee, the employee is immune from individual liability for the conduct if the county acknowledges that the conduct arose out of the course and scope of the employee's official duties. A County Attorney who dismissed his secretary when he took office was acting within the scope of his duties and was therefore immune from a wrongful discharge suit and was entitled to summary judgment on the claim. Kenyon v. Stillwater County, 254 M 142, 835 P2d 742, 49 St. Rep. 673 (1992).

No Immunity Under Claim That State Not Liable for Joint and Several Liability Not Attributable to State Employee: The state, wishing to avoid the effects of joint and several liability, claimed that the state could not be jointly liable for the 42% negligence of an accident victim because the victim was not an officer or employee of the state. The Supreme Court found no applicable statutory or other theory that would preclude the general rule that the state has no immunity for its torts unless otherwise provided by the Legislature. Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991).

Failure to Review Application for Self-Insurance — Quasi-Judicial Immunity Not Applicable: The Division of Workers' Compensation (now State Fund) admitted negligence for failing to conduct an adequate review of a corporation's financial ability to self-insure under plan No. 1, but claimed immunity under the rationale of Koppen v. Bd. of Medical Examiners, 233 M 214, 759 P2d 173, 45 St. Rep. 1433 (1988), for its acts as a government agency. The Supreme Court, noting that for immunity to apply, the function of the Division (now State Fund) must be quasi-judicial rather than administrative or ministerial, distinguished Koppen based on the lack of discretion necessary for the Division (now State Fund) to perform its statutory duty. Because simply performing this duty did not involve the use of quasi-judicial discretion, the act was purely ministerial and not protected by quasi-judicial immunity. The discretionary function exemption will not apply when a statute, regulation, or policy specifically prescribes a course of action for an employee to follow and the employee has no rightful option but to adhere to the directive. State ex rel. Div. of Workers' Comp. v. District Court, 240 M 225, 805 P2d 1272, 47 St. Rep. 1911 (1990), following Berkovitz v. U.S., 486 US 531, 100 L Ed 2d 531, 108 S Ct 1945 (1988). See also Meinecke v. McFarland, 122 M 515, 206 P2d 1012 (1949).

State and State Officials Not "Persons" for Purposes of Federal Suit Involving Deprivation of Rights: Neither the state nor its officials acting in their official capacities are "persons" for purposes of a civil action for deprivation of rights under 42 U.S.C. 1983. State ex rel. Div. of Workers' Comp. v. District Court, 246 M 225, 805 P2d 1272, 47 St. Rep. 1911 (1990), following Will v. Mich. Dept. of State Police, 491 US 58, 105 L Ed 2d 45, 109 S Ct 2304 (1989), and Brandon v. Holt, 469 US 464, 83 L Ed 2d 878, 105 S Ct 873 (1985).

Right to Sue Under 42 U.S.C. 1983 for Death Caused by Shots Fired by Police: Two police officers responded to a report of a shot fired in a residential area. The officers knocked on the door of an apartment identified by a local resident as the one entered by the man who had fired the shot. One of the officers shot and killed plaintiff's husband after the husband opened the door and allegedly pointed a shotgun at the officers. His wife sued the officers, the police department, and Butte-Silver Bow County under 42 U.S.C. 1983. The court held that the action was recognizable under that section since the wife alleged that the defendants acted with gross negligence amounting to deliberate indifference to her husband's well-being. A local government may be held liable under 42 U.S.C. 1983 for a federal constitutional violation when execution of its policy or custom, whether by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts an injury. Scott v. Henrich, 700 F. Supp. 498, 45 St. Rep. 2444 (D.C. Mont. 1988).

Initiation of Lawsuit by School District — Waiver of Sovereign Immunity: When a school district sued respondents for return of school transportation payments allegedly made in error, the school district was not entitled to use the doctrine of sovereign immunity as a defense to respondents' counterclaim. School District v. Simonsen, 210 M 100, 683 P2d 471, 41 St. Rep. 944 (1984).

School District Not Entitled to Protection of Eleventh Amendment — Federal Age Discrimination in Employment Action: Where the plaintiff schoolteacher brought an action against the defendant school district under the federal Age Discrimination in Employment Act and the defendant claimed it was entitled to the protection of the 11th amendment as against the

plaintiff's claims for summary damages, the federal District Court held, under the analysis required by Mt. Healthy City Bd. of Educ. v. Doyle, 429 US 274 (1977), and under Montana law, that a school district is not the "alter ego" of the State itself and therefore is not entitled to 11th amendment protection against actions for damages granted to states. Because the court held that the defendant district did not constitute the State, it did not reach the issue of whether the State had waived its 11th amendment immunity. Kenny v. Bd. of Trustees, 563 F. Supp. 95, 40 St. Rep. 940 (D.C. Mont. 1983).

Wrongful Placement of Special Education Child — Duty Owed by School District — Sovereign Immunity No Bar to Claim for Damages: The plaintiff, a minor child, was diagnosed as needing special education and was to be educated in a class with other "normal" children but was later removed to a class of retarded children and as a result regressed in development. The school district's action of placement of the child was subject to judicial review and was not barred from review by the doctrine of sovereign immunity merely because it was discretionary. The school authorities owed the child a duty of reasonable care in testing and placing her in an appropriate special education program, and the District Court therefore erred in dismissing the child's action for damages. B.M. v. St., 200 M 58, 649 P2d 425, 39 St. Rep. 1285 (1982). See also State ex rel. Eccleston v. District Court, 240 M 44, 783 P2d 363, 46 St. Rep. 1929 (1989).

Federal Suit by Prisoner — City Not a Proper Defendant: A state prison inmate brought a civil rights action in federal District Court against his parole officers, a deputy sheriff, and the city of Deer Lodge. Because the parole officers were employed by the state, the Deputy Sheriff was employed by the county, and the plaintiff failed to oppose the city's motion for summary judgment, the city was properly dismissed as a defendant. Harvey v. Pomroy, 535 F. Supp. 78, 39 St. Rep. 657 (D.C. Mont. 1982).

Stipulation of Dismissal of Action Against Police Officer as Applying to City and County Under "Respondeat Superior" Doctrine: A man fleeing from police officers was shot by one of them. The man later entered into a stipulation for dismissal with prejudice of the claim against the officer, but later the city and county, also defendants in the suit, were denied their motions for dismissal with prejudice. The Montana Supreme Court held that a stipulation of dismissal with prejudice of a defendant is tantamount to a judgment on the merits; accordingly, such a dismissal with prejudice is res judicata as to every issue reasonably raised by the pleadings. Under the doctrine of respondeat superior, an employer defendant's liability is vicarious or derivative and does not arise until an employee acts negligently within the scope of his employment. A dismissal with prejudice of a claim against an employee is equivalent to a finding that the employee was not negligent. Under the doctrine of respondeat superior, such a dismissal of an employee operates to exonerate the employer. The Supreme Court will look at the dismissal with prejudice on its face and will not look behind the words "with prejudice". State ex rel. Havre v. District Court, 187 M 181, 609 P2d 275 (1980).

Highway Death — Sovereign Immunity: The state may not under Montana's Constitution or any law maintain a defense of sovereign immunity against claims arising from death, and there is no such defense as "financial feasibility or discretion" that would relieve the state of liability for traffic deaths resulting from highways maintained unsafely. St. v. District Court, 175 M 63, 572 P2d 201 (1977).

Prosecutorial Immunity: Prosecutorial immunity and sovereign immunity are different concepts supported by different considerations of public policy. It is an established general principle that any statutory waiver of a state's immunity from suit be strictly construed. Prosecutorial immunity remains in this state and applies to the state and the Department of Justice, specifically. State ex rel. Dept. of Justice v. District Court, 172 M 88, 560 P2d 1328 (1976).

State Not Responsible for Negligence of Municipal Police Officers: City's claim that state is liable under doctrine of respondeat superior where plaintiff sustained injuries allegedly due to negligence of city police was without merit. St. v. District Court, 170 M 15, 550 P2d 382 (1976).

Torts Committed by Police Officers — Liability of City: The power in the city to control its policemen in both broad and detailed affairs related to their work brings the policemen squarely within the definition of "employee" and subjects the city to liability for torts committed within the scope of their employment or duties. St. v. District Court, 170 M 15, 550 P2d 382 (1976).

Attorney General's Opinions

Taxation — Levy for Liability Insurance: The levy provided by 2-9-212 does not require an election. The school trustees may authorize the levy upon determining that it is in the best interests of the school district. The annual property tax may be used to fund all policies of

insurance required or permitted by law. 37 A.G. Op. 109 (1978), reversing contrary language in 35 A.G. Op. 44 (1973).

Law Review Articles

The King's Resurrection: Sovereign Immunity Returns to Montana, Kutzman, 51 Mont. L. Rev. 529. (1990).

Educational Malpractice—Does the Cause of Action Exist?, Magone, 49 Mont. L. Rev. 140 (1988).

Standing Requires More Than Interest of Public at Large, Guardino, 229 N.Y.L.J. 7 (2003).

Collateral References

Tort liability of public schools and institutions of higher learning for injury to student walking to or from school. 72 ALR 5th 469.

Tort liability of public schools and institutions of higher learning for accidents occurring during school athletic events. 68 ALR 5th 663.

Tort liability of schools and institutions of higher learning for personal injury suffered during school field trip. 68 ALR 5th 519.

Tort liability of public schools and institutions of higher learning for accidents occurring in physical education classes. 66 ALR 5th 1.

Payment of attorneys' services in defending action brought against officials individually as within power or obligation of public body. 47 ALR 5th 553.

Liability of municipal corporation or other governmental entity for injury or death caused by action or inaction of off-duty police officer. 36 ALR 5th 1.

Liability of school or school personnel for injury to student resulting from cheerleader activities. 25 ALR 5th 784.

Municipal liability for negligent performance of building inspector's duties. 24 ALR 5th 200.

Tort liability of public schools and institutions of higher learning for accidents associated with transportation of students. 23 ALR 5th 1.

Personal injury liability of civil engineer for negligence in highway or bridge construction or maintenance. 43 ALR 4th 911.

Liability, in motor vehicle-related cases, of governmental entity for injury, death, or property damage resulting from defect or obstruction in shoulder of street or highway. 19 ALR 4th 532.

Liability of governmental unit for intentional assault by employee other than police officer. 17 ALR 4th 881.

Liability of governmental officer or entity for failure to warn or notify of release of potentially dangerous individual from custody. 12 ALR 4th 722.

Governmental tort liability for injuries caused by negligently released individual. 6 ALR 4th 1155.

Public defender's immunity from liability for malpractice. 6 ALR 4th 774.

Highway construction contractor's liability for injuries to third persons by materials or debris on highway during course of construction or repair. 3 ALR 4th 770.

Bridges: liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from design, construction, or failure to warn of narrow bridge. 2 ALR 4th 635.

Educational malpractice: tort liability of public schools and institutions of higher learning for educational malpractice. 1 ALR 4th 1139.

Nonfeasance: personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce the law or arrest law breaker. 41 ALR 3d 700.

Right of contractor with federal, state, or local public body to latter's immunity from tort liability. 9 ALR 3d 382.

Immunity from liability for damages in tort of state or governmental unit or agency in operating hospital. 25 ALR 2d 203.

2-9-103. Actions under invalid law or rule — same as if valid — when.

Case Notes

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, this section did not give the peace officers immunity from suit on the basis that

they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in this section for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

City Not Liable for Reliance on Age Restriction Employment Statute: Plaintiff sued the city of Great Falls, alleging that the city was liable when it applied the provisions of 7-32-4112, which requires that police officer applicants be between the ages of 18 and 35. The District Court did not err when it held that even if 7-32-4112 was unconstitutional, the city cannot be held liable for relying on the statute. Ross v. Great Falls, 1998 MT 276, 291 M 377, 967 P2d 1103, 55 St. Rep. 1127 (1998).

Law Not Clearly Established at Time — Qualified Immunity Extended: Police officers searched Dorwart's home pursuant to writs of execution and seized his personal property, but without Dorwart's permission or a search warrant. The District Court held that the officers were entitled to qualified immunity from individual liability for Dorwart's due process claims because the constitutional notice-related rights that were violated were not clearly established at the time of the officers' entry, so the officers could not have known that their actions violated Dorwart's rights. In analyzing whether an official is entitled to qualified immunity, a court must identify the right violated and must determine whether the right was clearly established at the time of the violation and, if so, whether a reasonable person or the official would have known that the conduct violated that right. If plaintiff shows that the right was clearly established at the time of the violation, the burden then shifts to defendant asserting qualified immunity to prove that the conduct was reasonable even though it violated the law. Under the law as it existed at the time that the officers entered Dorwart's home and levied upon his property, it was not clearly established whether a writ of execution pursuant to which the deputies acted, in and of itself, authorized entry into a private residence or whether the officers' entry pursuant only to the writ violated Dorwart's right to be free from unreasonable search and seizure. Plaintiff Dorwart never satisfied the initial burden of proving that the right that the deputies violated was clearly established at the time of the violation, so the deputies were entitled to qualified immunity from individual liability for Dorwart's search and seizure claim. Dorwart's general assertion of the right to be free from unreasonable search and seizure was too broad for purposes of determining the clearly established right portion of the qualified immunity determination, which requires that violation of the right be established in a more particularized, relevant sense. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Hamilton v. Endell, 981 F2d 1062 (9th Cir. 1992), and Orozco v. Day, 281 M 341, 934 P2d 1009 (1997).

Qualified Immunity Defense Unavailable in Action for Declaratory or Injunctive Relief: Plaintiff did not seek monetary damages for a due process claim, requesting only a declaratory judgment and permanent injunction. Qualified immunity is a defense to damages liability but is not available in actions for declaratory or injunctive relief. The District Court erred in applying qualified immunity in the context of this due process claim. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Am. Fire, Theft & Collision Managers, Inc. v. Gillespie, 932 F2d 816 (9th Cir. 1991).

2-9-105. State or other governmental entity immune from exemplary and punitive damages.

Case Notes

Government Punitive Damages Immunization — Constitutionality: Plaintiff had a constitutional right to redress against the state for all of her injuries but did not have a constitutional right to punitive damages. Thus the rational basis test, rather than the strict scrutiny test, was applied to equal protection review of 2-9-105, immunizing the state and other governmental entities from exemplary and punitive damages. There is a rational basis for distinguishing governmental from other entities in the grant of punitive damages, in that such damages are to punish the wrongdoer and deter future similar conduct of the wrongdoer and others similarly disposed. The deterrent effect upon a government is extremely small, and innocent taxpayers are the persons punished. Therefore, 2-9-105 is not unconstitutional. White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983). See also Birkenbuel v. Mont. St. Comp. Ins. Fund, 212 M 139, 687 P2d 700, 41 St. Rep. 1647 (1984).

Claims Prior to Effective Date of Section: Irrigation district, a state government entity, was subject to punitive damages in tort action where action arose in and was limited to summer of 1974. The 1972 Montana Constitution provided that the state, counties, cities, towns, and all other local governmental entities have no immunity from suit for injury to person or property except as may be specifically provided by law by a two-thirds vote of each house of the Legislature, and the Legislature did not provide immunity for certain governmental entities until 1977 when it enacted 2-9-104 and this section, which cannot be retroactively applied. Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981).

Immunity of State Employees: This section does not apply to individuals so as to make them immune from punitive damages; their immunity from damages is covered in 2-9-305. Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981).

Collateral References

Recovery of exemplary or punitive damages from municipal corporation. 1 ALR 4th 448.

Comment note: municipal immunity from liability for torts. 60 ALR 2d 1198.

2-9-108. Limitation on governmental liability for damages in tort.

Compiler's Comments

1997 Amendment: Chapter 337 inserted (2) providing that state, county, municipality, taxing districts, and other state political subdivisions are not liable for negligent actions of officers, agents, or employees for damages suffered by persons on the premises of a correctional or detention facility who are serving a sentence for a crime, creating an exemption to immunity for medical malpractice, gross negligence, willful or wanton conduct, and intentional tort, and providing that subsection (2) does not create an exception from the dollar limitations established in subsection (1); and made minor changes in style. Amendment effective April 22, 1997.

Severability: Section 2, Ch. 337, L. 1997, was a severability clause.

Repeal of Termination Date: Section 1, Ch. 239, L. 1993, amended sec. 9, Ch. 22, Sp. L. June 1986, by deleting the June 30, 1987, termination date applicable to this section. Section 2, Ch. 239, L. 1993, amended sec. 1, Ch. 228, L. 1987, by deleting the June 30, 1991, termination date applicable to this section. Section 3, Ch. 239, L. 1993, amended sec. 1, Ch. 803, L. 1991, by deleting the June 30, 1993, termination date applicable to this section. The effect of the 1993 act was to make this section permanent. Amendment effective April 1, 1993.

Effective Date — Termination — Special Vote Requirement: Section 1, Ch. 228, L. 1987, extended the effective period of the temporary versions of 2-9-101 and 2-9-108 from June 30, 1987, to June 30, 1991.

Section 2, Ch. 228, L. 1987, provided: "Because this act amends and extends the effect of a statute imposing limited immunity on governmental entities, Article II, section 18, of the Montana constitution may require a two-thirds vote of the members of each house of the legislature to be effective." Chapter 228 was passed by a vote of 90-5 in the House of Representatives and 47-3 in the Senate.

Applicability — Termination — 1986 Enactment: Sections 7 and 9, Ch. 22, Sp. L. June 1986, provided that 2-9-108 was effective July 10, 1986; applies to all claims, lawsuits, and causes of action arising after July 10, 1986; and terminates on June 30, 1987.

Immunity From Suit — 1986 Enactment: Since Ch. 22, Sp. L. June 1986, imposed limited immunity on governmental entities, Article II, section 18, of the Montana Constitution required a vote of two-thirds of the members of each house of the Legislature to be effective. Chapter 22 was approved by a vote of 85-8 in the House and 43-7 in the Senate.

Severability — 1986 Enactment: Section 6, Ch. 22, Sp. L. June 1986, was a severability clause.

Case Notes

Refusal to Treat Separate Recoveries as Single Claim of Damages: When a rape and subsequent pregnancy were the subjects of a complaint and at trial defendant admitted to two additional rapes of the same victim, the District Court did not err in refusing to treat the separate recoveries as a single claim of damages under this section because each rape was a separate wrongful act. Maguire v. St., 254 M 178, 835 P2d 755, 49 St. Rep. 688 (1992), followed in Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996).

Limitations on Certain Types of Government Tort Damages — Constitutionality:

The Supreme Court invalidated 2-9-107 (repealed 1986) as violative of the fundamental right to redress, insofar as it limits the liability of the state or any political subdivision, in tort actions for damages suffered from an act or omission of an officer, agent, or employee of the entity, to amounts not in excess of $300,000 for each claimant and $1,000,000 for each occurrence. The

court rejected the legislative findings that prefaced enactment of 2-9-107 as a substitute for 2-9-104 (repealed 1983), which was declared unconstitutional in White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983). The legislative findings denigrate the right of the individual to full legal redress in favor of not raising taxes and do not constitute a compelling state interest. Pfost v. St., 219 M 206, 713 P2d 495, 42 St. Rep. 1957 (1985).

Article II, sec. 16, Mont. Const., guarantees that all persons shall have a speedy remedy for every injury to person, property, or character. The Constitution's language "every injury" embraces all recognized compensable components of injury, including the right to be compensated for physical pain, mental anguish, and the loss of enjoyment of living. The right to bring a civil action for personal injury is a fundamental right, and the strict scrutiny test requiring that the statutory scheme be found unconstitutional unless the state could demonstrate that it was necessary to promote a compelling government interest applied to 2-9-104 (repealed, 1983), which provided that the state, a county, municipality, taxing district, or any other political subdivision of the state was not liable in tort for noneconomic damages or for economic damages in excess of $300,000 a claimant and $1 million an occurrence. White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983).

Subsection (1) of 2-9-104 (repealed, 1983) provided that neither the state, a county, municipality, taxing district, nor any other political subdivision of the state was liable in tort for economic damages in excess of $300,000 a claimant and $1 million an occurrence or for noneconomic damages. The state argued a compelling state interest in insuring that there would be sufficient funds to supply needed services to those governed by state and local government and that government has to engage in a wide range of activities, some extremely dangerous and not confronted by private industry. This bare assertion fell far short of justifying the subsection (1)(a) class discrimination that infringed upon fundamental rights. Denying noneconomic damages while allowing economic damages was unconstitutional under the strict scrutiny equal protection test. Furthermore, to strike (1)(a) and leave (1)(b) intact would create new discrimination problems in that those with economic loss could get only limited damages, while those with noneconomic loss would have no limit imposed; and since the state failed to demonstrate a compelling state interest justifying any limitation, subsection (1) was unconstitutional in its entirety. Though some liability limit may comport with equal protection, the limitation could not discriminate between those suffering pain and loss of life quality and those suffering primarily economic loss. White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983).

Initiation of Lawsuit by School District — Waiver of Sovereign Immunity: When a school district sued respondents for return of school transportation payments allegedly made in error, the school district was not entitled to use the doctrine of sovereign immunity as a defense to respondents' counterclaim. School District v. Simonsen, 210 M 100, 683 P2d 471, 41 St. Rep. 944 (1984).

State's Liability Insurance Not Limit on Recovery Against State: Former law providing for waiver of sovereign immunity defense up to limits of any existing liability insurance policy was not applicable because the defense could not be raised in instant case. Jacques v. Mont. Nat'l Guard, 199 M 493, 649 P2d 1319, 39 St. Rep. 1565 (1982).

Injuries Prior to Enactment of Former Section Limiting Liability — Governing Law: Plaintiff's tort damages were substantive, and their measure was governed by the law in effect on the date of his injury. Therefore, where 2-9-104 (repealed 1984) was enacted after plaintiff's accident, for which the state was found liable, but was in effect at the time of the trial, the limits in 2-9-104 governing the state's liability did not apply. Jacques v. Mont. Nat'l Guard, 199 M 493, 649 P2d 1319, 39 St. Rep. 1565 (1982).

Immunity of State Employees: Section 2-9-104 (repealed 1984) did not apply to individuals so as to make them immune from punitive damages; their immunity from damages is covered in 2-9-305. Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981).

Limitation of Damages as Reinstatement of Immunity — Final Judgment on Noneconomic Damages Required — Remedies of Plaintiff: Where the plaintiff brought an action against the state for injuries received by her minor son from the explosion of a National Guard practice grenade, claiming $93,000 in noneconomic damages and claiming that the limitation on noneconomic damages imposed by 2-9-104 (repealed 1984) was an unconstitutional limitation on the immunity of the state, the Supreme Court declined to rule on the constitutionality of the limitation and held instead that the District Court improperly granted partial summary judgment for the state, excluding all economic damages, as 2-9-104 allowed a plaintiff to petition the governing body of the defendant governmental entity for payment of economic damages only

after a final judgment has been obtained as to those damages. Makin v. St., 190 M 363, 621 P2d 477, 37 St. Rep. 1998 (1980).

Law Review Articles

Limitations on Legislative Immunity: A New Era for Montana's Sovereign Immunity Doctrine, Conwell, 54 Mont. L. Rev. 127 (1993).

White v. State: Raising the Stakes of State Tort Claims, Heringer, 45 Mont. L. Rev. 151 (1984).

Constitutional Law—Eleventh Amendment Abrogation—United States v. Union Gas. 832 F.2d 1343, 22 Suffolk U.L. Rev. 867 (1988).

Collateral References

Validity and construction of statute or ordinance limiting the kinds or amount of actual damages recoverable in tort action against governmental unit. 43 ALR 4th 19.

Liability insurance coverage as extending to liability for punitive or exemplary damages. 16 ALR 4th 11.

Recovery of exemplary or punitive damages from municipal corporation. 1 ALR 4th 448.

2-9-111. Immunity from suit for legislative acts and omissions.

Compiler's Comments

1991 Amendments: Chapter 818 inserted (5)(b) relating to liability for surface water and ground water contamination. Amendment effective May 24, 1991.

Chapter 821 in (1)(a), near beginning after "government entity", substituted "means only" for "includes" and after "school districts" inserted language concerning any other local governmental entity or political subdivision vested with legislative power; in (1)(b), near beginning after "legislative body", substituted "means only" for "includes" and near middle, after "Montana and", deleted "any local governmental entity given legislative powers by statute, including school boards" and inserted language concerning local government entities or political subdivisions empowered to enact statutes, charters, ordinances, orders, rules, policies, resolutions, or resolves; inserted (1)(c) defining legislative act and excepting from definition administrative action undertaken in execution of law or public policy; in (2), near beginning before "act or omission", inserted "legislative" and after "legislative body" substituted "or any member or staff of the legislative body, engaged in legislative acts" for "a member, officer, or agent thereof"; at beginning of (3) substituted "Any member or staff of a legislative body" for "A member, officer, or agent of a legislative body" and near end, after "associated with", substituted "legislative acts of the legislative body" for "the introduction or consideration of legislation or action by the legislative body"; inserted (4) concerning acquisition of insurance as not constituting waiver of immunity provided by section; and made minor changes in style. Amendment effective May 24, 1991.

Severability: Section 3, Ch. 818, and sec. 2, Ch. 821, L. 1991, were severability clauses.

Effective Date — Retroactive Applicability: Section 4, Ch. 818, L. 1991, provided: "[This act] is effective on passage and approval [approved May 24, 1991] and applies retroactively, within the meaning of 1-2-109, to causes of action that have not been reduced to final judgment on or before [the effective date of this act] [effective May 24, 1991]."

Retroactive Applicability: Section 3, Ch. 821, L. 1991, provided that this section applies retroactively, within the meaning of 1-2-109, to causes of action that have not been reduced to final judgment on or before [the effective date of this act]. Effective May 24, 1991.

Case Notes

DECISIONS AFTER 1991 AMENDMENTS

Absolute Common-Law Immunity Against Civil Suits for Legislative Actions: A consumer suit against several private electric and natural gas utilities and various state elected officials, including 58 members of the Montana House of Representatives and 25 members of the Montana Senate during the 1997 legislative session, was properly dismissed as to state legislators because they have absolute common-law immunity against civil suits for legislative actions. Single Moms, Inc. v. Mont. Power Co., 331 F3d 743 (9th Cir. 2003).

Award of Attorney Fees Under Private Attorney General Doctrine Inapplicable to Legislative Actions: Plaintiffs, including several individuals and cities, prevailed in an action declaring as unconstitutional a statutory process for designating a county building code jurisdictional area and eliminating municipal jurisdictional areas by an election procedure limited to record owners of real property instead of the general constituency. Plaintiffs sought attorney fees from defendants, including several counties and the state, under the private attorney general doctrine

exception established in Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800 (1999). The Supreme Court found that although it might be equitable to award attorney fees to plaintiffs under the doctrine, the inequity of imposing those fees against the defendant counties who neither fashioned nor passed the unconstitutional law was overriding. Thus, the only entity remaining against whom fees could be assessed was the state, for the actions of the Legislature, but under this section, the Legislature is immune from suit for any action or omission, so there was no avenue whereby attorney fees could be assessed, and the request for fees was denied. Finke v. State ex rel. McGrath, 2003 MT 48, 314 M 314, 65 P3d 576 (2003).

Immunity of Council Members From Suit Relating to Approval or Denial of Subdivision Plat Application by City Council: A legislative act is an action by a legislative body that results in the creation of law or declaration of public policy. An administrative act is an action taken in the execution of a law or public policy. The approval or denial of a subdivision plat application is an administrative act. Therefore, neither the governmental entity nor a member of it who acts for the entity is immune under this section from suit based on the approval or denial. However, in this case, all the claims alleged by the developer suing over the conditions that the City Council attached to its approval of the preliminary plat application related to actions performed by City Council members acting as the City Council. Therefore, under 2-9-305, the individual Council members were immune from suit. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

Statute Held to Grant Discretion to Approve or Deny Tax Reduction — County Immunity Not Implicated by Declaratory Judgment Action: After granting new or expanded industry tax reductions to several applicants whose property also received a tax break pursuant to another program, the Board of County Commissioners of Yellowstone County amended its resolution implementing the new or expanded industry tax reduction to provide that applicants were to no longer be entitled to a reduction but that reductions would be granted in the discretion of the Board and would not be granted by the Board if the property of the applicant was already subject to a tax break through some other program. Pursuant to these changes, the County Commissioners denied Cenex's application for a tax reduction under 15-24-1402 on pollution control equipment that had already received a different tax reduction from the state. Cenex brought a declaratory judgment action against the Board, claiming that the Board had illegally withheld the tax reduction. Noting the construction previously given to the statutory use of the term "approval" in McCarten v. Sanderson, 111 M 407, 109 P2d 1108 (1941), the Supreme Court held that 15-24-1402 clearly gives the County Commissioners discretion over whether or not to grant approval of the tax reduction and does not require that approval to be granted. The Supreme Court also held that the Board could change its position as to whether the tax reductions would be granted for property subject to other tax breaks and was not required to continue to grant the tax reductions under 15-24-1402 after the Board discovered the fiscal effect of granting a reduction on property that already received a tax break under another program. The Supreme Court held that because Cenex sought a declaratory judgment, the Board's liability wasn't an issue and that for that reason, the Supreme Court would not address the Board's claim of immunity under this section. Cenex, Inc. v. Yellowstone County Bd. of Comm'rs, 283 M 330, 941 P2d 964, 54 St. Rep. 695 (1997).

Federal Court Summary Judgment Final — Subsequent State Court Action Barred as Res Judicata: Mills filed a claim in U.S. District Court against Lincoln County for negligence. The county filed a motion for summary judgment, claiming immunity under this section, and the court granted the motion. Shortly thereafter, the Legislature amended this section to clarify that legislative immunity extended only to legislative bodies and to legislative actions taken by those bodies. Rather than filing a motion for reconsideration in federal court, Mills filed a complaint in state District Court, effectively precluding any relief from the federal system and rendering the federal court judgment final. A federal court summary judgment is a final judgment on the merits, and Mills' subsequent state action was therefore barred as res judicata. Mills v. Lincoln County, 262 M 283, 864 P2d 1265, 50 St. Rep. 1552 (1993), followed in State ex rel. Harlem Irrigation District v. District Court, 271 M 129, 894 P2d 943, 52 St. Rep. 364 (1995).

Good Faith Considerations Improperly Considered in Context of Age Discrimination Claim: The District Court granted summary judgment to employer on an age discrimination claim, concluded that immunity under this section did not apply, and then went on to grant summary judgment to the employer on a wrongful discharge claim based on its determination that the employee was terminated for good cause, as defined in 39-2-903. The good cause discussion and conclusion followed immediately upon the court's consideration of the employer's long-term dissatisfaction with the employee's work performance in the context of the age discrimination

claim. The motion for summary judgment and supporting arguments on the wrongful discharge claim differed significantly from those relating to the age discrimination claim, and the good cause issue as it related to the wrongful discharge claim was not raised or argued by either party. By granting summary judgment on an issue not before it, the court effectively denied Kenyon notice and an opportunity to be heard on the issue. The case was remanded. Kenyon v. Stillwater County, 254 M 142, 835 P2d 742, 49 St. Rep. 673 (1992), overruled, with regard to plaintiff's burden to adduce facts that, if believed, support a reasonable inference that plaintiff was denied an employment opportunity and, if the employer rebuts the inference of discrimination with evidence of legitimate, nondiscriminatory reasons, to demonstrate with specific facts that the employer's explanation is a pretext, in Heiat v. E. Mont. College, 275 M 322, 912 P2d 787, 53 St. Rep. 162 (1996).

Change in Governmental Immunity Law — Extraordinary Circumstance Warranting Reversal of Prior Judgment — Reasonable Time for Filing Claim for Relief: Although generally a change in decisional law is not a valid reason under which a prior judgment may be reversed pursuant to Rule 60(b)(5), M.R.Civ.P. (Title 25, ch. 20), extraordinary circumstances may warrant modification, under Rule 60(b)(6), M.R.Civ.P. (Title 25, ch. 20), of a final judgment. Legislative revision of this section, enacted in response to the decisions in Eccleston v. District Court, 240 M 44, 783 P2d 363 (1990), and Crowell v. School District No. 7, 247 M 38, 805 P2d 522 (1991), significantly changed the statute and modified the theories expressed in those immunity cases so as to constitute circumstances extraordinary enough to warrant reversal. This does not establish a general rule for reopening a final judgment merely because there has been a substantial change in statutory law upon which that judgment was based because only when extraordinary circumstances are found to exist may Rule 60(b)(6) be used to modify a final judgment. Further, the fact that plaintiffs' motion was filed 48 days after the Crowell decision was not so unreasonable as to make the motion untimely. The discretion of the Supreme Court to revisit a final judgment is flexible enough to allow reconsideration of individual case facts in the interests of justice. Koch v. Billings School District No. 2, 253 M 261, 833 P2d 181, 49 St. Rep. 517 (1992).

School District Not Immune From Suit for Act or Omission by Teacher:

The day after the decision in Hedges v. School District No. 73, 248 M 365, 812 P2d 334, 48 St. Rep. 449 (1991), below, a law was signed that significantly amended this section by removing the immunity of a legislative body for the negligent acts of its employees. The Supreme Court found no relationship between the alleged negligence of a teacher and the adoption by the school board of policies that would constitute a legislative act sufficient to trigger immunity. Because the teacher's actions did not arise from the lawful discharge of an official duty associated with a legislative act, under the amended statute, there was no immunity for the school district or any member or staff of the district. Hedges v. School District No. 73, 253 M 188, 832 P2d 775, 49 St. Rep. 469 (1992). See also Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991).

Consistent with this section as it read prior to the 1991 amendment, a school district was immune from suit for an act or omission by its agent, including that of a teacher acting as an agent of the district. Hedges v. School District No. 73, 248 M 365, 812 P2d 334, 48 St. Rep. 449 (1991), following Crowell v. School District No. 7, 247 M 38, 805 P2d 522, 48 St. Rep. 81 (1991). See also S.M. v. R.B., 248 M 322, 811 P2d 1295, 48 St. Rep. 453 (1991).

Road Maintenance — No Immunity: The city of Missoula held a public hearing to address residents' proposed closure of a dirt road. Upon motion, the resolution was denied. The residents filed suit, claiming inverse condemnation and a continuing nuisance. The city alleged immunity because of consideration of the issue by the City Council. The Supreme Court held that immunity applies only to legislative acts. A legislative act is an action by a legislative body that results in creation of law or declaration of public policy. The duty of a city in connection with the maintenance of streets is an administrative function. A municipality is not immune from nuisance claims. Knight v. Missoula, 252 M 232, 827 P2d 1270, 49 St. Rep. 230 (1992).

City Liable for Nonlegislative Act of City Employee — Applicability of 1991 Amendment: Dagel sued the city of Great Falls under this section for wrongful discharge and both negligent and intentional infliction of emotional distress, based on harassment against her by Manzer, her city supervisor. Dagel alleged that under this section, the city was responsible for the individual acts of its agent, Manzer. The 1991 amendments to this section clearly provided that a legislative body is not immune from the negligent acts of its employees and that the purchase of insurance does not waive liability. Because harassment by a superior is not a legislative act, Dagel's claim of constructive discharge is not related to action by a legislative body and the city is therefore not immune from suit under this section. To the extent that the 1991 amendment does not conform with contrary prior decisions in Crowell v. School District No. 7, 247 M 38, 805 P2d 522, 48 St.

Rep. 81 (1991), Eccleston v. District Court, 240 M 44, 783 P2d 363 (1990), and Peterson v. School District No. 1, 237 M 376, 733 P2d 316 (1989), the 1991 version of this section prevails. Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991), followed, with regard to county immunity, in Quirin v. Weinberg, 252 M 386, 830 P2d 537, 49 St. Rep. 331 (1992).

Damages for Contamination of Water Supply: Plaintiffs sued the landfill district for damages caused by a contaminated water supply. The District Court dismissed the landfill district from the suit on the basis of legislative immunity under this section. The Supreme Court reversed and remanded in view of the 1991 legislative revisions to this section. Sanders v. Scratch Gravel Landfill District, 249 M 232, 814 P2d 1005, 48 St. Rep. 660 (1991).

Immunity Defense Unavailable in State Court if Unavailable in Federal Court: The District Court neglected to analyze a complaint and the relevant facts made against a school district under 42 U.S.C. 1983 and to apply the law in deciding whether the claim was barred, assuming that the claims under 42 U.S.C. 1983 would be barred under this section. The Supreme Court, in remanding for consideration of the issue, cited Howlett v. Rose, 496 US 356, 110 L Ed 2d 332, 110 S Ct 2430 (1990), for the proposition that a state immunity defense is not available in an action under 42 U.S.C. 1983 brought in a state court if that defense would not be available if the action were brought in a federal court. S.M. v. R.B., 248 M 322, 811 P2d 1295, 48 St. Rep. 453 (1991).

Liability of City for Actions of Executive Branch Officers of City With Self-Governing Powers: Although 7-14-4122 gives city councils the power to regulate and repair sidewalks, the section does not apply when a city has adopted a charter that provides for separate branches of government and delegates different duties to each branch. When a charter gave the executive branch the power to enforce the ordinance pertaining to sidewalk repair, any negligent acts or omissions connected with the maintenance of sidewalks were attributable to the executive branch and neither the city's legislative body nor its agents were implicated by the executive's failure to repair the sidewalks. Accordingly, the city was not immune from suit under this section for the negligent maintenance of a city sidewalk. Woods v. Billings, 248 M 254, 811 P2d 534, 48 St. Rep. 421 (1991).

Constructive Discharge of Superintendent — School District Not Immune: A state law defense of sovereign immunity under this section is not available in a suit filed pursuant to 42 U.S.C. 1983 in which a defendant school board is otherwise subject to suit in a state court and in which such a defense would not be available had the action been brought in a federal forum. Doohan v. Bigfork School District No. 38, 247 M 125, 805 P2d 1354, 48 St. Rep. 121 (1991).

DECISIONS PRIOR TO 1991 AMENDMENTS

City Administrator Not Immune From Suit: The plaintiff sued the city for damages resulting from personal injuries suffered because of a traffic condition created by the city. The city charter provided that the city administrator had authority for the oversight and regulation of traffic. The Supreme Court held that under the city charter, the administrator was a member of the executive branch rather than the legislative branch of city government and therefore was not immune from suit. Irion v. Peterson, 247 M 459, 807 P2d 714, 48 St. Rep. 258 (1991).

Immunity Waived to Extent of Insurance Coverage: A student filed a complaint against the school district and her physical education teacher after she was injured in class while attempting to perform an unsupervised gymnastics routine. Although the district had purchased liability insurance covering the school and teachers, the District Court dismissed the action on the grounds that the defendants were immune from suit. The Supreme Court reversed and remanded, holding that while the district and teacher were immune from suit, the purchase of liability insurance by the school district waived its immunity to the extent of the coverage granted by the insurance policy. Crowell v. School District No. 7, 247 M 38, 805 P2d 522, 48 St. Rep. 81 (1991), followed in Murphy v. St., 248 M 82, 809 P2d 16, 48 St. Rep. 335 (1991), Hedges v. School District No. 73, 248 M 365, 812 P2d 334, 48 St. Rep. 449 (1991), and in S.M. v. R.B., 248 M 322, 811 P2d 1295, 48 St. Rep. 453 (1991), and distinguished in Hyde v. Evergreen Volunteer Rural Fire Dept., 252 M 299, 828 P2d 1377, 49 St. Rep. 259 (1992).

Irrigation District a Governmental Entity Immune From Suit: The plaintiffs filed suit in August 1983, alleging that the irrigation district's actions had resulted in crop losses for the plaintiffs. In November 1989, the lower court allowed the defendant to amend its answer to include the defense that the irrigation district was a governmental entity immune from suit. After allowing the amendment, the lower court dismissed the suit on a summary judgment motion. The Supreme Court upheld the lower court's decision on the basis that it was within the lower court's discretion and that the plaintiffs had failed to show that they were prejudiced by the amendment. Love v. Harlem Irrigation District, 245 M 443, 802 P2d 611, 47 St. Rep. 2190 (1990). After the 1990 Love decision, supra, Loves filed another amended complaint alleging

contractual violations, negligence, fraud, and additional damages. Following Whirry v. Swanson, 254 M 248, 836 P2d 1227 (1992), and Mills v. Lincoln County, 262 M 283, 864 P2d 1265 (1993), and distinguishing Boucher v. Dramstad, 522 F. Supp. 604 (D.C. Mont. 1981), the Supreme Court held that despite Loves' claims of issues of fundamental fairness and new theories of recovery, all four elements composing the doctrine of res judicata were met. The issues having been previously decided in the 1990 Love decision, judgment for the irrigation district on the issues raised by the amended complaint was granted. State ex rel. Harlem Irrigation District v. District Court, 271 M 129, 894 P2d 943, 52 St. Rep. 364 (1995), followed in Bozeman v. AIU Ins. Co., 272 M 349, 900 P2d 296, 52 St. Rep. 823 (1995).

School Board Immune From Suit for Breach of Covenant of Good Faith and Fair Dealing: The plaintiff was terminated as a school psychologist for incompetence. The Supreme Court held that he could not bring a suit for breach of the covenant of good faith and fair dealing because the school board was immune under state law. Harris v. Bailey, 244 M 279, 798 P2d 96, 47 St. Rep. 1622 (1990).

Governmental Immunity of County Board of Health — Not Affected by Wrongful Discharge From Employment Act: The Supreme Court held that a county board of health was an agent of the County Commissioners and therefore covered by state law creating governmental immunity. The court also held that there was no intent by the Legislature when it passed the Wrongful Discharge From Employment Act to create remedies when earlier immunity statutes denied recovery. Burgess v. Lewis & Clark City-County Bd. of Health, 244 M 275, 796 P2d 1079, 47 St. Rep. 1619 (1990). The Supreme Court held that this case is no longer controlling in view of the 1991 legislative revisions to this section. Sanders v. Scratch Gravel Landfill District, 249 M 232, 814 P2d 1005, 48 St. Rep. 660 (1991).

Park Board Not Legislative Body or Agent for Legislative Body: The trial court dismissed the plaintiffs' wrongful termination case on the basis that the park board was a legislative body immune from suit. The Supreme Court reversed the decision, stating that the board performed statutory executive functions and therefore was not a legislative body. The Supreme Court also ruled that the board was not an agent of the County Commissioners with respect to the employment of the plaintiffs and was not immune from suit on that basis. Koch v. Yellowstone County, 243 M 447, 795 P2d 454, 47 St. Rep. 1312 (1990).

Specific Wording Unnecessary for Alleging 1983 Claim: The District Court dismissed the plaintiff's claim against the town and council on the grounds that the complaint did not allege that the defendants had acted "under the color of state law". The Supreme Court reversed, stating that the complaint contained factual allegations indicating that the defendants had acted in their official capacity and that no specific language was required in bringing a section 1983 claim. Cummings v. Plains, 242 M 236, 790 P2d 486, 47 St. Rep. 769 (1990).

Statutory Immunity Not Extended to Board of Regents: The Board of Regents of Higher Education is not a local governmental entity within the meaning of this section, and therefore no immunity from suit is extended to the Board of Regents by this section. Mitchell v. Univ. of Mont., 240 M 261, 783 P2d 1337, 46 St. Rep. 2109 (1989).

Janitors Employed by School Board Immune From Negligence Suit: Plaintiff fell on a stairway owned by a school district and subsequently filed a negligence action against the district and school janitors for their alleged failure to maintain the stairway in a safe condition. Under this section, both the school district and its employees are immune from suit. The school board is the governing body, i.e., the legislative body, of the governmental entity, the school district. As agents of the school board, the janitors are immune. Their alleged omission arose from the lawful discharge of an official duty associated with an alleged omission by the legislative body. A failure to take legislative action, i.e, a legislative omission, will give rise to the immunity afforded by the statute. Any alleged failure by the school district to provide sufficient funding for maintenance of stairways and employment of additional janitors is an omission by its legislative body, the school board. The alleged omission by the janitors occurred during the lawful discharge of duties associated with the omission by the board. Thus, the janitors are immune under subsection (3) of this section. Also, under the plain language of subsection (2), the school district is clearly immune for an omission by an agent of the school board. State ex rel. Eccleston v. District Court, 240 M 44, 783 P2d 363, 46 St. Rep. 1929 (1989).

Immunity Extends to Body's Acts, Not Just Its Legislative Acts: A school district was immune from a wrongful discharge suit by a custodian fired by an administrative assistant employed by the school district. The custodian's contention that the termination was an administrative, not a legislative, action was not considered relevant by the court, which stated that the plain language of this section shows that the immunity is not limited to legislative acts of a legislative body, but rather extends to an act or omission of the legislative body whether or not the act or omission is

legislative. Peterson v. School District, 237 M 376, 773 P2d 316, 46 St. Rep. 880 (1989), followed in State ex rel. Eccleston v. District Court, 240 M 44, 783 P2d 363, 46 St. Rep. 1929 (1989), Miller v. Fallon County, 240 M 241, 783 P2d 419, 46 St. Rep. 2087 (1989), and in Hayworth v. School District No. 19, 243 M 503, 795 P2d 470, 47 St. Rep. 1361 (1990).

Immunity of City Council Members: City Council members are immune from suit resulting from the actions of a Council agent in performance of an official duty associated with the Council's actions. Mogan v. Harlem, 238 M 1, 775 P2d 686, 46 St. Rep. 1043 (1989).

Right to Full Legal Redress Not Violated by Grant of Immunity for Acts of Legislative Body: The right to full legal redress under the state constitution is not violated by a statute granting a legislative body immunity from suit for its acts. The right involved in this case is one of access to the courts. It is not fundamental. The immunity statute's constitutionality in regard to the right is thus presumed, and the state need only show a rational basis for the immunity statute. The statute has previously passed that test. Peterson v. School District, 237 M 376, 773 P2d 316, 46 St. Rep. 880 (1989), followed in Miller v. Fallon County, 240 M 241, 783 P2d 419, 46 St. Rep. 2087 (1989), and in Hayworth v. School District No. 19, 243 M 503, 795 P2d 470, 47 St. Rep. 1361 (1990).

Equal Protection Not Violated by Statutory Immunity From Suit: This section, which grants immunity from suit for legislative acts and omissions, does not violate the equal protection guarantee of Art. II, sec. 4, Mont. Const. Bieber v. Broadwater County, 232 M 487, 759 P2d 145, 45 St. Rep. 1218 (1988), followed in State ex rel. Eccleston v. District Court, 240 M 44, 783 P2d 363, 46 St. Rep. 1929 (1989).

Immunity of County Commissioner Acting Within Lawful Duty: It was within the official duty of a County Commissioner to fire a county road crew member, and immunity from suit was proper under this section. Bieber v. Broadwater County, 232 M 487, 759 P2d 145, 45 St. Rep. 1218 (1988), followed in State ex rel. Eccleston v. District Court, 240 M 44, 783 P2d 363, 46 St. Rep. 1929 (1989).

County Commission Decision Not to Renew Lease Agreement — County Immune From Suit: A hospital and nursing home administrator brought a complaint against the county when he lost his job upon failure of the County Commission to renew a lease agreement with a hospital association. The District Court dismissed the action on the ground that the suit was barred by this section. The Supreme Court agreed, finding that the Commissioners clearly possessed the authority to choose not to renew the lease pursuant to lawful discharge of official duty, and as such the action fell within the statutory governmental immunity. Barnes v. Koepke, 226 M 470, 736 P2d 132, 44 St. Rep. 810 (1987), followed in State ex rel. Eccleston v. District Court, 240 M 44, 783 P2d 363, 46 St. Rep. 1929 (1989).

County Immune From Suit — Act of Legislative Body: In a negligence action brought against a county and its legislative body (the Board of County Commissioners), when the Board granted final approval of the plat of a subdivision without requiring subdivision improvements or a bond guaranteeing the improvements, the county was immune from suit under 2-9-111. Counties are immune from suit for acts of their legislative bodies, and members of a legislative body are immune from suit for damages arising from the lawful discharge of an official duty. In this instance, the claimed negligent act was the failure of the Commissioners to require compliance with subdivision regulations prior to approval of the plat, which comes expressly within the plain language of 2-9-111. W.D. Constr., Inc. v. Bd. of County Comm'rs, 218 M 348, 707 P2d 1111, 42 St. Rep. 1638 (1985), followed in Bieber v. Broadwater County, 232 M 487, 759 P2d 145, 45 St. Rep. 1218 (1988).

Immunity for City's Failure to Take Legislative Action: The failure of the city of Billings to declare an irrigation ditch a nuisance may not be the basis of a suit against it for liability since the city is immune under this section. Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491, 42 St. Rep. 1460 (1985), followed in State ex rel. Eccleston v. District Court, 240 M 44, 783 P2d 363, 46 St. Rep. 1929 (1989).

Law Review Articles

Discretionary Function Defined, Willcher, 35 Fed. B. News & J. 458 (1988).

Collateral References

Liability of school or school personnel in connection with suicide of student. 17 ALR 5th 179.

Right of one governmental subdivision to sue another such subdivision for damages. 11 ALR 5th 630.

Governmental tort liability for detour accidents. 1 ALR 5th 163.

Supreme Court's construction and application of privileges and immunities clause United States Constitution (Article IV, §2, cl 1). 79 L. Ed. 2d 918.

2-9-112. Immunity from suit for judicial acts and omissions.

Case Notes

Municipality Not Liable Solely on Respondeat Superior Theory — Causal Link Required: In evaluating a local government's liability under 42 U.S.C. 1983, courts must determine whether plaintiff's harm was caused by a constitutional violation and, if so, whether the local government unit is responsible for the violation. A municipality or local government unit cannot be held liable under the federal law on a respondeat superior theory solely because it employs a tortfeasor. Rather, a plaintiff must show that the local government action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the action and the deprivation of federal rights. Municipal liability under section 1983 attaches only when a deliberate choice to follow a course of action is made from among various alternatives by the official responsible for establishing final policy with respect to the subject matter in question. In the case at bar, the city of Red Lodge obtained immunity by extension based on individual immunities unavailable to local government units. The District Court, applying Reisdorff v. Yellowstone County, 1999 MT 280, 296 M 525, 989 P2d 850 (1999), granted summary judgment for the city on judicial and quasi-judicial immunity grounds. The extension of immunity to employees of governmental entities in Reisdorff was correct; however, the blanket immunity extended to all defendants including the local governmental unit itself was erroneous, and to that extent, Reisdorff was overruled. Miller v. Red Lodge, 2003 MT 44, 314 M 278, 65 P3d 562 (2003). See also Monell v. New York City Dept. of Social Services, 436 US 658 (1978), Pembaur v. Cincinnati, 475 US 469 (1986), Collins v. Harker Heights, Tex., 503 US 115 (1992), and Bd. of County Comm'rs v. Brown, 520 US 397 (1997).

Board of Psychologists — Immunity From Suit: Rahrer sought to hold the Board of Psychologists liable for damages arising out of a contested case hearing involving the Board's investigation of a complaint against Rahrer, a licensed psychologist. Applying Butz v. Economou, 438 US 478, 57 L Ed 2d 895, 98 S Ct 2894 (1978), and Koppen v. Bd. of Medical Examiners, 233 M 214, 759 P2d 173, 45 St. Rep. 1433 (1988), the Supreme Court held that the Board of Psychologists was entitled to quasi-judicial immunity. Initiating, investigating, and presenting a case pursuant to the Montana Administrative Procedure Act involve precisely the types of decisions for which the state and its agencies are granted quasi-judicial immunity. Rahrer v. Bd. of Psychologists, 2000 MT 9, 298 M 28, 993 P2d 680, 57 St. Rep. 53 (2000).

Test for Judicial Immunity From Federal Section 1983 Case — Quasi-Judicial Immunity Extended to Official Acting Under Valid Court Order: State immunity laws do not shield the state or its officials from liability based on 42 U.S.C. 1983. To be immune from a claim based on that section, the immunity must be found in federal law. In Stump v. Sparkman, 435 US 349 (1978), the U.S. Supreme Court established a two-part test for determining when a judge is entitled to immunity from a sec. 1983 action. The first part is whether the judge dealt with the plaintiff in a judicial capacity. If the judge was not dealing in a judicial capacity, there is no immunity. If the judge was dealing in a judicial capacity, the second part of the test is whether the judge acted in the clear absence of all jurisdiction. From the doctrine of judicial immunity has come the doctrine of quasi-judicial immunity. Officials acting pursuant to a facially valid court order have absolute immunity from damages for actions taken to execute that order. In the present case, the Justice of the Peace was clearly acting in a judicial capacity when issuing an order that Reisdorff feed and care for her animals. Reisdorff did not argue that the order was facially invalid, and the District Court did not err in holding that officials carrying out the order were entitled to quasi-judicial immunity. Reisdorff v. Yellowstone County, 1999 MT 280, 296 M 525, 989 P2d 850, 56 St. Rep. 1128 (1999), overruled, to the extent that liability under 42 U.S.C. 1983 was extended to local government units pursuant to the doctrines of judicial and quasi-judicial immunity in Miller v. Red Lodge, 2003 MT 44, 314 M 278, 65 P3d 562 (2003). See also Patterson v. Von Riesen, 999 F2d 1235 (8th Cir. 1993).

Judicial Immunity Inapplicable to Parole Officer: A parole officer miscalculated the good time allowance creditable to Brunsvold while he was on probation while serving a suspended sentence, resulting in Brunsvold's wrongful incarceration. Brunsvold's subsequent civil suit named the state, the Department of Institutions (now Department of Corrections), the prison warden, and the parole officer as defendants. Under this section, judicial immunity was properly extended to the first three parties; however, the parole officer was not immune from suit because he performed an administrative task in calculating good time credits as a routine part of his daily job requirements. This task was not such an intimate association with a judicial act as to allow the parole officer to be considered an agent of the judiciary discharging an official duty

associated with judicial action of the court. Brunsvold v. St., 250 M 500, 820 P2d 732, 48 St. Rep. 939 (1991).

City and Its Agent Immune for Cleanup of Defendant's Property Pursuant to Court Order: The defendant was brought to trial by the City of Great Falls under a criminal statute for failure to clean up her property. The defendant was given 7 days to abate the nuisance, and when she failed to do so, the city had its employees perform the cleanup and bill the defendant for the cost. The Supreme Court ruled that the defendant could not sue the city or its employees for alleged damages resulting from the cleanup in that they were immune because the cleanup was the result of a judicial act. Great Falls v. Price, 238 M 99, 775 P2d 1260, 46 St. Rep. 1120 (1989), followed in Reisdorff v. Yellowstone County, 1999 MT 280, 296 M 525, 989 P2d 850, 56 St. Rep. 1128 (1999).

Board of Medical Examiners — Immunity From Suit: In the exercise of its quasi-judicial authority, the Board of Medical Examiners is entitled to the absolute immunity from suit afforded executive officials. Koppen v. Bd. of Medical Examiners, 233 M 214, 759 P2d 173, 45 St. Rep. 1433 (1988).

Quasi-Judicial Immunity as Common Law: The doctrine of quasi-judicial immunity is not a subject of statutory law, and the question of its applicability was therefore decided under the common-law rule as reviewed in Butz v. Economou, 438 US 478, 57 L Ed 2d 895, 98 S Ct 2894 (1978). The grant of judicial immunity in this section is not in derogation of the right to sue the state, granted by Art. II, sec. 18, Mont. Const., and quasi-judicial immunity is therefore extended to state boards and to the state itself. Koppen v. Bd. of Medical Examiners, 233 M 214, 759 P2d 173, 45 St. Rep. 1433 (1988), followed in Rahrer v. Bd. of Psychologists, 2000 MT 9, 298 M 28, 993 P2d 680, 57 St. Rep. 53 (2000), distinguished in State ex rel. Div. of Workers' Comp. v. District Court, 246 M 225, 805 P2d 1272, 47 St. Rep. 1911 (1990), and discussed in Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994).

Immunity of Judge, County, and Its Commissioners, for Discharge of Judge's Predecessor's Personal Secretary: Historically, judges have enjoyed absolute immunity for judicial acts, a doctrine which is codified in this section and which provides that a member of the judiciary is immune from suit for damages arising from his lawful discharge of an official duty associated with judicial actions of the court. This doctrine clothes District Courts with inherent and statutory powers to do all that is necessary to render their jurisdiction effective. The public policy of judicial immunity safeguards principled and independent decisionmaking. A judge's personal secretary occupies a distinct and unique status among District Court employees, and it is not a violation of public policy for a newly elected or appointed District Court Judge to discharge his predecessor's secretary and select his own. The lower court's dismissal, on the basis of judicial immunity under this section, of dismissed secretary's action alleging violation of her right to due process, breach of implied covenant of good faith and fair dealing, and wrongful discharge, was proper. Since the discharge was a judicial act, the codefendant county and County Commissioners cannot be held liable because they are expressly immunized under the provision of this section that governmental units are immune from suits for acts or omissions of the judiciary. Mead v. McKittrick, 223 M 428, 727 P2d 517, 43 St. Rep. 1886 (1986), distinguished, with regard to applicability of judicial immunity to bar a grievance hearing regarding the suspension by a Justice of the Peace of a court manager who was not a key employee, in Clark v. Dussault, 265 M 479, 878 P2d 239, 51 St. Rep. 642 (1994).

Sentencing — "Judicial Act": Petitioner was convicted of issuing a bad check in 1979. Her sentence was deferred, and she was placed on probation for 3 years. In 1982, petitioner's deferral was revoked because she was convicted of forgery. As a result of the revocation, she was sentenced to serve 5 years in prison. Later in 1982, the Supreme Court, relying on Crist v. Segna, 191 M 210, 622 P2d 1028, 38 St. Rep. 150 (1981), ordered petitioner's release because at the time of her imprisonment she had accumulated sufficient good time credit on probation that her deferred sentence would have been fully served. Petitioner then sued for damages for illegal imprisonment. The Supreme Court held that the State was immune from suit under 2-9-112 because the sentence imposed on petitioner for her violation of probation was a judicial act. Knutson v. St., 211 M 126, 683 P2d 488, 41 St. Rep. 1258 (1984).

Prosecutor's Quasi-Judicial Immunity From Prosecution: Plaintiff's civil action against a County Attorney, based upon alleged unlawful arrest by certain policemen and challenging the legality of the criminal prosecution against him, must be dismissed because the County Attorney enjoys absolute immunity for prosecutorial actions done in a quasi-judicial capacity. Hall v. Lympus, 478 F. Supp. 644 (D.C. Mont. 1979).

Law Review Articles

Qualified Immunity and State Courts, Welch, 8 Rev. Litigation 53 (1988).

2-9-113. Immunity from suit for certain gubernatorial actions.

Collateral References

Construction and application, under state law, of doctrine of "executive privilege". 10 ALR 4th 355.

Part 2
Comprehensive State Insurance Plan

Part Compiler's Comments

Severability: Section 27, Ch. 380, L. 1973, was a severability clause.

Part Attorney General's Opinions

Allowable Insureds — Not Negotiated Employee Benefit: It is apparent that the insurance authorized by this part is for the political subdivision itself and is not provided to the subdivision's employees as a negotiated benefit. The tax allowed by 2-9-212 may not be used for health and disability insurance for school district employees. The holding in 37 A.G. Op. 109 (1980) is not to the contrary. 39 A.G. Op. 56 (1982).

Part Collateral References

Coverage and exclusions under liability policy issued to municipal corporation or similar governmental body. 23 ALR 3d 1282.

2-9-201. Comprehensive insurance plan for state.

Administrative Rules

ARM 2.6.101 Insurance requirements for independent contractors.

Case Notes

State's Liability Insurance Not Limit on Recovery Against State: Former law providing for waiver of sovereign immunity defense up to limits of any existing liability insurance policy was not applicable because the defense could not be raised in instant case. Jacques v. Mont. Nat'l Guard, 199 M 493, 649 P2d 1319, 39 St. Rep. 1565 (1982).

Attorney General's Opinions

Taxation — Levy for Liability Insurance: The levy provided by 2-9-212 does not require an election. The school trustees may authorize the levy upon determining that it is in the best interests of the school district. The annual property tax may be used to fund all policies of insurance required or permitted by law. 37 A.G. Op. 109 (1978), reversing contrary language in 35 A.G. Op. 44 (1973).

Collateral References

Liability to refund local taxes as within coverage of liability insurance. 21 ALR 4th 895.

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR 3d 6.

2-9-202. Apportionment of costs — creation of deductible reserve.

Compiler's Comments

1997 Amendment: Chapter 532 in (3), in third sentence after "fund", substituted "must be used by" for "are statutorily appropriated, as provided in 17-7-502, to"; and made minor changes in style. Amendment effective July 1, 1997.

1985 Amendment: In (3) substituted third and fourth sentences concerning proceeds of the self-insurance reserve fund and expenditures for expenses required for administration of the fund for "Proceeds of the fund may be used only to pay claims under parts 1 through 3 of this chapter and for actual and necessary expenses required for the efficient administration of the fund".

Attorney General's Opinions

Taxation — Levy for Liability Insurance: The levy provided by 2-9-212 does not require an election. The school trustees may authorize the levy upon determining that it is in the best interests of the school district. The annual property tax may be used to fund all policies of insurance required or permitted by law. 37 A.G. Op. 109 (1978), reversing contrary language in 35 A.G. Op. 44 (1973).

2-9-211. Political subdivision insurance.

Compiler's Comments

2001 Amendment: Chapter 29 in (5) near end of first sentence after "exceeding" substituted "0.18% of the total assessed value of taxable property, determined as provided in 15-8-111, within" for "3% of the taxable value of". Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1995 Amendment: Chapter 68 in (1) inserted last two sentences that read: "Political subdivisions that elect to procure insurance jointly (pooled fund) under this section may obtain excess coverage from a surplus lines insurer without proceeding under the provisions of 33-2-302(2) through (4). Political subdivisions that are not in a pooled fund may obtain excess coverage from a surplus lines insurer without proceeding under the provisions of 33-2-302(2) through (4) only if the insurer carries an A rating or better by a nationally recognized rating company or is a Lloyds of London underwriter"; and made minor changes in style. Amendment effective February 22, 1995.

1986 Amendment: At end of (2) after "reserve" and near beginning of (3) after "reserve fund" inserted "separately or jointly with other subdivisions"; at end of second sentence of (3) added "or from the proceeds of bonds or notes authorized by subsection (5)"; and inserted (5) allowing funding of a self-insurance or deductible reserve fund.

Case Notes

Liability of Political Subdivisions: This section, along with sections 82-4309 and 82-4318, R.C.M. 1947 (now 2-9-212 and 2-9-304), and section 82-4326, R.C.M. 1947 (since repealed), manifests a legislative intent that political subdivisions should be responsible for the torts of their employees, to the exclusion of any liability on the part of the state. St. v. District Court, 170 M 15, 550 P2d 382 (1976).

Attorney General's Opinions

Joint Solid Waste Management District as Political Subdivision — No Authority to Issue Bonds for Workers' Compensation Reserve Fund: Because a joint solid waste management district has been vested with broad plenary powers that may be exercised independent of a city or county governing body, a joint district must be considered a political subdivision within the meaning of this section. However, a joint solid waste management district or similar political subdivision does not have specific or express authority under 39-71-403 to participate in workers' compensation plan No. 1 or to issue bonds to establish a workers' compensation self-insurance fund. The bonding authority in this section may not be used as a basis for issuance of bonds for the establishment of a reserve fund to guarantee payment of workers' compensation claims. 45 A.G. Op. 22 (1994).

Nonexclusive Means of Establishing Insurance Program: An interlocal agreement pursuant to 7-11-104 is not the exclusive means by which counties might establish a joint self-insurance program, provided that the method selected is not specifically prohibited by law. 38 A.G. Op. 75 (1980).

Joint Self-Insurance Programs: Montana counties may procure insurance separately or jointly and may use a deductible or self-insurance plan. Therefore, it is permissible for counties to enter into a joint self-insurance program. 38 A.G. Op. 75 (1980).

Taxation — Levy for Liability Insurance: The levy provided by 2-9-212 does not require an election. The school trustees may authorize the levy upon determining that it is in the best interests of the school district. The annual property tax may be used to fund all policies of insurance required or permitted by law. 37 A.G. Op. 109 (1978), reversing contrary language in 35 A.G. Op. 44 (1973).

Collateral References

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability. 68 ALR 2d 1437.

2-9-212. Political subdivision tax levy to pay premiums.

Compiler's Comments

2003 Amendment: Chapter 529 in (2)(a) at beginning of first sentence inserted "If a political subdivision made contributions for group benefits under 2-18-703 on or before July 1, 2001" and

near middle after "in effect" substituted "at the beginning of the last fiscal year" for "on July 1, 1999" and inserted second through fifth sentences concerning calculation and reporting of the permissive medical levy; in (2)(b) at beginning inserted "Each year" and near middle after "subsection (2)(a)" inserted "after notice of the hearing given under 7-1-2121 or 7-1-4127"; inserted (2)(c) providing that a levy under this section in the previous year may not be included in the amount of property taxes for the purposes of determining the amount that a governmental entity may assess under the provisions of 15-10-420(1)(a) and that when a levy under this section decreases or is no longer levied, the revenue may not be combined with the revenue determined in 15-10-420(1)(a); and made minor changes in style. Amendment effective April 26, 2003.

Transition — Retroactive Applicability: Section 3, Ch. 529, L. 2003, provided: "A levy made prior to [the effective date of this act] [effective April 26, 2003] under 2-9-212(2) may not be included as a levy in a previous year in determining the amount of property taxes that a governmental entity may assess under the provisions of 15-10-420(1)(a). If a levy made prior to [the effective date of this act] [effective April 26, 2003] under 2-9-212(2) decreased or was no longer levied, the difference between that levy and the next year levy may not be carried forward for imposition in a subsequent year under 15-10-420(1)(b)."

Section 6, Ch. 529, L. 2003, provided that the transition provisions in sec. 3, Ch. 529, L. 2003, applied retroactively, within the meaning of 1-2-109, to levies made after December 31, 1998.

2001 Amendment: Chapter 511 near beginning of (1) inserted reference to subsection (2); inserted (2) exempting increases in local government's property tax levy for the employer's premium contributions for group health insurance benefits from the mill levy calculation limitation and requiring public hearing prior to implementing levy; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning substituted reference to 15-10-420 for "Notwithstanding any provisions of law to the contrary" and after "2-9-211(5)" deleted "even though as a result of such levy the maximum levy as otherwise restricted by law is exceeded thereby, provided that the revenues derived therefrom may not be used for any other purpose"; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1991 Amendment: Near beginning substituted "a political subdivision, except for a school district" for "all political subdivisions". Amendment effective April 23, 1991.

1986 Amendment: Near middle after "herein authorized" inserted "and to pay the principal and interest on bonds or notes issued pursuant to 2-9-211(5)".

Case Notes

Liability of Political Subdivisions: This section, along with sections 82-4306 and 82-4318, R.C.M. 1947 (now 2-9-211 and 2-9-304), and section 82-4326, R.C.M. 1947 (since repealed), manifests a legislative intent that political subdivisions should be responsible for the torts of their employees, to the exclusion of any liability on the part of the state. St. v. District Court, 170 M 15, 550 P2d 382 (1976).

Attorney General's Opinions

Allowable Insureds: It is apparent that the insurance authorized by this part is for the political subdivision itself and is not provided to the subdivision's employees as a negotiated benefit. The tax allowed by 2-9-212 may not be used for health and disability insurance for school district employees. The holding in 37 A.G. Op. 109 (1980) is not to the contrary. 39 A.G. Op. 56 (1982).

Taxation — Levy for Liability Insurance: The levy provided by 2-9-212 does not require an election. The school trustees may authorize the levy upon determining that it is in the best interests of the school district. The annual property tax may be used to fund all policies of insurance required or permitted by law. 37 A.G. Op. 109 (1978), reversing contrary language in 35 A.G. Op. 44 (1973).

Part 3
Claims and Actions

Part Compiler's Comments

Severability: Section 27, Ch. 380, L. 1973, was a severability clause.

Part Case Notes

Liability of State to Suit — Active Duty U.S. Army Worker Injured While Assigned to National Guard — Tort Claim Not Barred: While in full-time service to the U.S. Army, Trankel was assigned to a Montana Army National Guard unit rebuilding armored vehicles and was injured by toxic chemicals during the rebuilding project. Trankel sued the state, asserting violations of the Occupational Health Act of Montana, the Montana Safety Act, and the Employee and Community Hazardous Chemical Information Act. The state contended that Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950), and Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986), barred a claim that was incident to military service regardless of the substantive law upon which the claim was based, the status of the plaintiff at the time of injury, or the status of the party against whom the claim was made and that the alleged violations of the state Acts did not provide a private cause of action and could be remedied only through the administrative remedies provided for in the Acts. The District Court agreed with the state and dismissed Trankel's complaint with prejudice. On appeal, the Supreme Court distinguished Feres and related federal cases because they were based on federal rather than state tort claims, with little bearing on rights under state law and the Montana Constitution. The Supreme Court overruled the holding in Evans that the National Guard was not a political subdivision subject to suit, finding instead that the National Guard and the Department of Military Affairs were clearly governmental entities within the meaning of 2-9-101 and that the constitutional premise on which Evans was based did not apply. Consistent with other applications of Art. II, sec. 16, Mont. Const., any statute or court decision that deprives an employee of the right to full legal redress, as defined by general Montana tort law against third parties, is absolutely prohibited. Because Trankel was not employed by the Montana Army National Guard or the Department of Military Affairs at the time of injury, Trankel's claim against the state pursuant to the tort claims statutes was not barred. Further, applying the rationale in Pollard v. Todd, 148 M 171, 418 P2d 869 (1966), the Supreme Court held that the statutory state Acts did not give rise to causes of action independent from a claim of negligence subject only to the administrative remedies contained in the Acts, but rather established duties, the violation of which is negligence per se. Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997), distinguishing Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950), U.S. v. Johnson, 481 US 681, 95 L Ed 2d 648, 107 S Ct 2063 (1987), and Stauber v. Cline, 837 F2d 395 (9th Cir. 1988); following Webb v. Mont. Masonry Constr. Co., 233 M 198, 761 P2d 343 (1988), Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488 (1989), and Francetich v. St. Comp. Mut. Ins. Fund, 252 M 215, 827 P2d 1279 (1992); overruling Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986); and followed in Lake v. St., 282 M 484, 938 P2d 698, 54 St. Rep. 442 (1997).

Nature of National Guard Service — State Court Jurisdiction: Members of the National Guard serve a dual responsibility, both to the State of Montana and to the United States of America. While Guard units consist of members enlisted in the United States Army, they are also a Montana military unit consisting of Montana citizens. The District Court improperly dismissed a suit brought by members of the Montana Army National Guard on grounds that the court did not have jurisdiction, absent proof that the members were on federal active duty as opposed to state active duty. The case was remanded for further findings. Grove v. Mont. Army Nat'l Guard, 264 M 498, 872 P2d 791, 51 St. Rep. 366 (1994), distinguishing Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986).

National Guardsman Injured on Weekend Drill — No Right to Sue State — Summary Judgment Upheld: The Supreme Court affirmed summary judgment granted state by District Court because: (1) issues raised on appeal were not genuine issues of material fact but rather questions of law, therefore summary judgment was proper; (2) the National Guard is a military force, not a political subdivision of the state, so appellant had no right to sue under the Tort Claims Act (Title 2, ch. 9, parts 1 through 3); and (3) traditionally, the federal government and state governments have not been held liable in tort for injuries that arise in the course of activity incident to military service (Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950)). Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160, 43 St. Rep. 1930 (1986), distinguished in Grove v. Mont. Army Nat'l Guard, 264 M 498, 872 P2d 791, 51 St. Rep. 366 (1994), and overruled in Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997).

No Waiver of Immunity From Suit in Constitution — State Officials Liable in Federal Civil Rights Suit: A former state employee sued the state for violations of his civil rights while he worked for the state. Under 2-15-104, the Department of Institutions (now Department of Corrections), the plaintiff's former employer, was held an alter ego of the state and not the sort of separate corporate entity held to be a citizen for purposes of federal diversity. The federal District Court held that neither Title 2, ch. 9, part 3, (prior to the 1983 amendment) nor the

legislative history of Art. II, sec. 18, Mont. Const., suggests an intent to submit the state to suit in federal court. The 11th amendment immunity of the state from suit is not waived. However, the court also held that 2-9-305 was intended to facilitate suit against the sovereign and its employees and that there was no evidence in that section of an intent to impart immunity to state officials as individuals in a federal civil rights suit under 42 U.S.C. §1983 (1976). Holladay v. St., 506 F. Supp. 1317, 38 St. Rep. 285 (D.C. Mont. 1981).

2-9-301. Filing of claims against state and political subdivisions — disposition by state agency as prerequisite.

Compiler's Comments

1991 Amendment: In (2), in second sentence after "writing", deleted "sent by certified mail". Amendment effective April 20, 1991.

Effective Date — Applicability: Section 2, Ch. 494, L. 1991, provided: "[This act] is effective on passage and approval and applies to all claims submitted on or after [the effective date of this act]." Effective April 20, 1991.

1987 Amendment: In (1) substituted "must be presented in writing to" for "shall be presented to and filed with"; and inserted (2) relating to the requirement for the presentation of a claim prior to District Court filing.

Applicability: Section 3, Ch. 507, L. 1987, provided: "This act applies to causes of action filed in district court after the effective date of this act." Effective October 1, 1987.

Case Notes

Latent Disease Case Comprising Exposure to Harmful Substance Over Extended Period — Continuing Tort Theory Contrary to Public Policy: Gomez contended that the exposure to chemical fumes that allegedly injured him occurred each day that he worked and was thus in the nature of a continuing tort. Because the date of last exposure to the fumes occurred on Gomez's last day of employment, he contended that the 3-year statute of limitations did not begin to run until that date. Citing Handa v. PPG Indus., Inc., 236 M 493, 771 P2d 956, 46 St. Rep. 532 (1989), the Supreme Court noted that, in latent disease or injury cases, the point at which the statute of limitations begins to run is ascertained by applying the discovery rule and determining when the injured person knew, or in the exercise of due diligence should have known, of the facts constituting the cause of action. The court declined to apply the continuing tort theory to delay the statute of limitations until the last injurious exposure because doing so could delay running of the limitations period indefinitely and is contrary to the general policy underlying statutes of limitations. Gomez was aware of his injuries, of the cause of those injuries, and of the fact that he had a cause of action by 1992 or earlier, but he did not take action on the claims until 1996, essentially sleeping on his rights. Thus, the District Court did not err in concluding that Gomez's complaint was not timely filed or in granting summary judgment to the state on grounds that Gomez's causes of action were barred by the statute of limitations. Gomez v. St., 1999 MT 67, 293 M 531, 975 P2d 1258, 56 St. Rep. 272 (1999), distinguishing Shors v. Branch, 221 M 390, 720 P2d 239, 43 St. Rep. 919 (1986), and Graveley Ranch v. Scherping, 240 M 20, 782 P2d 371 (1989).

Tort Claim Against Political Subdivision — No Requirement for Filing of Administrative Claim — Statute Clear and Unambiguous: Lincoln County Deputy Sheriff Stratemeyer filed a tort action against Lincoln County for failing to properly train, debrief, and counsel him to cure his posttraumatic stress disorder incurred from observing a suicide victim. The Supreme Court held that there is no requirement under subsection (3) of this section similar to the requirement under subsection (1) of this section that a tort claim against a political subdivision first be presented for administrative settlement. To the extent that such a requirement was implied in Rouse v. Anaconda-Deer Lodge County, 250 M 1, 817 P2d 690 (1991), the Supreme Court expressly overruled that case. The Supreme Court also held that subsection (3) of this section is clear and unambiguous in its lack of requirement of an administrative claim and that Stratemeyer therefore filed his tort action within the 3-year statute of limitations contained in 27-2-204. Stratemeyer v. Lincoln County, 276 M 67, 915 P2d 175, 53 St. Rep. 245 (1996).

Tort Claims Filing Procedure Applies Retroactively: The events upon which the plaintiff based his tort claim against the state occurred prior to the adoption of the statute creating new claim filing procedures. The plaintiff filed his claim directly in District Court after the new law became effective. The Supreme Court affirmed the dismissal of the claim on the basis that the statute applied retroactively because it was merely procedural and did not impair substantive rights. The court did point out that the plaintiff could file again under 27-2-407. Buettner v. St., 240 M 389, 784 P2d 906, 46 St. Rep. 2220 (1989).

Standing to Sue Government in General — Annexation Proceedings in Particular: Before one has standing to sue a governmental entity, there must be a case or controversy. The plaintiff must clearly allege past, present, or threatened injury to a property or civil right, and the injury must be distinguishable from injury to the public in general, though it need not be exclusive to the plaintiff. In an annexation protest, annexation is a political matter exclusively for legislative control, absent a constitutional prohibition. The annexation must be void ab initio, and the challenger must be a property owner who would suffer a tax increase. The available remedy is an injunction, not monetary damages. A count of petition signatures for only one of many annexed areas, by a plaintiff who used his own criteria for the count, is insufficient to support a claim that the government entity inaccurately counted the signatures. Since plaintiff here had no standing to directly attack the annexation, he could not collaterally attack it by attempting to show negligence. O'Donnell Fire Serv. & Equip. Co. v. Billings, 219 M 317, 711 P2d 822, 42 St. Rep. 2051 (1985), followed in Knudsen v. Ereaux, 275 M 146, 911 P2d 835, 53 St. Rep. 83 (1996).

Constitutionality: Subsection (1) of this section (formerly section 82-4311, R.C.M. 1947) relating to the state, as construed prior to 1977 amendment deleting a 120-day limitation on filing a claim, was declared unconstitutional under Art. II, sec. 18, Mont. Const., which abolished sovereign immunity and limitations upon the waiver of sovereign immunity. Noll v. Bozeman, 166 M 504, 534 P2d 880 (1975).

Law Review Articles

Noll v. Bozeman: Notice of Claim Provisions in Montana, Murphy, 37 Mont. L. Rev. 206 (1976).

Collateral References

Waiver of, or estoppel to assert, failure to give or defectsin notice of claim against state or local politicalsubdivision—modern status. 64 ALR 5th 519.

Persons or entities upon whom notice of injury or claim against state or state agencies may or must be served. 45 ALR 5th 173.

Complaint as satisfying requirement of notice of claim upon states, municipalities, and other political subdivisions. 45 ALR 5th 109.

Maintenance of class action against governmental entity as affected by requirement of notice of claim. 76 ALR 3d 1244.

Death action against municipal corporation as subject to statute of limitations governing wrongful death actions or that governing actions against a municipality for injury to person or property. 53 ALR 2d 1068.

2-9-302. Time for filing — limitation of actions.

Case Notes

Local Government to Deny Claim Before Six-Month Limitation for Filing in District Court Commences: Rouse sued the county to recover damages for alleged police brutality. The lower court dismissed the claim on the basis that the statute of limitations had run. The Supreme Court reversed, holding that the county had never denied the claim and that the 6-month limitation for filing an action in District Court did not commence until the county denied the claim. Rouse v. Anaconda-Deer Lodge County, 250 M 1, 817 P2d 690, 48 St. Rep. 834 (1991), overruled in part in Stratemeyer v. Lincoln County, 276 M 67, 915 P2d 175, 53 St. Rep 245 (1996).

2-9-303. Compromise or settlement of claim against state.

Compiler's Comments

2001 Amendment: Chapter 172 at end of (2) inserted "unless a right of individual privacy clearly exceeds the merits of public disclosure"; and made minor changes in style. Amendment effective March 30, 2001.

Retroactive Applicability: Section 4, Ch. 172, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the compromise or settlement of claims entered into prior to [the effective date of this act]." Effective March 30, 2001.

1987 Amendments: Chapter 97 in second sentence of (1), after "deductible reserve fund", inserted "exceeding $10,000".

Chapter 111 inserted (2) relating to public inspection of governmental portion of settlement agreement.

1981 Amendment: Added phrase to authorize district courts other than those of first judicial district to compromise claims.

Case Notes

Settlement Agreement Involving Minor Child Open for Public Inspection — No Right of Privacy Recognized — Demands of Privacy Do Not Exceed Merits of Public Disclosure: Pengra and the state agreed to a settlement of Pengra's suit against the state on behalf of his daughter and himself involving the death of his wife. Pengra requested that the settlement document be sealed and thereby made unavailable for public inspection. In a challenge to the sealing of the settlement agreement, the Supreme Court held that: (1) minors have no greater right of privacy than adults in settlement agreements involving claims against the state; (2) Pengra had no subjective expectation of privacy in the settlement agreement; (3) by the Legislature's enactment of this section, society is not willing to recognize any privacy expectation of Pengra regarding the settlement agreement; (4) compelling policy reasons support the disclosure of the settlement; and (5) any right of privacy by Pengra in the settlement agreement did not outweigh the merits of public disclosure of that agreement. Pengra v. St., 2000 MT 291, 302 M 276, 14 P3d 499, 57 St. Rep. 1231 (2000).

2-9-304. Compromise or settlement of claim against political subdivision.

Compiler's Comments

2001 Amendment: Chapter 172 at end of (2) inserted "unless a right of individual privacy clearly exceeds the merits of public disclosure". Amendment effective March 30, 2001.

Retroactive Applicability: Section 4, Ch. 172, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the compromise or settlement of claims entered into prior to [the effective date of this act]." Effective March 30, 2001.

1995 Amendment: Chapter 103 in (1) deleted second sentence that read: "A settlement involving a self-insurance reserve fund or deductible reserve fund must be approved by the district court where the claim is filed"; in (2), after "entered into", deleted "or approved"; and made minor changes in style. Amendment effective March 10, 1995.

1987 Amendment: Inserted (2) relating to public inspection of governmental portion of settlement agreement.

Case Notes

Student's Settlement With College Statutory Bar to Suit Against Professor for Actions Outside Scope of Employment: Stansbury filed suit against Eastern Montana College (now Montana State University-Billings) and a professor, Lin, alleging that Lin had slandered him in class. Stansbury entered into a settlement agreement with the college containing language that he was not precluded from pursuing his case against Lin for actions outside the course of the professor's employment. The Supreme Court upheld the lower court's dismissal of the suit against Lin on the basis that the statute was an absolute bar against suits against employees of a state entity when the plaintiff has previously obtained a recovery from the state entity. Stansbury v. Lin, 257 M 245, 848 P2d 509, 50 St. Rep. 251 (1993).

State Not Responsible for Negligence of Municipal Police Officers: City's claim that state is liable under doctrine of respondeat superior where plaintiff sustained injuries allegedly due to negligence of city police was without merit. St. v. District Court, 170 M 15, 550 P2d 382 (1976).

2-9-305. Immunization, defense, and indemnification of employees.

Compiler's Comments

1983 Amendment: Substituted entire section (see Ch. 530, L. 1983, for text) for former text, which read: "(1) It is the purpose of this section to provide for the immunization and indemnification of public officers and employees sued for their actions, other than intentional tort or felonious acts, taken within the course and scope of their employment.

(2) In an action brought against any employee of a state, county, city, town, or other governmental entity for a negligent act, error, or omission or other actionable conduct of the employee committed while acting within the course and scope of his office or employment, the governmental entity employer shall be made a party defendant to the action.

(3) Recovery against a governmental entity under the provisions of parts 1 through 3 of this chapter shall constitute a complete bar to any action or recovery of damages by the claimant, by reason of the same subject matter, against the employee whose negligence or wrongful act, error, or omission or other actionable conduct gave rise to the claim. In any such action against a governmental entity, the employee whose conduct gave rise to the suit shall be immune from suit by reasons of the same subject matter if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of such employees' employment, unless the claim is based upon an intentional tort or felonious act of the employee.

(4) In any action in which a governmental entity employee is a party defendant, the employee shall be indemnified by the governmental entity employer for any money judgments or legal expenses to which he may be subject as a result of the suit unless the conduct upon which the claim is brought did not arise out of the course and scope of his employment or is an intentional tort or felonious act of the employee."

Case Notes

Immunity of Council Members From Suit Relating to Approval or Denial of Subdivision Plat Application by City Council: A legislative act is an action by a legislative body that results in the creation of law or declaration of public policy. An administrative act is an action taken in the execution of a law or public policy. The approval or denial of a subdivision plat application is an administrative act. Therefore, neither the governmental entity nor a member of it who acts for the entity is immune under 2-9-111 from suit based on the approval or denial. However, in this case, all the claims alleged by the developer suing over the conditions that the City Council attached to its approval of the preliminary plat application related to actions performed by City Council members acting as the City Council. Therefore, under this section, the individual Council members were immune from suit. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

Section 1983 Action for Damages and Declaratory and Injunctive Relief — State Agency Held Not a "Person" — Individual or Official Capacity of Individual Defendants Determined — Test for Qualified Immunity in Damages Action — Remington Overruled: Orozco, an inmate in the Montana State Prison, brought a civil action for damages pursuant to 42 U.S.C. 1983 against the Department of Corrections and Human Services (now Department of Corrections) and several Department employees for the denial of his due process rights in connection with the denial of his ability to earn good time credits. The Department moved for dismissal for failure to state a claim, based upon 11th amendment immunity. As to the Department, the Supreme Court held, citing Will v. Mich. Dept. of St. Police, 491 US 58 (1989), that because the Department has been created as part of the Executive Branch of state government, suing the Department is the same as suing the State of Montana, which is not a "person" for the purposes of a section 1983 action. In response to Orozco's argument that this section required him to join the Department as a party, the Supreme Court noted that there is nothing in the text of that section that requires that the state be joined as a party; the section provides only for the tender of a defense and payment of damages by the state if a state employee is sued. Therefore, the Supreme Court held that the District Court correctly dismissed the action for damages against the Department. As to the individual defendants, the Supreme Court held that state employees acting in their official capacities are likewise not "persons" for the purposes of a section 1983 action but that state employees acting in their individual capacities are "persons" within the meaning of section 1983. The Supreme Court noted that Orozco had not clearly indicated the capacities in which the individual defendants were being sued, and so it looked to other provisions of the complaint and to U.S. Supreme Court decisions in order to determine Orozco's intent and held that Orozco intended to sue the individual defendants in their individual capacities. For this reason, the Supreme Court held that the District Court erred in holding that the individually named defendants were not "persons" under 42 U.S.C. 1983 for the purposes of the action for damages. The Supreme Court also held that in enacting 53-30-105 (now repealed) mandating rules for the accrual of good time, the state had created a right to good time. The Supreme Court also held that the immunity analysis used in Remington v. Dept. of Corrections and Human Services, 255 M 480, 844 P2d 50 (1992), was incorrect in light of the later decision of the U.S. Supreme Court in Sandin v. Connor, 515 US 472 (1995), and overruled Remington, but, on the basis of the Sandin immunity analysis, determined that Orozco's liberty interest in the award of good time credits was not clearly established on the date of Orozco's hearing to reclassify him as a maximum security prisoner who was no longer entitled to earn good time credits. For this reason, the Supreme Court held that the Department employees who were sued in their individual capacities were to be given qualified immunity for the purposes of the action for damages but that the District Court improperly dismissed the action for declaratory and injunctive relief and remanded the case to the District Court for a determination of what process was due Orozco before his opportunity to earn good time was revoked and whether he received that process. Orozco v. Day, 281 M 341, 934 P2d 1009, 54 St. Rep. 200 (1997).

No Opportunity for Parties to Address Issues — Award of Attorney Fees Premature: An award of attorney fees based on this section is premature unless and until an appropriate record is created and the parties have a full and fair opportunity to address the issues. Clark v. Dussault, 265 M 479, 878 P2d 239, 51 St. Rep. 642 (1994).

Immunity for Government Employee Not Provided — Recovery for Same Conduct as Governmental Entity Barred: Absent a recovery from a governmental entity, this section does not preclude the filing of an action against a government employee. However, in a case in which the jury likely awarded damages against the entity first and the employee later for the same conduct, double recovery is barred by the plain language of subsection (5) of this section. Because plaintiff recovered damages from the entity at the time of the jury verdict, later recovery from the employee as an individual was barred and the award was stricken from the judgment. Story v. Bozeman, 259 M 207, 856 P2d 202, 50 St. Rep. 761 (1993).

Limited Application of Nondelegable Duty Exception to Respondeat Superior Doctrine: Application of the nondelegable duty exception to the respondeat superior doctrine is limited to instances of safety in which the subject matter is inherently dangerous. The Supreme Court declined to modify the presently accepted version of the doctrine by adopting the exception, set out in section 214 of Restatement (Second) of Agency, that a master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance or duty to a servant or other person is subject to liability to others for harm caused to them by the failure of the agent to perform the duty. Noting that there are several reasons for and against extending the liability of an employer when an intentional tort is committed only because or by virtue of the employment situation, the court opted to leave adoption of such a major doctrinal change to the Legislature. Maguire v. St., 254 M 178, 835 P2d 755, 49 St. Rep. 688 (1992), followed in Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996).

Summary Dismissal of Wrongful Discharge Claim Against County Attorney Acting in Official Capacity: When an action is brought against a county based on actionable conduct by an employee, the employee is immune from individual liability for the conduct if the county acknowledges that the conduct arose out of the course and scope of the employee's official duties. A County Attorney who dismissed his secretary when he took office was acting within the scope of his duties and was therefore immune from a wrongful discharge suit and was entitled to summary judgment on the claim. Kenyon v. Stillwater County, 254 M 142, 835 P2d 742, 49 St. Rep. 673 (1992).

City Not Liable for Actions of Employee — Respondeat Superior Inapplicable: Dagel sued the city of Great Falls under 42 U.S.C. 1983 for wrongful discharge and both negligent and intentional infliction of emotional distress, based on actions against her by Manzer, her city supervisor. Dagel alleged that under this section, the city was responsible for the individual acts of its agent, Manzer, and adopted them as its own. The District Court, in granting the city's motion for summary dismissal, cited numerous federal decisions holding that respondeat superior or vicarious liability is not a valid basis for recovery under 42 U.S.C. 1983. The Supreme Court adopted the guiding principles outlined in St. Louis v. Praprotnik, 485 US 112 (1988), for holding a municipality liable under sec. 1983: (1) liability attaches only for acts for which the municipality itself is actually responsible—those which the municipality has officially sanctioned or ordered; (2) only officials who have final policymaking authority may, by their actions, subject the government to liability; (3) whether a particular official has final policymaking authority is a question of state law; and (4) the challenged action must have been taken pursuant to a policy adopted by the official responsible under state law for making policy in that area of the city's business. Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991).

Additional Omnibus Insured — Tort Claims Act Not Shield — Employer's Insurance Secondary: When an employee of Butte-Silver Bow was involved in an auto accident while acting in the course and scope of his employment and driving his own car, Butte-Silver Bow was an additional omnibus insured under the employee's auto policy. The employee's personal insurance carrier was not shielded from liability by the state tort claims act. The employee's insurer was the primary insurer, and Butte-Silver Bow's insurer was the excess insurer. Guar. Nat'l Ins. Co. v. State Farm Ins. Co., 238 M 324, 777 P2d 353, 46 St. Rep. 1303 (1989).

Federal Action by Prisoner — City Not a Proper Defendant: A state prison inmate brought a civil rights action in federal District Court against his parole officers, a deputy sheriff, and the city of Deer Lodge. Because the parole officers were employed by the state, the Deputy Sheriff was employed by the county, and the plaintiff failed to oppose the city's motion for summary judgment, the city was properly dismissed as a defendant. Harvey v. Pomroy, 535 F. Supp. 78, 39 St. Rep. 657 (D.C. Mont. 1982).

Intentional Torts and Felonious Acts Excepted: Under this section, public officers and employees are immune from suit for actions they take within the course and scope of their

employment, except for intentional torts and felonious acts. (Decided prior to 1983 amendment.) Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981).

Personal Liability for Official Action Holding One in Contempt: Action against county officials in their personal capacity, arising out of plaintiffs' being held in contempt of court after refusing to leave court upon order of the Justice of the Peace, was properly dismissed as there was no basis for personal liability because the defendants acted in their official capacities only. Stickney v. St., 195 M 415, 636 P2d 860, 38 St. Rep. 1991 (1981).

No Waiver of Immunity From Suit in Constitution — State Officials Liable in Federal Civil Rights Suit: A former state employee sued the state for violations of his civil rights while he worked for the state. Under 2-15-104, the Department of Institutions (now Department of Corrections), the plaintiff's former employer, was held an alter ego of the state and not the sort of separate corporate entity held to be a citizen for purposes of federal diversity. The federal District Court held that neither Title 2, ch. 9, part 3, (prior to the 1983 amendments) nor the legislative history of Art. II, sec. 18, Mont. Const., suggests an intent to submit the state to suit in federal court. The 11th amendment immunity of the state from suit is not waived. However, the court also held that 2-9-305 was intended to facilitate suit against the sovereign and its employees and that there was no evidence in that section of an intent to impart immunity to state officials as individuals in a federal civil rights suit under 42 U.S.C. §1983 (1976). Holladay v. St., 506 F. Supp. 1317, 38 St. Rep. 285 (D.C. Mont. 1981).

Game Wardens: The rule of absolute state immunity which the Supreme Court applied to acts of the Attorney General and other prosecutors does not apply to acts of state Game Wardens in their capacity as law enforcement officers. It is the more limited form of statutory immunity that applies to law enforcement officers, including state Game Wardens. Orser v. St., 178 M 126, 582 P2d 1227 (1978), followed in Hill v. Burlingame, 244 M 246, 797 P2d 925, 47 St. Rep. 1580 (1990).

Intentional Torts: Game Wardens, acting within the scope of their duties as law enforcement officers, are not personally immune from suit for malicious prosecution, as such a suit falls within the statutory exception of intentional torts. The Legislature contemplated recovery against the state not only for the negligence of its employees but also for all other forms of actionable conduct, including intentional torts. Orser v. St., 178 M 126, 582 P2d 1227 (1978).

Attorney General's Opinions

County Attorney as Employee for Purposes of Lawsuit Regarding Administrative Actions: A County Attorney is not liable for civil damages for conduct within the scope of prosecutorial duties; however, that immunity does not extend to the discretionary administrative business of running a County Attorney's office. Thus, a County Attorney is considered a county employee for purposes of the Montana Comprehensive State Insurance Plan and Tort Claims Act whenever the County Attorney is named in a civil lawsuit for actions regarding county administrative business, such as the hiring and firing of staff. 44 A.G. Op. 29 (1992).

Trustee-Operated Fire District Liable for Indemnification: Employees of a fire district operated by trustees must be indemnified under the comprehensive state insurance plan and the Tort Claims Act by the fire district rather than by the county in which the fire district is located. 42 A.G. Op. 84 (1988), overruling a contrary holding in 35 A.G. Op. 71 (1974), and followed in 43 A.G. Op. 2 (1989).

Trustee-Operated Fire Service Area Liable for Indemnification: Employees of a fire service area operated by trustees must be indemnified under the comprehensive state insurance plan and the Tort Claims Act by the fire service area rather than by the county in which the fire service area is located. 42 A.G. Op. 84 (1988), overruling a contrary holding in 35 A.G. Op. 71 (1974).

Authority of County Officer to Retain Defense Counsel: An elected county officer is not required to obtain the consent of the County Attorney or the County Commissioners in order to retain counsel in defense of a suit brought by the County Attorney pursuant to 7-6-2323 (now repealed). The county must reimburse the officer for legal fees incurred in the defense of the action unless an exclusion, as provided in 2-9-305, applies. 42 A.G. Op. 34 (1985).

Indemnification by County in Action Against Officer: Pursuant to this section the county must indemnify its officials for costs, attorneys' fees, and personal liability resulting from actions taken by its officials unless the conduct upon which the claim is brought did not arise out of the course and scope of employment or is an intentional tort or felonious act. "Other actionable conduct", as used in this section, may include actions taken "under color of state law", as used in 42 U.S.C. §1983. Nevertheless, this section's requirement that the governmental employer be

joined in actions against its employees does not apply to actions under 42 U.S.C. §1983. (Opinion issued prior to 1983 amendment.) 37 A.G. Op. 171 (1978).

Collateral References

Payment of attorneys' services in defending action brought against officials individually as within power or obligation of public body. 47 ALR 5th 553.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 ALR 3d 90.

2-9-311. Jurisdiction of district court — rules of procedure.

Case Notes

Venue — Action Against Multiple Counties: In 1981, Silver Bow County erroneously reissued the registration number of plaintiff's vehicle to another automobile. The automobile was subsequently reported stolen. The vehicle was recovered but not shown as such on county records. Defendant, a Jefferson County Deputy Sheriff, saw plaintiff's vehicle and requested status information. The vehicle was shown as stolen. Plaintiff was arrested and later released upon discovery of the error. Plaintiff brought suit against both Silver Bow and Jefferson Counties in Silver Bow District Court seeking damages on several grounds. Jefferson County moved for a change of venue, which was denied. The Supreme Court found that if the provisions of the venue statutes and the Rules of Civil Procedure were applied strictly, plaintiff would be placed in an impossible situation whereby both counties were indispensable parties and either could object to venue and be entitled to a change or dismissal. The court, relying on State ex rel. Mont. Deaconess Hosp. v. Park County, 142 M 26, 381 P2d 297 (1963), affirmed the refusal to grant a change of venue because both counties were necessary parties and because venue was proper at least as to Silver Bow County. Hutchinson v. Moran, 207 M 330, 673 P2d 818, 40 St. Rep. 2081 (1983).

2-9-313. Service of process on state.

Compiler's Comments

1993 Amendment: Chapter 3 near beginning of first sentence inserted "arising under this chapter" and inserted second sentence requiring an answer within 40 days after service of summons and complaint; and made minor changes in style.

2-9-314. Court approval of attorney's fee.

Case Notes

Personal Defense of Frivolous Action Against Official: Justice of the Peace was properly granted attorney fees where, through no fault of her own, she was forced to personally defend a frivolous action seeking to hold her personally liable for action she took in her official capacity. Stickney v. St., 195 M 415, 636 P2d 860, 38 St. Rep. 1991 (1981).

Attorney General's Opinions

Tort Claims Against State — Fee Regulation: This section requires an attorney representing a party to a tort claim against the state to file a copy of his contract of employment with the Department of Administration. The District Court of Lewis and Clark County has the power to regulate such fees in conjunction with claims that are not litigated. In the case of litigated claims, the District Court before which the case is tried has regulatory power. The method and extent of its regulation are matters for the court's discretion. 37 A.G. Op. 121 (1978).

2-9-316. Judgments against governmental entities.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 278 in introductory clause at beginning deleted "Except as provided in 15-1-402"; in (3) at end after "judgment or settlement" deleted "except that the levy may not exceed 10 mills"; in (4) in last sentence at end after "amortize the bonds" deleted "provided the levy for payment of any bonds, settlements, or judgments may not exceed, in the aggregate, 10 mills annually"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 at end of (3) deleted "except that the levy may not exceed 10 mills"; and at end of (4) deleted "provided the levy for payment of any bonds, settlements, or judgments may not exceed, in the aggregate, 10 mills annually". Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1999 Amendment: Chapter 23 in introductory clause, (3), and (4) after "judgment" inserted "or settlement"; in (4) in last sentence after "bonds" inserted "settlements"; and made minor changes in style. Amendment effective February 18, 1999.

Retroactive Applicability: Section 7, Ch. 23, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all occurrences prior to [the effective date of this act] [effective February 18, 1999] for which a cause of action has not been filed and served upon a conservation district."

1989 Amendment: At beginning inserted exception clause relating to protested taxes. Amendment effective March 21, 1989.

Effective Date — Retroactive Applicability: Section 14, Ch. 213, L. 1989, provided: "[This act] is effective on passage and approval [approved March 21, 1989] and applies retroactively, within the meaning of 1-2-109, to any tax appeal or tax paid under protest after December 31, 1983."

Case Notes

Instruction Concerning County's Satisfaction of Judgment: The District Court instructed the jury that it was not to concern itself with the manner in which Sanders County would meet its obligation as to judgment if rendered against it in this case. The District Court refused plaintiff's instruction on possible sources of payment. This was proper, since further instruction might have led the jury into speculation on issues not properly before it as trier of fact. Wollaston v. Burlington N., Inc., 188 M 192, 612 P2d 1277 (1980).

Attorney General's Opinions

No Statutory Authority to Levy Taxes in Order to Fund Judicial Budget or Budget Deficit: This section does not grant counties the authority to levy taxes in response to a District Court order that a judicial budget or budget deficit be funded. 43 A.G. Op. 37 (1989).

Levy of County Property Taxes for Special Purposes: The mill levy limitation provided in 7-6-2501 does not apply to special levies authorized for particular purposes. Therefore, the mill levy authorized by 2-9-316, which is a special levy, is not subject to the limit provided in 7-6-2501. 39 A.G. Op. 34 (1981).

2-9-317. No interest if judgment paid within two years — exception.

Compiler's Comments

1997 Amendment: Chapter 508 at beginning inserted exception clause; and made minor changes in style. Amendment effective May 1, 1997.

Case Notes

Tort Judgment — Constitutionality: Application of this section to a tort judgment against the state does not offend Art. II, sec. 18, Mont. Const., which provides that the State has no immunity from suit for injury to a person or property except as may be specifically provided by a two-thirds vote of each house of the Legislature. Interest on a judgment is not an integral part of the cause of action, and as interest is not a detriment arising from the wrongful act, it can be suspended by statute. Jacques v. Mont. Nat'l Guard, 199 M 493, 649 P2d 1319, 39 St. Rep. 1565 (1982), followed in Weber v. St., 258 M 62, 852 P2d 117, 50 St. Rep. 425 (1993).

Part 5
General Provisions Related to Official Bonds

2-9-501. Application — state official and employee bonds excepted.

Collateral References

Executors and Administrators *key* 26, 527, et seq.; Guardian and Ward *key* 15, 173, et seq.; Receivers *key* 51, 212, et seq.

21 C.J.S. Creditor and Debtor §§6, 7; 33 C.J.S. Executors and Administrators §67; 34 C.J.S. Executors and Administrators §§945, 949, et seq., 1022, 1033, 1037; 39 C.J.S. Guardian and Ward §§31, et seq., 197, et seq.

31 Am. Jur. 2d Executors and Administrators §§102, 103; 39 Am. Jur. 2d Guardian and Ward §72; 65 Am. Jur. 2d Receivers §102, et seq.

Right of court or guardian to use funds of incompetent for benefit of others, then incompetent. 160 ALR 1435, superseded by 99 ALR 2d 946 and 24 ALR 3d 863.

Power or discretion of court, after bond of executor, administrator, or testamentary trustee has been given, to dispense, discontinue, or modify bonds. 121 ALR 951.

Liability of sureties on bond of guardian, executor, administrator or trustee for defalcation or deficit occurring before bond was given. 82 ALR 585.

Right of sureties on bonds to take advantage of noncompliance with statutory requirement as to approval of bond. 77 ALR 1479.

Liability of Clerk of Court or his bond for money paid into his hands by virtue of his office. 59 ALR 60.

Invalidity of designation of officer, fiduciary or depository as affecting liability on bond. 18 ALR 274.

Bond of executor or administrator as covering debt due from principal to decedent. 8 ALR 84.

Leave of court as a prerequisite to an action on an executor's, administrator's or statutory bond. 2 ALR 563.

2-9-502. Bonds of deputies.

Case Notes

Failure to Require Bond: Under this section, an officer may indemnify himself by requiring a bond of his deputy; failing to do this, neither the officer nor his surety may complain that they have suffered loss. Silver Bow County v. Davies, 40 M 418, 107 P 81 (1910).

Collateral References

Officers and Public Employees *key* 37.

67 C.J.S. Officers and Public Employees §61.

Liability of clerk of court, county clerk or prothonotary, or surety on bond, for negligent or wrongful acts of deputies or assistants. 71 ALR 2d 1140.

2-9-503. Bond of appointee.

Collateral References

Officers and Public Employees *key* 37.

67 C.J.S. Officers and Public Employees §61.

2-9-504. Conditions, form, and signatures.

Case Notes

County Treasurer: The obligation to account for all money coming into his hands by virtue of his office is imposed upon a County Treasurer by this section, as one of the conditions of his official bond. Gallatin County v. USF&G Co., 50 M 55, 144 P 1085 (1914), distinguished in School District v. Pondera County, 89 M 342, 297 P 498 (1931). See also, as to duty of a Sheriff, Well-Dickey Co. v. Benjamin, 74 M 170, 239 P 771 (1925).

Deputies Included Under Clerk of Court: A surety company, which had signed the bond of a Clerk of the District Court, was responsible for the official misconduct of his deputy to any party injured thereby by virtue of this section. Am. Bonding Co. v. St. Sav. Bank, 47 M 332, 133 P 367 (1913).

Signatures: The surety of an official bond, joint and several in character, is not released from liability thereon because of the failure of the principal to sign the bond. Deer Lodge County v. USF&G Co., 42 M 315, 112 P 1060 (1910).

Deputies: By subsection (2) of this section the illegal act or official misconduct of the deputy is expressly put in the same category as the illegal act or misconduct of the principal. Silver Bow County v. Davies, 40 M 418, 107 P 81 (1910).

District Court Clerk: Under this section, the liability of the sureties on the bond of a District Court Clerk for losses sustained by the county through the issuance of spurious jurors' and witnesses' certificates by the Clerk's chief deputy depended not on the fact that in executing and issuing the certificates the deputy was not technically guilty of forgery because he omitted to impress on the certificates the seal of the court as required by statute, but on the question whether their issuance in the form in which they were issued and under color of office operated as an effective cause of the county's loss. Silver Bow County v. Davies, 40 M 418, 107 P 81 (1910).

City Treasurer: The official bond of a City Treasurer must be conditioned in accordance with this section. Philipsburg v. Degenhart, 30 M 299, 76 P 694 (1904).

Collateral References

Officers and Public Employees *key* 37.

67 C.J.S. Officers and Public Employees §58.

63A Am. Jur. 2d Public Officers §487, et seq.

Nonfeasance: personal liability of policeman, Sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce the law or arrest law breaker. 41 ALR 3d 700.

Liability of Clerk of Court, County Clerk, or prothonotary, or surety on bond, for negligent or wrongful acts of deputies or assistants. 71 ALR 2d 1140.

Validity, construction, and application of provision of fidelity bond as to giving of notice of loss or claim within specified time after close of bond year. 149 ALR 945.

Statutory conditions prescribed for public officer's bond as part of bond which does not in terms include them, or which expressly excludes them. 109 ALR 501.

2-9-505. Bonds of receivers, assignees — payable to state.

Collateral References

21 C.J.S. Creditor and Debtor §43; 75 C.J.S. Receivers §§76, 77, 418 through 425; 90 C.J.S. Trusts §§224, 482.

6 Am. Jur. 2d Assignments for Benefit of Creditors §§105, 106; 65 Am. Jur. 2d Receivers §102, et seq.

2-9-506. Approval, filing, record, and custody.

Collateral References

Officers and Public Employees *key* 37.

67 C.J.S. Officers and Public Employees §61.

2-9-507. Sureties' qualifications.

Collateral References

Officers and Public Employees *key* 37.

67 C.J.S. Officers and Public Employees §61.

2-9-511. Extent of sureties' liability — when less than full.

Case Notes

Officer Holding Over: Where a bond is given by an officer, such bond would also cover such officer where he holds over until his successor is appointed and qualified. State ex rel. Olsen v. Swanberg, 130 M 202, 299 P2d 466 (1956).

Officer as Own Successor: While a bond furnished by an appointive state officer protects the state for the time he holds over under the original appointment, it may not be made the basis of liability for his acts done as his own successor. State ex rel. Nagle v. Stafford, 99 M 88, 43 P2d 636 (1935).

Appointive State Officer: State officer holding over under his first appointment agreeably to the constitutional provision "until his successor is appointed and qualified" was not required to file a new bond, since the surety on the original bond must be presumed to have executed it with the statutory provision in mind that liability on an official bond shall continue so long as the officer bonded holds the office and to have assumed a liability equal to the possible duration of the officer's tenure. State ex rel. Nagle v. Stafford, 97 M 275, 34 P2d 372 (1934).

Collateral References

Officers and Public Employees *key* 129, 131, 134 through 143.

67 C.J.S. Officers and Public Employees §§252, 355, 356.

63A Am. Jur. 2d Public Officers §538, et seq.

Liability of surety on private bond for punitive damages. 2 ALR 4th 1254.

When statute of limitations begins to run against action on bond of personal representative. 44 ALR 2d 807.

Extent of liability on fidelity bond renewed from year to year. 7 ALR 2d 946.

Validity of bond as affected by provision for post-mortem payment or performance. 1 ALR 2d 1228.

Change in duties of employee as affecting liability of sureties on his fidelity bond for his act or default. 43 ALR 977, supplemented by 46 ALR 976, 62 ALR 411, 77 ALR 861, and 98 ALR 1264.

2-9-512. Defects not to affect liability.

Case Notes

Applies Only to Official Bonds: A depositary of public funds is not an officer and a depositary bond is not an official bond within the meaning of section 6-315, R.C.M. 1947 (now 2-9-512(1)), providing that if there are any defects in the approval or filing thereof, etc., the bond shall not be void so as to discharge the officer or his sureties. State ex rel. Urton v. Am. Bank & Trust Co., 75 M 369, 243 P 1093 (1926).

Approval by District Judge: The language of section 6-316, R.C.M. 1947 (now 2-9-512(2)), was borrowed from the California political code. Adopting the construction placed upon it by the courts of that state, the failure of the District Judge to approve the bond of a County Treasurer

will not be held to invalidate it or to release the surety thereon. Deer Lodge County v. USF&G Co., 42 M 315, 112 P 1060 (1910). See also Stabler v. Adamson, 73 M 490, 237 P 483 (1925).

Collateral References

Officers and Public Employees *key* 126.
67 C.J.S. Officers and Public Employees §§355, 356.
63A Am. Jur. 2d Public Officers §§491, 492.

2-9-513. Insufficiency of sureties — action to vacate office.

Collateral References

Officers and Public Employees *key* 66, 126.
67 C.J.S. Officers and Public Employees §§148, 149, 151 through 158, 175, 220, 355, 356.
63A Am. Jur. 2d Public Officers §497.

Effect of giving new bonds on liability of public officer for defaults of subordinate. 1 ALR 222, supplemented by 102 ALR 174 and 116 ALR 1064, and partially superseded by 71 ALR 2d 1140.

2-9-515. Additional security — liability of officers and sureties.

Case Notes

Standing to Bring Action on Bond: Any party injured by the breach of conditions of an official bond can maintain an action for his damages thereby. Am. Bonding Co. v. St. Sav. Bank, 47 M 332, 133 P 367 (1913).

Collateral References

Officers and Public Employees *key* 135.
67 C.J.S. Officers and Public Employees §§371, 372.

Liability of notary public or his bond for willful or deliberate misconduct in the performance of his duties. 44 ALR 3d 1243.

Release of one joint tortfeasor as discharging liability of others: modern trends. 73 ALR 2d 403.

Release of one of joint and several defalcating tortfeasors as releasing insurer which was surety on fidelity bond of each. 35 ALR 2d 1122.

What period of limitation governs in an action against a public officer and the surety on his official bond. 18 ALR 2d 1176.

Liability on bond of police or other peace officer for defamation. 13 ALR 2d 902.

Liability on bond of public official or employee as affected by change in principal's duty. 94 ALR 613.

2-9-516. Separate judgments.

Collateral References

Officers and Public Employees *key* 143.
67 C.J.S. Officers and Public Employees §§384, 385.

2-9-517. Contribution between sureties.

Collateral References

Principal and Surety *key* 194(1).
72 C.J.S. Principal and Surety §§352, 354 through 361.
63A Am. Jur. 2d Public Officers §563.

2-9-521. Discharge of sureties.

Case Notes

Withdrawal of Surety: Since, under the provisions of this section, a surety on an official bond may withdraw therefrom at any time, a complaint against a surety company to recover on the bond of a constable, in failing to state that the relationship of principal and surety existed between him and the company at the time of his alleged wrongful seizure and detention of plaintiff's chattels, did not state a cause of action, the allegation that such relationship existed at the time of filing the complaint being insufficient. Ferrat v. Adamson, 53 M 172, 163 P 112 (1917).

Collateral References

Officers and Public Employees *key* 128.
67 C.J.S. Officers and Public Employees §§368, 369.
63A Am. Jur. 2d Public Officers §538.

2-9-527. Suit on bonds.

Collateral References

Officers and Public Employees *key* 135.

67 C.J.S. Officers and Public Employees §§371, 372.

63A Am. Jur. 2d Public Officers §539, et seq.

Validity, construction, and application of provision of fidelity bond as to giving of notice of loss or claim within specified time after close of bond year. 149 ALR 945.

2-9-528. Lien on real estate of surety — action to compel specific performance.

Collateral References

Lis Pendens *key* 13, 18, 22, et seq.

54 C.J.S. Lis Pendens §22, et seq.

63A Am. Jur. 2d Public Officers §539, et seq.

Part 6
Bonds of State Officers and Employees

2-9-602. Officers and employees to be bonded — coverage, form, amount.

Case Notes

Bonding Not Intended to Waive Immunity for Torts: The mandatory bonding requirements of this part do not constitute a waiver of sovereign immunity. Distinguishing the holding in Longpre v. Joint School District No. 2, 151 M 345, 443 P2d 1 (1968), the Supreme Court found nothing in the bonding statutes that implies a legislative intent to waive the immunity for torts committed by a bonded state officer or employee. Rather, the statutes are aimed at protection from the mishandling of state funds. Murphy v. St., 248 M 82, 809 P2d 16, 48 St. Rep. 335 (1991).

Filing Bond With Secretary of State: A state officer, holding over for failure of the Senate to confirm his successor but claiming to hold by virtue of a reappointment, qualified anew to the extent of filing his official oath and procuring an extension certificate of his original bond for the new term but failed to file the bond with the Secretary of State. Where the officer failed to qualify for his alleged second term as required by law, his successor having been duly appointed, confirmed, and qualified, the latter was entitled to the office. State ex rel. Nagle v. Stafford, 99 M 88, 43 P2d 636 (1935).

Collateral References

States *key* 48.

81A C.J.S. States §91.

63A Am. Jur. 2d Public Officers §487, et seq.

Public officer's bond as subject to forfeiture for malfeasance in office. 4 ALR 2d 1348.

Constitutional, statutory, or charter provision as to time of taking oath of office and giving official bond as mandatory or directory. 158 ALR 639.

Liability of public officer and his sureties in respect of payments made without compliance with procedure prescribed for payment of claims. 146 ALR 762.

Liability of sureties on bond of public officer as affected by fact that it was not signed by him. 110 ALR 959.

Liability of sureties on bond of public officer for acts or defaults occurring after termination of office or principal's incumbency. 81 ALR 10.

Liability of public officer or his bond for the defaults of subordinates. 1 ALR 222, supplemented by 102 ALR 174 and 116 ALR 1064, and partially superseded by 71 ALR 2d 1140.

Part 7
Bonds of County Officers and Employees

2-9-701. County officers and employees to be bonded — form — conditions of group bonds.

Collateral References

Counties *key* 64; Officers and Public Employees *key* 88.

20 C.J.S. Counties §§102, 104.

63A Am. Jur. 2d Public Officers §487, et seq.

Liability on bond of Clerk of Court, County Clerk, or prothonotary for negligent or wrongful acts of deputies or assistants. 71 ALR 2d 1140.

Public officer's bond as subject to forfeiture for malfeasance in office. 4 ALR 2d 1348.

Approval of or refusal to approve bond of public officer as subject of judicial review. 134 ALR 1359.

Mandamus to compel approval of official bond. 92 ALR 1211.

2-9-702. Amount.

Compiler's Comments

1995 Amendment: Chapter 179 deleted (2) providing that the Department of Commerce could overrule the Board of County Commissioners as to the amount of the bond; and made minor changes in style. Amendment effective July 1, 1995.

1983 Amendment: Substituted references to department of commerce for references to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs" twice in (2).

Transfer of Functions: The functions performed by the state in this section have been transferred between state departments twice. In 1981, as provided in sec. 7, Ch. 274, L. 1981, the Department of Community Affairs was abolished and its functions under this section were transferred to the Department of Administration. In 1983, as provided in sec. 1, Ch. 287, L. 1983, the functions in this section were transferred from the Department of Administration to the Department of Commerce.

2-9-711. Actions against a sheriff for official acts.

Case Notes

Recovery by Sheriff From Sureties: A Sheriff seized property in an attachment suit and turned it over to his successor, who sold it. The owners of the property sued the Sheriff and his successor for its conversion. The sureties on the Sheriff's indemnity bond were notified and defended the suit. The resulting judgment against the Sheriff was sufficient evidence of the Sheriff's right of indemnification to allow him to recover from the sureties the sum paid by him on the judgment. Tuttle v. Hardenberg, 15 M 219, 38 P 1070 (1895).

Collateral References

Sheriffs and Constables *key* 151.

80 C.J.S. Sheriffs and Constables §§283 through 288.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§181, 182, and 188.

Liability of sureties on bond of sheriff for unlawful arrest made by him or his deputy beyond his territorial jurisdiction. 149 ALR 1093.

Liability of sureties on bond of public officer for acts or defaults occurring after termination of office or principal's incumbency. 81 ALR 10.

Liability of bond of sheriff for unlawful search. 62 ALR 855.

Liability of sureties on police officer's bond for unlawful arrest without a warrant. 3 ALR 1623.

Part 8
Bonds of City Officers and Employees

2-9-802. Bonds — amount.

Compiler's Comments

1995 Amendment: Chapter 179 deleted (2) providing that the Department of Commerce could overrule the council or commission as to the amount of the bond; and made minor changes in style. Amendment effective July 1, 1995.

1983 Amendment: Substituted references to department of commerce for references to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs" twice in (2).

Transfer of Functions: The functions performed by the state in this section have been transferred between state departments twice. In 1981, as provided in sec. 7, Ch. 274, L. 1981, the Department of Community Affairs was abolished and its functions under this section were transferred to the Department of Administration. In 1983, as provided in sec. 1, Ch. 287, L. 1983, the functions in this section were transferred from the Department of Administration to the Department of Commerce.

Collateral References

Municipal Corporation *key* 145.

62 C.J.S. Municipal Corporations §359.

2-9-804. Purchase — responsible surety.

Compiler's Comments

2001 Amendment: Chapter 278 deleted former (2) that read: "(2) The city or town council or commission shall actively solicit offers on a competitive bases from available qualified insurance or surety companies before purchasing the bonds"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

CHAPTER 10
STATE AGENCY ACTIONS AFFECTING PRIVATE PROPERTY

Chapter Law Review Articles

Montana Supreme Court Unnecessarily Misconstrues Takings Law, Horwich & Lund, 55 Mont. L. Rev. 455 (1994).

Part 1
Private Property Assessment Act

2-10-104. Guidelines for actions with taking implications.

Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 462, L. 1995, provided: "A statement of intent is required for this bill because it grants the attorney general authority to develop guidelines for state agencies to follow in identifying and evaluating agency actions with taking implications. The attorney general, using a public process, should develop an orderly, consistent, internal management process for state agencies to evaluate the effects of proposed state actions on private property. Consistent with the Montana and United States constitutions, the attorney general should consider the following issues in developing guidelines:

(1) whether there is a constitutionally protected property right that will be affected;

(2) whether the proposed action would substantially advance a legitimate state interest;

(3) whether the action would deprive the owner of economically viable use of the property or result in a temporary or permanent physical invasion of the property;

(4) whether the action would damage the property;

(5) whether the action would require a property owner to dedicate a portion of the property to a public use or to grant an easement; and

(6) whether in balance, benefits of the proposed action justify the burden on private property. In addition, the attorney general may consider any other factors that bear upon the determination of whether a compensable taking has occurred, including new case law."

CHAPTER 11
LEGAL AUTHORITY FOR GOVERNMENT ACTION

Part 1
Government Accountability Act

Part Compiler's Comments

1997 Statement of Intent: The statement of intent attached to Ch. 502, L. 1997, provided: "The legislature finds that there have been instances in which decisions made by government entities exceed, or appear to exceed, the legal authority of the government entity. Because the power of government comes ultimately from the people served by the government, it is therefore appropriate that government should upon request provide the legal authority upon which certain action is based."

Applicability: Section 5, Ch. 502, L. 1997, provided: "[This act] [2-11-101 through 2-11-104] applies to a government act as defined by [section 3] [2-11-103] taken after [the effective date of this act]." Effective May 2, 1997.

Effective Date: Section 6, Ch. 502, L. 1997, provided: "[This act] [2-11-101 through 2-11-104] is effective on passage and approval." Approved May 2, 1997.

2-11-103. Definitions.

Compiler's Comments

1999 Amendment: Chapter 51 deleted former definition of "aggrieved" that read: ""Aggrieved" means that a person can demonstrate a specific personal and legal interest, as distinguished from a general interest, that has been adversely affected"; and made minor changes in style. Amendment effective March 15, 1999.

2-11-104. Statement of government authority required.

Compiler's Comments

2001 Amendment: Chapter 501 in (1) in first sentence inserted "specific" and in second sentence substituted "written request by the applicant for the written statement of specific legal authority or within 30 days after the government act, whichever occurs last" for "government act"; and in (2) after "clearly cite the" inserted "specific" and at end inserted "and the specific reason for the government act". Amendment effective July 1, 2001.

CHAPTER 15
EXECUTIVE BRANCH OFFICERS AND AGENCIES

Chapter Law Review Articles

Energy in the Executive, Roeder, 33 Mont. L. Rev. 1 (1971).

Shaping the Modern West: The Role of the Executive Branch, Leshy, 72 U. Colo. L. Rev. 287 (2001).

Executive Branch (Developments in State Constitutional Law: 1999), 31 Rutgers L.J. 1551 (2000).

Part 1
General Provisions

Part Compiler's Comments

Severability Clause: Section 5, Ch. 272, L. 1971, was a severability clause.

2-15-101. Declaration of policy and purpose.

Attorney General's Opinions

Merger of Merit System Council With Department of Administration: The Merit System Council may enter into an agreement with the Department of Administration to allow the Department to perform staff functions for the Council provided the Council continues to retain its identity and exercise independent quasi-judicial, quasi-legislative, licensing, and policymaking functions as provided by law. 37 A.G. Op. 123 (1978).

2-15-102. Definitions.

Compiler's Comments

2001 Amendment: Chapter 313 substituted definition of data for definition of data and information technology resources that read: ""Data and information technology resources" means data processing mainframe, microcomputer hardware, peripherals, software, special forms, personnel, facility resources, maintenance, training, electronically stored data, or other related resources"; in definition of executive branch substituted "Article III, section 1, and Article VI of the Montana constitution" for "the Montana constitution, Articles III and VI"; inserted definition of information technology resources; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Inserted definition of data and information technology resources.

Case Notes

Section 1983 Action for Damages and Declaratory and Injunctive Relief — State Agency Held Not a "Person" — Individual or Official Capacity of Individual Defendants Determined — Test for Qualified Immunity in Damages Action — Remington Overruled: Orozco, an inmate in the Montana State Prison, brought a civil action for damages pursuant to 42 U.S.C. 1983 against the Department of Corrections and Human Services (now Department of Corrections) and several Department employees for the denial of his due process rights in connection with the denial of his ability to earn good time credits. The Department moved for dismissal for failure to state a claim, based upon 11th amendment immunity. As to the Department, the Supreme Court held, citing Will v. Mich. Dept. of St. Police, 491 US 58 (1989), that because the Department has been created

as part of the Executive Branch of state government, suing the Department is the same as suing the State of Montana, which is not a "person" for the purposes of a section 1983 action. In response to Orozco's argument that 2-9-305 required him to join the Department as a party, the Supreme Court noted that there is nothing in the text of that section that requires that the state be joined as a party; the section provides only for the tender of a defense and payment of damages by the state if a state employee is sued. Therefore, the Supreme Court held that the District Court correctly dismissed the action for damages against the Department. As to the individual defendants, the Supreme Court held that state employees acting in their official capacities are likewise not "persons" for the purposes of a section 1983 action but that state employees acting in their individual capacities are "persons" within the meaning of section 1983. The Supreme Court noted that Orozco had not clearly indicated the capacities in which the individual defendants were being sued, and so it looked to other provisions of the complaint and to U.S. Supreme Court decisions in order to determine Orozco's intent and held that Orozco intended to sue the individual defendants in their individual capacities. For this reason, the Supreme Court held that the District Court erred in holding that the individually named defendants were not "persons" under 42 U.S.C. 1983 for the purposes of the action for damages. The Supreme Court also held that in enacting 53-30-105 (now repealed) mandating rules for the accrual of good time, the state had created a right to good time. The Supreme Court also held that the immunity analysis used in Remington v. Dept. of Corrections and Human Services, 255 M 480, 844 P2d 50 (1992), was incorrect in light of the later decision of the U.S. Supreme Court in Sandin v. Connor, 515 US 472 (1995), and overruled Remington, but, on the basis of the Sandin immunity analysis, determined that Orozco's liberty interest in the award of good time credits was not clearly established on the date of Orozco's hearing to reclassify him as a maximum security prisoner who was no longer entitled to earn good time credits. For this reason, the Supreme Court held that the Department employees who were sued in their individual capacities were to be given qualified immunity for the purposes of the action for damages but that the District Court improperly dismissed the action for declaratory and injunctive relief and remanded the case to the District Court for a determination of what process was due Orozco before his opportunity to earn good time was revoked and whether he received that process. Orozco v. Day, 281 M 341, 934 P2d 1009, 54 St. Rep. 200 (1997).

Failure to Review Application for Self-Insurance — Quasi-Judicial Immunity Not Applicable: The Division of Workers' Compensation (now State Fund) admitted negligence for failing to conduct an adequate review of a corporation's financial ability to self-insure under plan No. 1, but claimed immunity under the rationale of Koppen v. Bd. of Medical Examiners, 233 M 214, 759 P2d 173, 45 St. Rep. 1433 (1988), for its acts as a government agency. The Supreme Court, noting that for immunity to apply, the function of the Division (now State Fund) must be quasi-judicial rather than administrative or ministerial, distinguished Koppen based on the lack of discretion necessary for the Division (now State Fund) to perform its statutory duty. Because simply performing this duty did not involve the use of quasi-judicial discretion, the act was purely ministerial and not protected by quasi-judicial immunity. The discretionary function exemption will not apply when a statute, regulation, or policy specifically prescribes a course of action for an employee to follow and the employee has no rightful option but to adhere to the directive. State ex rel. Div. of Workers' Comp. v. District Court, 240 M 225, 805 P2d 1272, 47 St. Rep. 1911 (1990), following Berkovitz v. U.S., 486 US 531, 100 L Ed 2d 531, 108 S Ct 1945 (1988). See also Meinecke v. McFarland, 122 M 515, 206 P2d 1012 (1949).

Quasi-Judicial Board With Other Hearing Procedure — Montana Administrative Procedure Act Not Applicable to Unemployment Insurance Claims: The unemployment compensation insurance law contains a complete procedure for hearing and determining undisputed claims for unemployment insurance. The Board of Labor Appeals, as a quasi-judicial board, may consider not only the record made before the appeals referee but new evidence produced at the Board hearing. The provisions of MAPA are unworkable when an attempt is made to apply them to determine claims for unemployment insurance benefits. It is an incorrect interpretation of statutory law to hold that the Board has no power to overturn the findings of fact of the appeals referee. In reviewing the Board's decision, the District Court is limited by the provisions of 39-51-2410. Decker Coal Co. v. Employment Security Div., 205 M 1, 667 P2d 923, 40 St. Rep. 1056 (1983).

2-15-103. Policymaking authority and administrative powers of governor.

Attorney General's Opinions

Collective Bargaining — Representation of Executive Agencies: The Governor or his designee has the statutory authority to represent all agencies of the executive branch for purposes of collective bargaining with public employee unions. 37 A.G. Op. 168 (1978).

2-15-104. Structure of executive branch.

Compiler's Comments

1995 Amendments — Coordination — Composite Section: Chapter 418 in (1)(h) substituted "department of public health" for "department of health and environmental sciences"; deleted former (1)(o) that read: "(o) department of state lands"; and inserted (1)(p) concerning Department of Environmental Quality. Amendment effective July 1, 1995.

Chapter 546 deleted former (1)(h) that read: "(h) department of health and environmental sciences"; in (1)(h) substituted "department of public health and human services" for "department of social and rehabilitation services"; in (1)(i), after "corrections", deleted "and human services"; deleted (1)(r) that read: "(r) department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Section 568, Ch. 546, provided that if Ch. 418 and Ch. 546 were both passed and approved, subsection (1)(h) was eliminated.

Because both chapters affected the subsection numbering in subsection (1), the codifier has changed the numbering to reflect the changes made by both chapters.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendments: Chapter 262 in (1)(j) substituted "department of corrections and human services" for "department of institutions". Amendment effective July 1, 1991.

Chapter 512 in (1)(k) substituted "department of transportation" for "department of highways"; and made minor changes in style. Amendment effective July 1, 1991.

1987 Amendment: Inserted reference to Department of Family Services.

1981 Amendment: Deleted "department of community affairs" and "department of professional and occupational licensing" in (1); substituted "commerce" for "business regulation" in (1)(f).

Case Notes

Economic Advantage Inadequate Reason for Denial of Public Right to Observe Government Deliberations in Corrections Vendor Process: A newspaper company sought to restrain the Department of Corrections from excluding the public from meetings of the committee that reviewed proposals for operating private prison facilities. The District Court held that the public had no right to observe the negotiation phase of the committee's work, but that once negotiations were completed, the process by which the conclusions were arrived at must be open to public observation. Both parties appealed. The Supreme Court noted that as part of an Executive Branch agency, the Department and the committee were considered governmental bodies pursuant to this section for purposes of procurement and that under the constitutional right to know, proposals submitted by private vendors were considered documents of a public body or agency that, under 2-6-102, the public has a right to inspect. Under the two-part test in Missoulian v. Bd. of Regents, 207 M 513, 675 P2d 962 (1984), the only exception to the constitutional provision arises when the demand of individual privacy clearly exceeds the merits of public disclosure. The state contended that the meetings at issue were closed for economic advantage, but economic advantage is neither a privacy interest nor a sufficient reason for denying the public the opportunity to observe deliberations of public bodies or to examine public documents, including proposals submitted to the public body by a vendor, unless the proposal concerns a privacy interest involving legitimate trade secrets or individual safety. A public agency's desire for privacy does not provide an exception to the public's constitutional right to observe its government at work. To the extent that provisions in 18-4-304 or ARM 2.5.602 require exclusion of the public from the competitive bid process, those provisions are unconstitutional and unenforceable. Great Falls Tribune Co., Inc. v. Day, 1998 MT 133, 289 M 155, 959 P2d 508, 55 St. Rep. 524 (1998), following Mtn. States Tel. & Tel. Co. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181 (1981), State ex rel. Great Falls Tribune Co., Inc. v. District Court, 238 M 310, 777 P2d 345 (1989), Great Falls Tribune Co., Inc. v. Great Falls Pub. Schools, 255 M 125, 841 P2d 502 (1992), and Common Cause of Mont. v. Statutory Comm. to

Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604 (1994). See also Assoc. Press, Inc. v. Dept. of Revenue, 2000 MT 160, 300 M 233, 4 P3d 5, 57 St. Rep. 657 (2000).

2-15-108. Gender and racial balance — report to legislature.

Compiler's Comments

1993 Amendment: Chapter 349 at beginning of (3) deleted "Prior to the 10th legislative day of each regular session" and after "legislature" inserted "as provided in 5-11-210".

Preamble: The preamble to Ch. 208, L. 1991, provided: "WHEREAS, Article II, section 8, of the Montana Constitution provides the right of public participation in government and the public right to expect governmental agencies to afford such reasonable opportunity for citizen participation; and

WHEREAS, the 51st Legislature adopted House Joint Resolution No. 28, urging that all appointive boards, commissions, committees, and councils be gender-balanced; and

WHEREAS, the 52nd Legislature acknowledges that women and minorities are significantly underrepresented on all appointive boards, commissions, committees, and councils of state government; and

WHEREAS, the 52nd Legislature strongly supports progress toward the goal of full participation in state government by both genders and all races."

Effective Date: Section 4, Ch. 208, L. 1991, provided: "[This act] is effective on passage and approval." Approved March 27, 1991.

2-15-112. Duties and powers of department heads.

Compiler's Comments

2001 Amendment: Chapter 255 in (2)(e) at end deleted "Section 17-7-138 does not apply to this subsection (e)"; and made minor changes in style. Amendment effective April 16, 2001.

Termination Date Removed: Section 17, Ch. 417, L. 1997, and sec. 40, Ch. 532, L. 1997, removed the termination date for the amendments enacted by sec. 13, Ch. 23, Special Laws of November 1993.

1993 Special Session Amendment: Chapter 23 in (2)(e), at beginning of first full sentence, inserted "If the salary for an eliminated position is not redistributed as provided for under 2-18-1107"; and made minor changes in style. Amendment effective December 23, 1993, and terminates July 1, 1997.

Termination: Section 13, Ch. 23, Sp. L. November 1993, provided that the amendments to this section terminate July 1, 1997.

1993 Amendment: Chapter 601 inserted (2)(e) allowing a Department head to eliminate positions within the Department; and made minor changes in style. Amendment effective July 1, 1993.

1989 Amendment: In (1)(h) and (2)(a), after "subject to law", deleted reference to state merit system.

Case Notes

Designation of Hearing Officer's Order as Final: The Commissioner of Labor and Industry is charged with the responsibility of investigating wage claims and holding hearings under Montana wage payment law, and under this section, the Commissioner may delegate these functions to a subordinate employee. Therefore, statute and Department rule clearly allow the decision of an appointed hearing examiner to be a final order. Hoven, Vervick, & Amrine, P.C. v. Comm'r of Labor, 237 M 525, 774 P2d 995, 46 St. Rep. 1024 (1989).

Administrative Interpretation of Statute: In determining the meaning of a statute, deference must be given to the interpretations given the statute by the officers and agencies charged with its administration. St. v. Wood, 205 M 141, 666 P2d 753, 40 St. Rep. 666 (1983).

Venue for Failure to File Tax Returns:

Tax returns are required to be filed with the Department of Revenue. The Department is required to be located in Helena, Montana. Section 46-3-101 (renumbered 46-3-111) provides that in all criminal prosecutions, trial shall be in the county where the offense was committed. The offense charged here was failure to properly file tax returns, so that venue was properly with Lewis and Clark County where Helena is located. St. v. Poncelet, 187 M 528, 610 P2d 698 (1980).

Venue of a criminal action charging intentional failure to file a properly completed Montana individual income tax return would lie in either Lewis and Clark County or the county in which defendants reside. But, since the complaint was filed in the former and no legal justification or prejudice was shown to support transfer, the Supreme Court reversed the District Court's

change of venue from Lewis and Clark County. Dept. of Revenue v. Lane, 187 M 230, 609 P2d 300 (1980), following St. v. Bretz, 169 M 505, 548 P2d 949 (1976).

Attorney General's Opinions

Department Heads — No Power to Allow Moving Expenses: An agency of the state of Montana is not liable for employees' moving expenses which were not specifically contracted for. 36 A.G. Op. 9 (1975).

2-15-114. Security responsibilities of departments for data.

Compiler's Comments

2003 Amendment: Chapter 114 in introductory clause and in (1), (2), (3), (4), and (6) after "data" deleted "and information technology resources". Amendment effective October 1, 2003.

2001 Amendment: Chapter 313 in (6) substituted "include a general description of the existing security program and future plans for ensuring security of data and information technology resources in the agency information technology plan as provided for in 2-17-523" for "maintain an information technology plan, including a general description of the existing security program and future plans for assuring security of data and information technology resources"; and made minor changes in style. Amendment effective July 1, 2001.

Preamble: The preamble to Ch. 592, L. 1987, provided: "WHEREAS, data and information collected and maintained by state government are assets which require protection; and

WHEREAS, the increasing use of information technology in state government requires a systematic risk-management approach to minimize increased security threats to data and information technology resources; and

WHEREAS, it is desirable to create a greater awareness regarding the importance of security of state government data and information technology resources; and

WHEREAS, a recent audit of mainframe computer security indicated a lack of security over data processing equipment and procedures."

2-15-115. Notice of estimated turnaround time on application for permit or license.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

2-15-121. Allocation for administrative purposes only.

Compiler's Comments

Internal Reference: Section 37-1-101 allows the Department of Commerce to assess professional and occupational boards attached to it a pro rata share of costs of administration.

Case Notes

Attachment for Administrative Purposes: An agency allocated to a department for administrative purposes is completely independent of the department in the exercise of its quasijudicial functions. Rules adopted by the department have no application to proceedings before the agency unless adopted by the agency. Bowen v. Liberty Mut. Ins. Co., 229 M 84, 745 P2d 330, 44 St. Rep. 1799 (1987).

Attorney General's Opinions

Appropriations — Legislative Control Over Marketing Assessment Funds: Although the control of the Legislature over appropriations to state agencies is based upon broad constitutional provisions, certain money may either be exempt from the appropriation process or the purposes for which that money may be appropriated may be limited by statute. Thus, the Legislature may control appropriations from the Wheat Marketing and Research Account, but those appropriations are subject to the statutorily stated purposes of the Account. Any attempt by the Legislature in an appropriation bill to alter the purposes for which appropriations from the Account are made is subject to the constitutional restriction that the purpose of legislation must be clearly stated in the title of the bill. 39 A.G. Op. 3 (1981).

Appropriation of Specially Assessed Funds — Due Process of Law: The Legislature may appropriate wheat research and marketing funds, which are funds derived from a special tax on the growers of wheat and barley, to the Centralized Services Division of the Department of Agriculture in order to pay for administrative services used by the Wheat Research and Marketing Committee because the Committee is required by law to use the services of the Division and that requirement implies a duty to pay for the services. Because the money appropriated is taxed to the grower for a specific purpose, the amount appropriated to the Centralized Services Division must be for a purpose substantially related to the purposes of the tax. 39 A.G. Op. 3 (1981).

Merger of Merit System Council With Department of Administration: The Merit System Council (now repealed) may enter into an agreement with the Department of Administration to allow the Department to perform staff functions for the Council provided the Council continues to retain its identity and exercise independent quasi-judicial, quasi-legislative, licensing, and policymaking functions as provided by law. 37 A.G. Op. 123 (1978).

Implied Amendment — Accountant Licensing: The laws relating to the Board of Public Accountants appear to have been impliedly amended by the Executive Reorganization Act and its duties transferred to the Department of Professional and Occupational Licensing (now Department of Commerce). When two acts are inconsistent on the same subject, the prior is treated as repealed by the latter. 35 A.G. Op. 58 (1974).

2-15-122. Creation of advisory councils.

Compiler's Comments

1991 Amendment: In first sentence of (1)(c) and (10) added Secretary of State to list of entities that may create advisory councils.

1989 Amendments: Chapter 83 at end of (4) changed "2-15-102(7)" to "2-15-102(8)".

Chapter 509 in (1)(c) and (10), after "general", inserted "the state auditor". Amendment effective January 1, 1990.

Applicability: Section 11, Ch. 509, L. 1989, provided: "[This act] applies to persons applying for a license as an insurance agent, solicitor, or enrollment representative on or after January 1, 1990."

2-15-124. Quasi-judicial boards.

Compiler's Comments

1985 Amendment: In (7) at beginning of first sentence substituted "Unless otherwise provided by law" for "Unless he is a full-time salaried officer or employee of this state or of a political subdivision of this state", in second sentence, after "their service as members" inserted exception clause and made minor changes in phraseology and inserted third sentence prohibiting ex officio members from receiving compensation but allowing travel expenses.

1983 Amendments: Chapter 83, in (2), deleted "and qualified" after "are appointed" in two places; in first sentence of (3), after "the senate", substituted "then meeting in regular session or next meeting in regular session following the appointment" for former next sentence, which read: "However, the governor may appoint a member to assume office before the senate meets at its next regular session to consider the appointment."

Chapter 672 increased per diem from $25 to $50 in (7).

Case Notes

Properly Constituted Board Need Not Include Attorney Participation: Plaintiff appealed a District Court order upholding the Board of Labor Appeals' denial of unemployment insurance benefits, claiming that the Board was improperly constituted because the attorney member did not participate in the benefits hearing. Affirming the District Court decision, the Supreme Court ruled that requiring all members, including the attorney member, to participate in a decision vitiates state law because this section requires only a majority of members to constitute a quorum to do business and only a majority vote to adopt a decision. Reynolds v. Pac. Telecom, 259 M 309, 856 P2d 1365, 50 St. Rep. 809 (1993).

Board of Medical Examiners — Immunity From Suit: In the exercise of its quasi-judicial authority, the Board of Medical Examiners is entitled to the absolute immunity from suit afforded executive officials. Koppen v. Bd. of Medical Examiners, 233 M 214, 759 P2d 173, 45 St. Rep. 1433 (1988).

Board of Realty Regulation Not Empowered to Award Damages — Complaint to Board Inadequate Notice of Legal Claim: The Board of Realty Regulation may only revoke or suspend a broker's license and has no power to award damages for negligence or fraud. Further, because the Board is not designated by law as a quasi-judicial board pursuant to this section, a complaint to the Board does not give adequate notice of the existence of a legal claim. Erickson v. Croft, 233 M 146, 760 P2d 706, 45 St. Rep. 1379 (1988).

Quasi-Judicial Board With Other Hearing Procedure — Montana Administrative Procedure Act Not Applicable to Unemployment Insurance Claims: The unemployment compensation insurance law contains a complete procedure for hearing and determining undisputed claims for unemployment insurance. The Board of Labor Appeals, as a quasi-judicial board, may consider not only the record made before the appeals referee but new evidence produced at the Board hearing. The provisions of MAPA are unworkable when an attempt is made to apply them to

determine claims for unemployment insurance benefits. It is an incorrect interpretation of statutory law to hold that the Board has no power to overturn the findings of fact of the appeals referee. In reviewing the Board's decision, the District Court is limited by the provisions of 39-51-2410. Decker Coal Co. v. Employment Security Div., 205 M 1, 667 P2d 923, 40 St. Rep. 1056 (1983).

Attorney General's Opinions

Compensation for Matters Other Than Board Meetings: Members of the Board of Natural Resources and Conservation (now Board of Environmental Review) are entitled to be compensated under 2-15-124 for the time spent on necessary Board-related matters other than Board meetings. 37 A.G. Op. 149 (1978).

2-15-130. Compliance with Military Selective Service Act required for employment — rulemaking.

Compiler's Comments

Preamble: The preamble attached to Ch. 320, L. 2001, provided: "WHEREAS, even in the time of voluntary membership in the armed services, Congress has chosen as part of the federal Military Selective Service Act, 50 App. U.S.C. 451, et seq., to maintain the military selective service registration system as a means for rapid induction of individuals into the armed forces and, as part of that system, still requires adult men between the ages of 18 and 26 to register with the selective service system; and

WHEREAS, the Military Selective Service Act in 50 App. U.S.C. 462(f) requires compliance with the registration requirements of the Military Selective Service Act as a prerequisite to the receipt of federal student financial assistance; and

WHEREAS, 5 U.S.C. 3328(a) makes ineligible for employment by a federal executive agency an individual who has failed to comply with the registration requirements of the Military Selective Service Act; and

WHEREAS, Montana should do all that it can to require that those men subject to the selective service registration requirements fulfill their obligation to register with the selective service system; and

WHEREAS, it is therefore appropriate that Montana likewise require compliance with the registration requirements of the Military Selective Service Act as a prerequisite for payment of state student financial aid, enrollment in a postsecondary educational institution of a student receiving financial assistance provided by state funds, and employment with the Executive Branch of state government."

Saving Clause: Section 5, Ch. 320, L. 2001, was a saving clause.

Severability: Section 6, Ch. 320, L. 2001, was a severability clause.

Effective Date: Section 7, Ch. 320, L. 2001, provided: "(1) Except as provided in subsection (2), [this act] is effective on passage and approval [approved April 21, 2001].

(2) [Sections 1(1) [2-15-130(1)] and 2(1) and (3) [20-1-225(1) and (3)]] are effective July 1, 2001."

2-15-132. Rights to property.

Compiler's Comments

1981 Amendment: Substituted "a reorganization within the executive branch" for "this chapter" in the first sentence.

2-15-133. Rules and orders.

Compiler's Comments

1981 Amendment: Substituted "a reorganization within the executive branch" for "this chapter" in the first sentence.

2-15-134. Legal proceedings.

Compiler's Comments

1981 Amendment: Substituted "by a reorganization within the executive branch" for "under this chapter".

2-15-135. Rights and duties under existing transactions.

Compiler's Comments

1981 Amendment: Substituted "by a reorganization within the executive branch" for "under this chapter" in the first sentence; deleted "under this chapter" at the end of the first sentence; made minor changes in grammar.

Attorney General's Opinions

Board of Dentistry Not to Reconsider Licensing Decisions of Board of Denturitry: Administrative agencies enjoy only those powers specifically conferred upon them by statute. They possess no common-law powers, and implied powers are limited only to those necessary for the effective exercise and discharge of powers and duties expressly conferred. Therefore, when the Board of Denturitry had no power to reconsider its licensing decisions, the Board of Dentistry, having succeeded to the functions of the Board of Denturitry, may not reconsider a prior decision of the Board of Denturitry to issue a denturist's license. 43 A.G. Op. 33 (1989).

2-15-136. References.

Compiler's Comments

1981 Amendment: Deleted "under this chapter" after "is abolished".

2-15-137. Federal aid.

Compiler's Comments

1981 Amendment: Substituted "a reorganization within the executive branch" for "this chapter" and "the reorganization" for "this chapter".

2-15-141. Definitions.

Compiler's Comments

Preamble: The preamble attached to Ch. 568, L. 2003, provided: "WHEREAS, the Legislature recognizes the right of tribes to self-government; and

WHEREAS, the Legislature supports tribal sovereignty and self-determination; and

WHEREAS, the Legislature recognizes the fundamental principle and integrity of the government-to-government relationship between the State of Montana and the Indian Nations of Montana; and

WHEREAS, the Legislature supports strengthening communications and building collaborative relationships that will benefit both the Indian Nations and the State of Montana."

Effective Date: This section is effective October 1, 2003.

2-15-142. Guiding principles.

Compiler's Comments

Preamble: The preamble attached to Ch. 568, L. 2003, provided: "WHEREAS, the Legislature recognizes the right of tribes to self-government; and

WHEREAS, the Legislature supports tribal sovereignty and self-determination; and

WHEREAS, the Legislature recognizes the fundamental principle and integrity of the government-to-government relationship between the State of Montana and the Indian Nations of Montana; and

WHEREAS, the Legislature supports strengthening communications and building collaborative relationships that will benefit both the Indian Nations and the State of Montana."

Effective Date: This section is effective October 1, 2003.

2-15-143. Training and consultation.

Compiler's Comments

Preamble: The preamble attached to Ch. 568, L. 2003, provided: "WHEREAS, the Legislature recognizes the right of tribes to self-government; and

WHEREAS, the Legislature supports tribal sovereignty and self-determination; and

WHEREAS, the Legislature recognizes the fundamental principle and integrity of the government-to-government relationship between the State of Montana and the Indian Nations of Montana; and

WHEREAS, the Legislature supports strengthening communications and building collaborative relationships that will benefit both the Indian Nations and the State of Montana."

Effective Date: This section is effective October 1, 2003.

2-15-149. Naming of sites and geographic features — replacement of word "squaw" — advisory group.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

2-15-150. Lewis and Clark bicentennial commission — membership — purpose — account.

Compiler's Comments

2003 Amendment: Chapter 190 in (2)(d) substituted reference to administrator of Montana promotions division for "director of travel Montana". Amendment effective April 1, 2003.

2001 Amendment: Chapter 414 inserted (4) authorizing commission indebtedness of up to $3 million for 6 years and pledging license plate sales to repay indebtedness; and made minor changes in style. Amendment effective April 28, 2001, and terminates December 31, 2006.

Applicability: Section 16, Ch. 414, L. 2001, provided: "[This act] applies to registrations of motor vehicles occurring after December 31, 2001."

Termination: Section 2, Ch. 428, L. 1997, provided: "[This act] [2-15-150] terminates December 31, 2007."

2-15-151. Lewis and Clark bicentennial license plates — authorization to apply as sponsor — use of proceeds.

Compiler's Comments

2001 Enactment: The enactment of this section by sec. 5, Ch. 414, L. 2001, was rendered void by sec. 17(1), Ch. 402, L. 2001, a coordination section. Pursuant to sec. 17, the text of sec. 5 was replaced.

Code Commissioner Instruction: Pursuant to sec. 47, Ch. 257, L. 2001, in (2) the code commissioner changed "state treasurer" to "department of revenue".

Effective Date: Section 15, Ch. 414, L. 2001, provided that this section is effective on passage and approval. Approved April 28, 2001.

Applicability: Section 16, Ch. 414, L. 2001, provided: "[This act] applies to registrations of motor vehicles occurring after December 31, 2001."

Termination: Section 17, Ch. 414, L. 2001, provided that this section terminates December 31, 2006.

Part 2
Governor

2-15-201. Powers and duties of governor.

Compiler's Comments

K-12 Public School Funding Study: Section 1, Ch. 580, L. 2001, provided: "Section 1. K-12 public school funding study — duties — hearings. (1) The governor and the superintendent of public instruction shall, within the provisions of the Montana constitution, conduct a study of funding for K-12 public schools, including but not limited to:

(a) analyzing the factors currently in law that are used to compute budget authority for schools to determine if additional factors or changes in those factors are necessary to equitably provide budget authority to public schools;

(b) determining the appropriate allocation of funding to adequately fund elementary, middle school, seventh and eighth grade, and high school programs;

(c) determining if a statewide salary schedule for school staff is possible under the constitutional provision for trustee management of school districts;

(d) determining if the current budget computations are prohibiting or discouraging local decisions to consolidate school districts;

(e) determining the adequacy and equity of the current statutory authority for public schools to access the funds necessary to provide facilities for school districts and state support for school facility costs;

(f) determining the adequacy and equity of current funding for pupil transportation;

(g) determining if appropriate disparity exists in the current local tax effort necessary to fund school districts;

(h) analyzing the current allocation of state funds to public schools to determine its equity;

(i) analyzing the relationship between increasing staffing levels in the classroom in the face of declining enrollment and the resulting financial impacts to school districts and the state;

(j) analyzing appropriate means for school districts to calculate ANB regarding nontraditional, part-time, or distance-learning students;

(k) determining if issues not listed in this section are affecting the equity of school funding in Montana and analyzing those issues;

(l) analyzing the school district structure that currently exists and determining if reducing the number of districts could provide efficiency in the operations of the districts and make existing resources available for classroom activities; and

(m) determining if the existence of 25 budgeted and nonbudgeted funds unreasonably restricts local decisionmakers.

(2) The governor, after consultation with the superintendent of public instruction, shall prepare and submit a preliminary report by December 31, 2001, on the findings and recommendations of the study to the education interim committee.

(3) (a) The education interim committee shall hold hearings and take public comment on the preliminary report prepared and submitted by the governor. The hearings may be held at various locations around the state to facilitate public comment on the governor's report.

(b) by August 1, 2002, the education interim committee shall provide to the governor for the governor's consideration a summary of the hearings and recommendations for changes to the report.

(c) The education interim committee may make any other recommendations on school funding that the committee considers appropriate. The education interim committee shall submit its recommendations and, if appropriate, prepare legislation for consideration by the 2003 legislature.

(4) Upon receipt of the summary and recommendations from the education interim committee, the governor shall issue a final report and, if appropriate, prepare legislation for consideration by the 2003 legislature.

(5) The governor may:

(a) appoint one or more advisory councils pursuant to 2-15-122 to assist in conducting the study;

(b) coordinate with any other legislative interim committee, as appropriate;

(c) request assistance from other legislative and executive branch agencies; and

(d) in addition to any legislative appropriation, accept donations for purposes of the study required in this section."

1987 Amendment: In (3)(a) inserted language requiring posting of notice that describes vacancy, qualifications, and application procedures.

1983 Amendment: Deleted former (11), which read: "He shall prepare a biennial report pursuant to 2-7-102."

1981 Amendment: Deleted "(10) He shall issue and transmit election proclamations, as prescribed by [13-11-101]."

Collateral References

States *key* 41.

81A C.J.S. States §130.

38 Am. Jur. 2d Governor §§4, 9, 11.

Construction and application, under state law, of doctrine of "executive privilege". 10 ALR 4th 355.

Devolution, in absence of Governor, of veto and approval power, upon Lieutenant Governor or other officer. 136 ALR 1053.

Mandamus to Governor. 105 ALR 1124.

Conclusiveness of Governor's decision in removing officers. 52 ALR 7, supplemented by 92 ALR 998.

Power to pardon or commute sentence as one which devolves upon the Lieutenant Governor during the absence or disability of Governor. 32 ALR 1162.

Power to declare martial law apart from military occupation or operations. 24 ALR 1183.

Power of executive to pardon one committed for contempt. 23 ALR 524, supplemented by 26 ALR 21, 38 ALR 171, and 63 ALR 226.

2-15-203. Western governors' university.

Compiler's Comments

Effective Date: Section 3, Ch. 205, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 7, 1997.

2-15-210. Mental health ombudsman.

Compiler's Comments

2001 Amendment: Chapter 544 in (1) in first sentence after "health" deleted "managed care" and in second sentence substituted "office of the governor" for "mental disabilities board of

visitors"; inserted (2) concerning annual report; substituted (3) concerning representation and not providing legal advocacy for "The ombudsman shall represent the interests of consumers of services with the contractor or the department of public health and human services under the mental health provisions of Title 53, chapters 6 and 21"; inserted (4) concerning legal support; inserted (5) concerning confidential and privileged information; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 577, L. 1999, provided: "WHEREAS, the Legislature is firmly committed to a managed care system for the delivery of public mental health services in an efficient and cost-effective manner and to ensuring access to services and quality of care; and

WHEREAS, in order for mental health managed care to be successful, care management must be carefully monitored and any contract for services must be enforced; and

WHEREAS, the state, service providers, and service recipients and their families must work cooperatively to ensure that the public mental health delivery system is successful; and

WHEREAS, the Legislature is committed to a transition from the existing contract to a competitive procurement of mental health managed care services."

Effective Date: Section 17, Ch. 577, L. 1999, provided: "[This act] is effective on passage and approval." Approved May 6, 1999.

2-15-211. Mental disabilities board of visitors — composition — allocation.

Compiler's Comments

2001 Amendment: Chapter 344 in (2)(a) increased board membership from five to six persons and after "persons" substituted language requiring board to consist of persons possessing qualifications necessary to carry out responsibilities defined in 53-20-104 and 53-21-104 for former language that read: "representing but not limited to consumers, doctors of medicine, and the behavioral sciences, at least three of whom may not be professional persons and at least one of whom must be a representative of an organization concerned with the care and welfare of the mentally ill and one representative of an organization concerned with the care and welfare of the mentally retarded or persons with developmental disabilities"; inserted (2)(b) and (2)(c) outlining board member requirements; inserted (2)(e) providing that board members serve 2-year staggered terms; and made minor changes in style. Amendment effective October 1, 2001.

1995 Amendments — Phrase Change: Section 21, Ch. 255, L. 1995, directed the Code Commissioner to change references in the MCA to a person who is developmentally disabled or to a developmentally disabled person to a person with developmental disabilities. The change was not to be made to the phrase "seriously developmentally disabled". At end of first sentence of (2), the Code Commissioner has made the change.

Chapter 546 in (2), near middle of last sentence, substituted "department of public health and human services" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

2-15-212. Reserved water rights compact commission.

Compiler's Comments

1995 Amendment: Chapter 418 in (1) inserted second sentence concerning acting on behalf of Governor; and substituted (4) concerning Commission being attached to Department of Natural Resources and Conservation and Commission staff for former language that read: "The commission is attached to the governor's office for administrative purposes only. The costs of the commission shall be paid from funds appropriated for that purpose from the water right adjudication account established in 85-2-241." Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: In (2), near beginning after "appointed", deleted "within 30 days of May 11, 1979"; and at beginning of (5) substituted first three sentences concerning 4-year terms, reappointment of members, and vacancies for "Members appointed to the commission shall serve until the work of the commission is completed or until they resign or are otherwise unable to serve". Amendment effective May 17, 1991.

2-15-217. Office of state coordinator of Indian affairs.

Compiler's Comments

Extension of Termination Date: Section 5, Ch. 69, L. 2001, amended sec. 19, Ch. 512, L. 1999, by extending the termination date imposed by Ch. 512 to June 30, 2005. Effective March 19, 2001.

1999 Amendment: Chapter 512 inserted (3) concerning qualifications for applicants; and inserted (4) concerning appointment of applicant agreed upon by tribal councils. Amendment effective April 28, 1999, and terminates June 30, 2001.

Severability: Section 15, Ch. 512, L. 1999, was a severability clause.

1995 Amendment: Chapter 52 in (1), in second sentence, substituted "governor's office" for "department of commerce"; and made minor changes in style. Amendment effective July 1, 1995.

1981 Amendment: Substituted "department of commerce" for "department of community affairs" in (1).

2-15-218. Office of economic development — structure.

Compiler's Comments

Effective Date: Section 222, Ch. 483, L. 2001, provided that this section is effective July 1, 2001.

2-15-219. Chief business development officer — duties.

Compiler's Comments

Effective Date: Section 222, Ch. 483, L. 2001, provided that this section is effective July 1, 2001.

2-15-225. Interagency coordinating council for state prevention programs.

Compiler's Comments

2001 Amendment: Chapter 215 inserted (1)(j) through (1)(m), which expanded council membership to include adjutant general of military affairs, department of transportation director, commissioner of higher education, and designated state agency representative; and made minor changes in style. Amendment effective October 1, 2001.

1997 Amendment: Chapter 173 in (1), before "members", deleted "eight"; inserted (1)(h) and (1)(i) adding the Director of the Department of Corrections and the State Coordinator of Indian Affairs as Council members; inserted (2)(f) requiring a unified budget; inserted (2)(g) requiring benchmarks; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendments — Composite Section: Chapter 25 in introductory clause of (1), after "following", substituted "11 members" for "10 members"; inserted (1)(g) adding the Commissioner of Labor and Industry as a member of the Council; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (1)(b) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in introductory clause of (1), after "following", reduced number of Council members from 10 to 7; deleted former (1)(a) through (1)(c) that read: "(a) the director of the department of family services provided for in 2-15-2401;

(b) the director of the department of health and environmental sciences provided for in 2-15-2101;

(c) the director of the department of corrections and human services provided for in 2-15-2301"; in (1)(b) substituted "department of public health and human services" for "department of social and rehabilitation services"; and made minor changes in style. Amendment effective July 1, 1995.

Because one chapter added to the number of Council members and another reduced the number, the codifier changed the number of Council members and the subsection numbering to reflect the resulting number.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Effective Date: Section 2, Ch. 29, L. 1993, provided: "[This act] is effective July 1, 1993."

2-15-232. Duties and assistance.

Compiler's Comments

1995 Amendment: Chapter 546 in two places substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 336 near middle of (1), after "governor", inserted "and the department of family services"; and near beginning of (3), after "governor", inserted "and the director of the department of family services". Amendment effective July 1, 1993.

Part 4
Secretary of State

2-15-401. Duties of secretary of state — authority.

Compiler's Comments

1997 Amendment: Chapter 291 inserted (2) authorizing the Secretary of State to develop and implement a statewide electronic filing system; and made minor changes in style.

1995 Amendment: Chapter 545 in (8), near beginning after "compensation", deleted "of whatever nature or kind by him"; in (12), after "legislative", substituted "services division" for "council"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1987 Amendment: In (4), after "books", deleted "all conveyances made to the state and".

1983 Amendments: Chapter 79 deleted former (13), which read: "report annually to the legislative council all changes of names received pursuant to 27-31-205 for publication in the Laws of Montana".

Chapter 125 deleted former (11), which read: "report to the governor as prescribed in 2-7-102".

1981 Amendment: Deleted former subsection (13), which read: "(13) distribute the bound volumes of the decisions of the supreme court in the manner provided by 3-2-604".

Attorney General's Opinions

State Agency Lists as Mailing Lists: Agencies are prohibited from distributing a list of persons only if the intended use of such list is for unsolicited mass mailings, house calls or distributions, or telephone calls. The prohibition pertains only to lists of natural persons, not businesses, corporations, governmental agencies, or other associations. Agencies are not required to affirmatively ascertain the intended use for which the list is sought; a clear written disclaimer from the agency as to the proscriptions and penalty is sufficient. 38 A.G. Op. 59 (1979).

Collateral References

States *key* 73.

81A C.J.S. States §132.

72 Am. Jur. 2d States, Territories, and Dependencies §62.

2-15-402. Deputy secretary of state.

Collateral References

States *key* 50.

81A C.J.S. States §84.

Assertion of immunity as grounds for removing or discharging public officer or employee. 44 ALR 2d 789.

2-15-403. Sale of corporate information list — rulemaking authority.

Compiler's Comments

1991 Statement of Intent: The statement of intent to Ch. 289, L. 1991, provided: "A statement of intent is required for this bill because [section 1] [2-15-403] authorizes the secretary of state to adopt rules setting fees to be charged for the sale of the corporate information list. It is the intent of the legislature that the fees should be commensurate with the costs of producing the list. Existing fees may be modified to the extent necessary to conform to this statement of intent and [section 1] [2-15-403]."

2-15-404. Electronic filing system — requirements — rules.

Compiler's Comments

2001 Amendment: Chapter 313 in (4) in first sentence at beginning deleted "In accordance with 2-17-501" and inserted last sentence relating to complying with 2-17-512. Amendment effective July 1, 2001.

2-15-405. Fees charged by secretary of state — deposit to account — rulemaking.

Compiler's Comments

Effective Date: Section 30, Ch. 396, L. 2001, provided that this section is effective July 1, 2001.

2-15-411. Commissioner of political practices.

Compiler's Comments

1980 Name Change: Section 19, Initiative No. 85, 1980, provided: "The office of the commissioner of campaign finances and practices, created by 13-37-102, shall be known as the office of the commissioner of political practices." The code commissioner has changed the name in this section accordingly. See 1-11-101(2)(g).

Part 5
Attorney General

2-15-501. General duties.

Compiler's Comments

1999 Amendment: Chapter 72 at end of (2) inserted "and in other debt collection proceedings at the request of a state agency". Amendment effective June 30, 1999.

Termination Provision Repealed: Section 3, Ch. 72, L. 1999, repealed sec. 4, Ch. 196, L. 1995, which terminated amendments to this section June 30, 1997, and sec. 1, Ch. 82, L. 1997, which terminated amendments to this section June 30, 1999. Effective June 30, 1999.

Extension of Termination Date: Section 1, Ch. 82, L. 1997, amended sec. 4, Ch. 196, L. 1995, by extending the termination date imposed by Ch. 196 to June 30, 1999. Effective June 30, 1997.

1995 Amendment: Chapter 196 inserted (2) requiring Attorney General to represent the state in bankruptcy proceedings if the state's interest is affected; in (3) inserted reference to subsection (2); and made minor changes in style. Amendment effective July 1, 1995, and terminates June 30, 1997.

Termination: Section 4, Ch. 196, L. 1995, provided: "[This act] terminates June 30, 1997."

1991 Amendment: In (1), after "party", substituted "or in which the state has an interest" for "and all causes to which any county may be a party unless the interest of the county is adverse to the state or some officer thereof acting in his official capacity"; deleted former (3) that read: "(3) to account for and pay over to the proper officer all moneys which may come into his possession belonging to the state or to any county"; in (3), near beginning after "cases", substituted "prosecuted or defended by him" for "in which he is required to appear" and deleted former second through fifth sentences that read: "The register must show the county, district, and court in which the cases have been instituted and tried and whether they are civil or criminal. If civil, the register must show the nature of the demand, the stage of proceedings, and, when prosecuted to judgment, a memorandum of the judgment, of any process issued thereon,

and whether satisfied or not. If not satisfied, the register must show the return of the sheriff. If criminal, the register must show the nature of the crime, the mode of prosecution, the stage of proceedings, and, when prosecuted to sentence, a memorandum of the sentence and of the execution thereof, if the same has been executed, and if not executed, of the reason of the delay or prevention"; in (5), after "duties", inserted "or to prosecute or defend appropriate cases in which the state or any officer of the state in his official capacity is a party or in which the state has an interest"; deleted former (8) that read: "(8) to bid upon and purchase in the name of the state and under the direction of the board of investments any property offered for sale under execution issued upon judgments in favor of or for the use of the state and to enter satisfaction, in whole or in part, of such judgments as the consideration for such purchases"; deleted (9) that read: "(9) whenever the property of a judgment debtor in any judgment mentioned in the preceding subsection has been sold under a prior judgment or is subject to any judgment, lien, or encumbrance taking precedence of the judgment in favor of the state, under the direction of the board of investments, to redeem such property from such prior judgment, lien, or encumbrance. All sums of money necessary for such redemption must be paid out of any money appropriated for such purposes"; deleted (10) that read: "(10) when in his opinion it is necessary for the collection or enforcement of any judgment hereinbefore mentioned, to institute and prosecute, in behalf of the state, such suits or other proceedings as are necessary to set aside and annul all conveyances fraudulently made by such judgment debtors, the cost necessary to the prosecution must be paid out of any appropriations for the prosecution of delinquents"; in (7), after "commissioners", deleted "and other duties prescribed by law"; deleted (12) that read: "(12) to prescribe the form of blanks to be used by the clerks of the district courts in issuing commitments to the several state institutions, admission to which requires a court commitment"; inserted (8) requiring performance of other legal duties; and made minor changes in style. Amendment effective April 27, 1991.

1983 Amendment: Deleted former (12), which read: "to report to the governor, at the time prescribed by 2-7-102, the condition of the affairs of his department, and to accompany the same with a copy of his docket and of the reports received by him from county attorneys".

Case Notes

Failure of District Court to Grant Motions to Dismiss as Directed by Attorney General for Government Misconduct — Violation of Separation of Powers: The Attorney General directed the Lincoln County Attorney to file motions to dismiss charges against certain criminal defendants for the reason that outrageous government misconduct had occurred in the course of the prosecution. The Lincoln County Attorney filed the motions, but they were denied by the District Court. In a proceeding for supervisory control, the Supreme Court held that the Attorney General was within his authority to direct the County Attorney to move to dismiss the charges and held that the Attorney General's conclusion that there had been outrageous government misconduct in the cases served as a basis under 46-13-401(1) for the District Court to dismiss the charges. The refusal of the District Court to dismiss the charges was an abuse of discretion and a violation of the doctrine of separation of powers. By refusing to grant the motions to dismiss, the District Court intruded upon the lawful functions of the County Attorney and the Attorney General, who belong to the Executive Branch of government. State ex rel. Fletcher v. District Court, 260 M 410, 859 P2d 992, 50 St. Rep. 992 (1993). See also St. v. Schneiderhan, 261 M 161, 862 P2d 37, 50 St. Rep. 1242 (1993).

Standing of Attorney General to Appeal P.S.C. Order: The Montana Power Company (M.P.C.) applied to the Public Service Commission (P.S.C.) for a rate increase of over $96.3 million. The P.S.C. granted only $4.1 million and denied in toto M.P.C.'s request to recover costs associated with Colstrip Unit 3. The M.P.C. appealed to District Court for review under 2-4-701. The judge reversed the P.S.C. order. The Attorney General filed notice of appeal. More than 60 days after the judge's order was entered, the P.S.C. also filed notice of appeal. The M.P.C. filed a motion to dismiss the appeal of the Attorney General for lack of standing and the appeal of the P.S.C. as untimely. The Supreme Court granted the motion, holding that the Attorney General had no standing to represent the state on appeal since it was not an aggrieved party or a party to the proceedings before the District Court and because, in his official capacity, the Attorney General may not appeal a decision that is within the discretion of the P.S.C. as a party to the action. Mont. Power Co. v. Dept. of Public Service Regulation, 218 M 471, 709 P2d 995, 42 St. Rep. 1750 (1985).

Power of Attorney General to Institute Actions in District Court — Felony Prosecution Initiated by County Attorney: Although County Attorney may be ordered by Attorney General to initiate a felony prosecution in a District Court, the Attorney General has no power to initiate the

action independent of the County Attorney. State ex rel. Woodahl v. District Court, 159 M 112, 495 P2d 182 (1972).

Weight of Opinion of Attorney General: While executive construction of a law in an opinion of the Attorney General is not binding upon the Supreme Court, even though acquiesced in by several legislative sessions, yet such interpretation is persuasive and it is entitled to respectful consideration and will be upheld if not palpably erroneous. State ex rel. Ebel v. Schye, 130 M 537, 305 P2d 350 (1956); State ex rel. Barr v. District Court, 108 M 433, 91 P2d 399 (1939).

Power of Attorney General to Institute Actions in District Courts — Common-Law Power: The statutes of this state do not authorize the institution of an action in the District Courts by the Attorney General on behalf of the state, but rather they specifically state that such an action must be brought by the County Attorney of the county; however, under the common-law powers and duties of the Attorney General, he can institute such an action where the public interest is affected and the state is a party in interest. State ex rel. Olsen v. P.S.C., 129 M 106, 283 P2d 594 (1955).

Common-Law Duties: Under Art. VII, sec. 1, 1889 Mont. Const. (similar to Art. VI, sec. 4, 1972 Mont. Const.), and this section, imposing upon the Attorney General certain duties and "other duties prescribed by law", and in view of the fact that the office of the Attorney General, as it existed in England under the common law, was adopted as a part of the governmental machinery of this state, the common-law duties of that officer attach themselves to the office, in the absence of express restrictions, insofar as they are applicable and in harmony with our system of government. State ex rel. Ford v. Young, 54 M 401, 170 P 947 (1918).

County a Party — Service Required: The Attorney General, being by law the attorney of record in all causes pending in the Supreme Court to which a county may be a party and as such entitled to be served with a copy of the transcript and appellant's brief, an appeal by plaintiff in an action against a county may be dismissed for failure to so serve him. McIntosh Hardware Co. v. Flathead County, 32 M 254, 80 P 239 (1905).

Causes in Which the County Is a Party: The Attorney General must appear in all cases to which the state is a party, but there is no law which authorizes him to contract on behalf of the county, and the county cannot legally pay expenses incurred in printing briefs on behalf of the state in a criminal cause on appeal. Independent Publishing Co. v. Lewis & Clarke County, 30 M 83, 75 P 860 (1904), distinguished in St. v. Barry, 45 M 582, 124 P 774 (1912).

Assisting County Attorney — Authority: When the emergency arises calling the Attorney General to the assistance of the County Attorney, he necessarily has the authority to do anything that the inferior officer may do or, if the circumstances require it, undo what has already been done. Independent Publishing Co. v. Lewis & Clarke County, 30 M 83, 75 P 860 (1904); State ex rel. Nolan v. District Court, 22 M 25, 55 P 916 (1899).

Assistance of County Attorneys — Grand Jury Participation: The Attorney General, by virtue of the power conferred upon him, has the right to appear before the grand jury and examine witnesses before it in assisting a County Attorney. State ex rel. Nolan v. District Court, 22 M 25, 55 P 916 (1899).

Attorney General's Opinions

Authority of County Commissioners to Employ Private Attorney: A County Attorney may not unreasonably withhold his consent to the employment of another attorney by the Board of County Commissioners to perform legal services in connection with the civil business of the county. The decision of a County Attorney to withhold his consent is subject to the supervisory authority of the Attorney General. 41 A.G. Op. 34 (1985).

Effect of Declaratory Judgment on Attorney General Opinion — Compensation of County Clerk and Recorder: In 1981, the Attorney General issued an opinion declaring it unlawful to pay the County Clerk and Recorder extra for serving as election administrator (39 A.G. Op. 7 (1981)). In 1984, a District Court held the reverse in a declaratory judgment. The opinion was not expressly overruled and remains valid. Although the parties to the declaratory judgment are bound, it is questionable that this judgment can serve as binding precedent for all judicial districts. The Attorney General is not bound by a declaratory judgment to which he is not a party and which does not explicitly overrule a previous opinion. Although the District Court opinion is entitled to weight, the Attorney General may reach a contrary result in his interpretation. 41 A.G. Op. 33 (1985).

Overlapping County-District Court Authority — Not Proper Subject of Opinion: Montana's District Courts are clothed with inherent and statutory power to do all that is necessary to render their jurisdiction effective, including the power to hire necessary court personnel and control them; but it appears that requiring District Court personnel to also abide by county

policies and regulations is not an undue interference with the judicial branch. The scope of the judicial authority in this matter in relation to county authority is not an appropriate matter for an Attorney General opinion and would be more appropriately disposed of by either an understanding between the court and the county or a judgment in a court of proper jurisdiction. 39 A.G. Op. 38 (1981).

District Court Declaratory Judgment — Effect on Attorney General Opinions: The Attorney General, in issuing advisory opinions, is not bound by a conclusion of law expressed in a District Court declaratory judgment in an action to which the Attorney General is not a party. 38 A.G. Op. 112 (1980).

State Conservation Districts — Legal Representation: The Attorney General is responsible for civil legal representation upon request from supervisors of a state conservation district, but private counsel may be employed as Special Assistant Attorneys General. The compensation may be set by the supervisors and becomes a district obligation. County Attorneys' duty to represent districts extends only to giving their opinion in writing to the officers of the district on matters pertaining to their offices. 37 A.G. Op. 76 (1977).

Prosecutorial Discretion: A County Attorney need not file and prosecute every individual's complaint when there is insufficient evidence to warrant prosecution or when such a prosecution would not be in the interests of justice. 36 A.G. Op. 47 (1975).

Joint Employment of County Attorneys: A County Attorney, for purposes of administration, is jointly employed by both the county and the state. 36 A.G. Op. 32 (1975).

Authority to Issue Legal Opinions and Weight to Be Given: Only the Attorney General has specific authority to issue legal opinions to County Attorneys or other agencies of state and county government. Opinions issued by state officers or agencies which conflict with the Attorney General's opinion on the same question must yield to the Attorney General's opinion. 35 A.G. Op. 68 (1974).

Collateral References

Attorney General *key* 6, 7.
7A C.J.S. Attorney General §§7 through 9, 11 through 14.
7 Am. Jur. 2d Attorney General §§7 through 12, et seq.

2-15-502. Qualification of assistants.

Collateral References

Attorney General *key* 2.
7A C.J.S. Attorney General §§4, 5.
7 Am. Jur. 2d Attorney General §3.

2-15-503. Representation of state in bankruptcy and debt collection proceedings — collection of fees from state agencies.

Compiler's Comments

Effective Date: Section 5, Ch. 72, L. 1999, provided: "[This act] is effective June 30, 1999."

Part 10
Department of Administration

Part Compiler's Comments

Functions Transferred — 1983: Section 1, Ch. 287, L. 1983, provided: "(1) The functions of the department of administration of generally assisting political subdivisions, exercising oversight of financial and reporting systems, supervising records retention, and performing audits in Title 2, chapter 7, part 5; 2-9-702; 2-9-802; 7-1-4130; 7-1-4145; 7-1-4147; 7-1-4148; Title 7, chapter 2, part 49; 7-3-146; 7-3-153; 7-4-2634; 7-5-2132; 7-5-4124; 7-6-207; 7-6-209; 7-6-210 [now repealed]; 7-6-2114; 7-6-2203 [now repealed];7-6-2212 [now repealed]; 7-6-2302 [now repealed]; 7-6-2311 [now repealed]; 7-6-2314 [now repealed]; 7-6-2315 [now repealed]; 7-6-2322 [now repealed]; 7-6-2352 [now repealed]; 7-6-4111 [now repealed]; 7-6-4113 [now repealed]; 7-6-4205 [now repealed]; 7-6-4221 [now repealed]; 7-6-4225 [now repealed]; 7-6-4233 [now repealed]; 7-7-123; 17-6-103; 19-11-206 [renumbered 19-18-206]; 19-11-403 [renumbered 19-18-403]; 20-1-212; 20-9-203; 20-9-344; 20-9-504; 61-2-208; 85-7-1616; 85-7-1913; 85-7-2027; and 85-9-611 [now repealed] are transferred to the department of commerce. [Chapter 483, L. 2001, transferred the functions to the Department of Administration.]

(2) Any reference in the MCA to "department of administration" in the sections and parts listed in subsection (1) or related references to "department" or "director" (of the department of administration) are changed to "department" (of commerce) or "director" (of commerce)."

2-15-1001. Department of administration — head.

Compiler's Comments

Executive Reorganization Implementation: Title 82A, ch. 2, R.C.M. 1947 (now 2-15-1001 through 2-15-1010), was implemented by Executive Reorganization Order 4-71, dated Aug. 20, 1971, effective Aug. 20, 1971, as amended by Executive Reorganization Order 6-72, dated Sept. 25, 1972.

2-15-1007. Board of examiners — allocation.

Administrative Rules

Title 2, chapter 53, ARM Board of Examiners.

Collateral References

States *key* 183.

81A C.J.S. States §274.

2-15-1009. Public employees' retirement board — terms — allocation.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 471 in (2) in introductory clause increased membership from six to seven; in (2)(a) at end inserted requirement that at least one member be, no later than July 1, 2003, a member of the defined contribution plan provided for in Title 19, chapter 3, part 21; and inserted (2)(d) requiring a member with experience in investment management, counseling, or financial planning or similar experience. Amendment effective October 1, 1999.

Chapter 562 in (2)(b) substituted "who is a member" for "who is an inactive member". Amendment effective July 1, 1999.

Saving Clause: Section 77, Ch. 471, L. 1999, was a saving clause.

Section 100, Ch. 562, L. 1999, was a saving clause.

Severability: Section 78, Ch. 471, L. 1999, was a severability clause.

1997 Amendment: Chapter 532 in (4) inserted second sentence requiring the hiring of necessary employees; and made minor changes in style. Amendment effective July 1, 1997.

1985 Amendment: In (5) substituted language relating to compensation and travel pursuant to 2-15-124 for: "Members of the board shall be paid their travel expenses as provided for in 2-18-501 through 2-18-503, as amended, and members of the board who are not active members of the public retirement system shall be entitled, in addition to travel expenses, to compensation as established for a quasi-judicial board in 2-15-124".

1983 Amendment: In first sentence of (2), changed "five members" to "six members"; inserted (2)(b) providing for membership of a retired public employee; in (2)(a) and (5), inserted "active" before "members".

2-15-1010. Teachers' retirement board — terms — allocation — definition.

Compiler's Comments

2001 Amendment: Chapter 45 in (3)(a) at beginning inserted exception clause and increased term of service from 4 years to 5 years; inserted (3)(b) concerning term of appointments; inserted (4) regarding appointment for vacancy in unexpired term; and made minor changes in style. Amendment effective March 16, 2001.

Saving Clause: Section 25, Ch. 45, L. 2001, was a saving clause.

Applicability: Section 27, Ch. 45, L. 2001, provided: "[Section 1(3)][2-15-1010(3)] applies to members whose terms expire after [the effective date of this act]." Effective March 16, 2001.

1997 Amendment: Chapter 388 deleted former (2)(a) that read: "the superintendent of public instruction"; at beginning of first sentence of (2)(a) substituted "three" for "two", after "who" inserted "when appointed", and after "are" inserted "active" and inserted second sentence requiring that at least one appointee be a classroom teacher; inserted (5) defining classroom teacher; and made minor changes in style. Amendment effective July 1, 1997.

Administrative Rules

Title 2, chapter 43, ARM Teachers' Retirement Board.

2-15-1011. State agency for surplus property.

Compiler's Comments

1989 Amendment: In first sentence inserted "federal" and substituted language allowing Governor to designate Department for reference to Department of Administration; and made minor changes in phraseology. Amendment effective July 1, 1989.

Collateral References

States *key* 85.

81A C.J.S. States §§145, 146.

2-15-1013. Records committee — composition and meetings.

Compiler's Comments

1991 Amendment: At end of (2) substituted "secretary of state" for "director of the department of administration". Amendment effective July 1, 1991.

1989 Amendment: Inserted (1)(d) including representative of Secretary of State on State Records Committee.

2-15-1015. State tax appeal board.

Administrative Rules

Title 2, chapter 51, ARM State Tax Appeal Board.

2-15-1016. State employee group benefits advisory council — composition.

Compiler's Comments

1991 Amendment: In (3) substituted "One member" for "At least one member"; inserted (4) providing a member for certain labor organizations; and made minor change in style.

1987 Amendment: In (2) inserted "and retirees" at end of first sentence and inserted second sentence requiring that at least one member be a retired state employee.

2-15-1019. Board of directors of state compensation insurance fund.

Compiler's Comments

1997 Amendment: Chapter 276 in (4) increased Board membership from five to seven; in (5), in first sentence, substituted "four of the seven members" for "three of the five members", in second sentence substituted "four" for "three", and inserted third sentence authorizing appointment of one licensed insurance producer; at beginning of (5)(a) inserted exception clause; and made minor changes in style. Amendment effective July 1, 1997.

Name Change — Directions to Code Commissioner: Section 14, Ch. 630, L. 1993, provided: "Wherever the name "state compensation mutual insurance fund", meaning the fund established in 39-71-2313, appears in the Montana Code Annotated or in legislation enacted by the 1993 legislature, the code commissioner is directed to change the name to "state compensation insurance fund"." The phrase appeared in this section and was changed by the Code Commissioner as directed.

Effective Date: Section 65, Ch. 613, L. 1989, provided that this section is effective April 21, 1989.

2-15-1020. Appellate defender commission — duties — rules.

Compiler's Comments

Termination Date Repealed: Section 1, Ch. 323, L. 1993, repealed sec. 13, Ch. 781, L. 1991, which would have terminated the Appellate Defender Commission effective July 1, 1993. The effect of the repealer is to make the Commission permanent. Repealer effective April 12, 1993.

1991 Statement of Intent: The statement of intent to Ch. 781, L. 1991, provided: "A statement of intent is required for this bill because [section 2] [2-15-1020] grants the appellate defender commission rulemaking authority for the conduct of the commission's affairs. It is the intent that the commission adopt rules of procedure necessary to implement and carry out the duties of the commission."

Implementation of Staggered Terms: Section 7, Ch. 781, L. 1991, provided: "(1) To implement the staggered-term system provided for in [section 2(3)] [2-15-1020(3)], beginning January 1, 1991, the first terms of the members are as follows:

(a) the member of the general public shall serve a 1-year term;

(b) two of the attorney members shall serve 2-year terms, as designated by the president of the Montana state bar association at the time of appointment; and

(c) the other members shall serve 3-year terms.

(2) Upon expiration of the terms provided in subsection (1), each member shall serve a 3-year term."

Initial Report to Legislature: Section 8, Ch. 781, L. 1991, provided: "At the end of the first biennium following the selection of the first appellate defender, the appellate defender commission shall submit a report to the legislature evaluating the performance and needs of the office of appellate defender."

Effective Date: Section 12, Ch. 781, L. 1991, provided: "[This act] is effective on passage and approval." Approved May 17, 1991.

Termination: Section 13, Ch. 781, L. 1991, provided: "[This act] terminates July 1, 1993."

2-15-1021. Information technology board — membership — qualifications — vacancies — compensation.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-15-1025. State banking board — composition — allocation.

Compiler's Comments

2001 Amendment: Chapter 483 in (4) after "department" inserted "of administration". Amendment effective July 1, 2001.

1993 Amendments — Composite Section: Chapter 52 in (2) deleted former third sentence requiring that one banker and one public member from each congressional district be appointed to Board; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 395 in (2), in first sentence, reduced Board to six members from seven members and after "members" deleted "including the director of commerce, or his designee, who is the chairman of the board", in second sentence, after "The", deleted "remaining six", deleted former third sentence requiring that one banker and one public member from each congressional district be appointed to Board, and inserted last sentence concerning election of presiding officer; in (3), in second sentence after "member", deleted "other than the director of commerce"; and made minor changes in style. Amendment effective April 19, 1993.

Style changes in (2) and (3) were slightly different in the two chapters. In each case, the codifier chose the more appropriate of the two.

Applicability: Section 13, Ch. 52, L. 1993, provided: "[This act] applies to appointments made after [the effective date of this act]." Effective July 1, 1993.

1981 Amendment: Substituted "director of commerce or his designee" for "director of business regulation" in (2); substituted "director of commerce" for "director of business regulation" in (3).

Administrative Rules

Title 2, chapter 59, ARM Banking and Financial Institutions.

Title 2, chapter 60, ARM State Banking Board.

2-15-1026. Board of county printing — composition — allocation — compensation.

Compiler's Comments

2001 Amendment: Chapter 483 in (4) after "department" inserted "of administration"; and made minor changes in style. Amendment effective July 1, 2001.

1981 Amendments: Chapter 247 inserted "with the consent of the senate" in (2).

Chapter 474 substituted language of (5) relating to compensation pursuant to 37-1-133 for former text that read: "(5) The members of the board shall be compensated and reimbursed as are members of advisory councils in 2-15-122".

Language Not Codified: Chapter 474, L. 1981, contained the phrase "for boards allocated to the department of professional and occupational licensing" at the end of (5) of 2-15-1102. Chapter 274, L. 1981, instructed the Code Commissioner to change all references to the "department of professional and occupational licensing" to the "department of commerce" and reallocated the board of county printing from the department of community affairs to the department of commerce. With the reallocation and department name change the phrase becomes redundant and hence was not codified.

Administrative Rules

Title 8, chapter 91, ARM Board of County Printing.

2-15-1027. Montana consensus council — purpose — composition — administration — executive director.

Compiler's Comments

Effective Date: Section 3, Ch. 503, L. 2003, provided that this section is effective July 1, 2003.

Part 11
Department of Community Affairs
(Renumbered and Repealed)

Part Compiler's Comments

Department of Community Affairs Abolished — Certain Functions Transferred to Department of Commerce: Section 6, Ch. 274, L. 1981, provided: "(1) The department of community affairs is abolished.

(2) The following functions of the department of community affairs are transferred to the department of commerce:

(a) allocation of state funds for public transportation in 7-14-102;

(b) acting as state administering agency for the Montana Economic Land Development Act under Title 15, chapter 24, part 13;

(c) relating to aviation and contained in 15-70-204, 15-70-221, Title 67, and 80-8-204;

(d) assisting development credit corporations, contained in 32-4-201;

(e) relating to recommendations concerning major facility siting and contained in 75-20-211, 75-20-216, and 75-20-501 [now repealed];

(f) prescribing standards for monumentation under 76-3-403;

(g) establishing minimum subdivision review rules under 76-3-502 and 76-4-129;

(h) planning and developing the state economy, contained in Title 90, chapter 1, part 1;

(i) furnishing advice concerning secondary industry development under 90-5-113; and

(j) furnishing facilities and information to the coal board under 90-6-204 and 90-6-207.

(3) Unless inconsistent with this act, any reference to the "department of community affairs" or "department" (of community affairs) in the sections listed in subsection (2) and in 2-8-103 are changed to "department of commerce" or "department" (of commerce).

(4) The divisions of the department of community affairs are abolished. Any reference in the sections listed in subsection (2) to a division in the department of community affairs is changed to "department" (of commerce).

(5) The governor may by executive order assign to a department in a manner consistent with this act functions allocated to the department of community affairs by the 47th legislature and not transferred by this act."

Functions of Department of Community Affairs Transferred: Section 7, Ch. 274, L. 1981, provided: "(1) The functions of the department of community affairs of auditing the accounts and financial transactions of political subdivisions and generally assisting political subdivisions in Title 2, chapter 7, part 5; 2-9-702; 2-9-802; 7-1-4121; 7-1-4130; 7-1-4145; 7-1-4147; 7-1-4148; Title 7, chapter 2, part 49; 7-3-146; 7-3-153; 7-4-2634; 7-5-2132; 7-5-4124; 7-6-207; 7-6-209; 7-6-210 [now repealed]; 7-6-2114; 7-6-2203 [now repealed]; 7-6-2212 [now repealed]; 7-6-2302 [now repealed]; 7-6-2311 [now repealed]; 7-6-2314 [now repealed]; 7-6-2315 [now repealed]; 7-6-2322 [now repealed]; 7-6-4111 [now repealed]; 7-6-4113 [now repealed]; 7-6-4205 [now repealed]; 7-6-4221 [now repealed]; 7-6-4225 [now repealed]; 7-6-4233 [now repealed]; 7-7-123; 17-6-103; 19-11-206 [renumbered 19-18-206]; 19-11-303; 19-11-403 [renumbered 19-18-403]; 20-1-212; 20-9-203; 20-9-344; 20-9-504; 61-2-208; 85-7-1616; 85-7-1913; 85-7-2027; and 85-9-611 [now repealed] and disposing of oil and gas severance taxes in 15-36-112 [now repealed] are transferred to the department of administration.

(2) Unless inconsistent with this act, any reference to "department of community affairs" in the sections listed in subsection (1) or to "municipal audit division" or "department" (of community affairs) in those sections or related reference to "department" (of community affairs) in related sections is changed to "department of administration"."

All of the above functions were further transferred to the Department of Commerce in 1983. Chapter 114, L. 1983, transferred the functions in 7-1-4121 and 15-36-112 (now repealed); the rest of the functions (except 19-11-303, which was repealed) were transferred by Ch. 287, L. 1983. Chapter 483, L. 2001, transferred the functions to the Department of Administration.

Boards Reallocated to Department of Commerce: Section 12, Ch. 274, L. 1981, provided: "The board of county printing, the board of aeronautics [now allocated to department of transportation], the coal board, and the office of state coordinator of Indian affairs [now allocated to governor's office], allocated to the department of community affairs under 2-15-1102 through 2-15-1104 [2-15-1811, renumbered 2-15-1026, 2-15-1812, renumbered 2-15-2506, and 2-15-1821] and 2-15-1111 [2-15-1813, renumbered 2-15-217], are reallocated to the department of commerce. The code commissioner shall recodify those sections in Title 2, chapter 15, part 18, and change internal name and section number references accordingly."

Reorganization Procedure: Section 18, Ch. 274, L. 1981, provided: "The provisions of sections 2-15-131 through 2-15-137 govern the merger of the department of community affairs, the department of professional and occupational licensing, and the department of business regulation into the department of commerce and the transfer of the various functions contained in this act."

Part 12
Department of Military Affairs

2-15-1201. Department of military affairs — head.

Compiler's Comments

Executive Reorganization Implementation: Title 82A, ch. 14, R.C.M. 1947 (now 2-15-1201 through 2-15-1203), was implemented by Executive Reorganization Order 1-71, dated June 25, 1971, effective July 1, 1971.

Administrative Rules

Title 34, ARM Military affairs.

2-15-1205. Board of veterans' affairs — composition — quorum — voting — compensation — allocation.

Compiler's Comments

2003 Amendment: Chapter 491 in (2)(a) in first sentence increased membership from 5 to 20 members and inserted second and third sentences requiring members to be state residents and providing that 11 members may vote and must be confirmed by the senate and 9 members may not vote and are ex officio members; in (2)(b) at beginning substituted provision for appointment of 19 members by the governor in a manner that provides for staggered terms for provisions that read: "appointed by the governor with the consent of the senate. Not more than one member shall be appointed from a single county. However, a change of residence within the state after appointment does not alter a member's status"; in (2)(b)(i) at beginning of first sentence substituted provision for five regional representatives, who are voting members, for provision that read: "All members shall be residents of this state" and inserted second through fourth sentences relating to appointment from different geographic regions, as provided for by rule, and members who move to other regions; inserted (2)(b)(ii) through (2)(b)(xi) relating to the background of members and whether each is a voting or nonvoting member; inserted (2)(c) relating to appointment of a tribal member; inserted (4) and (5) stating that six voting members are a quorum and a tie vote is a negative vote; in (6) substituted first sentence relating to receipt of expenses for former sentence that read: "Each member shall receive compensation and travel expenses as provided for in 37-1-133" and inserted second sentence relating to compensation for the legislator member; inserted (7) relating to the number of and call for meetings, where they are held, and notice; in (8) substituted "Each voting member may serve for a maximum of two terms. Each term is for 4 years" for "Each member shall serve for a term of 5 years"; inserted (9) relating to removal of a member by the governor; in (10) in second sentence at end substituted "including an administrator" for "and 2-15-121(2)(d) does not apply" and inserted third sentence providing that the administrator is the board secretary and may represent the board in communications with state agencies; and made minor changes in style. Amendment effective January 1, 2004.

Preamble: The preamble attached to Ch. 491, L. 2003, provided: "WHEREAS, the 57th Legislature requested a study of veterans' issues, and the State Administration and Veterans' Affairs Interim Committee conducted numerous hearings, received expert testimony, and examined research during a 14-month period; and

WHEREAS, the Interim Committee found that, using 2000 data, Montana's population of nearly 107,000 veterans and an estimated 170,000 family members of veterans not only ranks Montana second in the nation in the number of veterans per capita (11.9%) but also means that veterans and their family members constitute more than 25% of Montana's total population; and

WHEREAS, the Interim Committee found that more than 80,000 Montana veterans are combat-era veterans (more than 36,000 are Vietnam-era, more than 16,000 are Persian Gulf-era, more than 16,000 are World War II-era, and about 14,000 are Korean-era veterans) and that the largest group of veterans is now between 50 and 65 years of age; and

WHEREAS, the U.S. Department of Veterans Affairs estimates that more than 50% of combat theater veterans suffer from clinically serious and disabling posttraumatic stress disorder, that twice as many veterans as nonveterans experience homelessness, that many

veterans have overlapping and complex needs encompassing medical and nursing home care, mental health and chemical dependency counseling, housing, transportation, education and training, job services, and family support services, and that the children and families of veterans who do not get the help that they need are themselves at risk; and

WHEREAS, these complex needs and a maze of federal, state, local, public, and private services demand a high level of interagency coordination and cooperation for effective service delivery to ensure that veterans and their families do not fall through the cracks and to avoid unnecessary cost-shifting from federal to state and local public assistance programs; and

WHEREAS, the Interim Committee found that current statutory language establishing the Board of Veterans' Affairs as the lead agency for veterans' affairs dates back to 1919 and that although the Board's duties and responsibilities have consistently evolved, statutory language has not kept pace; and

WHEREAS, the Board hires and supervises its own classified employees, who make up the Montana Veterans' Affairs Division, but the Board does not have rulemaking authority to implement programs; and

WHEREAS, the Board is administratively attached to the Department of Military Affairs, which has greatly assisted veterans and supported the Board but has no statutory authority over veterans' affairs; and

WHEREAS, a legislative performance audit requested by the Interim Committee revealed that although the Montana Veterans' Affairs Division is to be commended for doing a great job with limited resources and limited statutory guidance, it also revealed that new management tools and updated information management systems are needed to provide more consistency and to track and manage staff workload; and

WHEREAS, the U.S. Department of Veterans Affairs spent about $175 million in Montana during fiscal year 2000, which ranked Montana 37th nationwide in per capita expenditures by the U.S. Department of Veterans Affairs on veterans; and

WHEREAS, the Interim Committee found that a statutory restructuring of powers, duties, and responsibilities for state veterans' affairs programs is essential, not only to address inadvertent statutory shortfalls and elevate the profile of state veterans' affairs, but also to better integrate benefit claims with human services programs so that eligible veterans and family members receive the federal compensation, benefits, and care that they have earned in self-sacrificing service in the armed forces of the United States of America."

Implementation: Section 14, Ch. 491, L. 2003, provided: "(1) The members of the board of veterans' affairs, established in 2-15-1205, who are members on the day before [the effective date of this act] [effective January 1, 2004] may continue to serve the remainder of their terms as described under the provisions of 2-15-1205.

(2) Appointments to the board made after [the effective date of this act] must be made as described in 2-15-1205(2)."

Board Transferred: Section 1, Ch. 271, L. 1983, provided: "The allocation of the board of veterans' affairs for administrative purposes is transferred from the department of social and rehabilitation services [now department of public health and human services] to the department of military affairs. Section 2-15-2202, MCA, is intended to be renumbered and recodified as an integral part of Title 2, chapter 15, part 12."

1981 Amendments: Chapter 247 inserted "with the consent of the senate" in (2).

Chapter 474 inserted (3) relating to compensation and travel expenses pursuant to 37-1-133.

Part 13
Department of Revenue

2-15-1301. Department of revenue — head.

Compiler's Comments

Executive Reorganization Implementation: Title 82A, ch. 18, R.C.M. 1947 (now 2-7-104, 2-15-1301, 2-15-1302, 2-15-1311, and 16-4-411), was implemented by Executive Reorganization Order 3-71, dated Aug. 4, 1971, effective Aug. 9, 1971.

Administrative Rules

Title 42, ARM Department of Revenue.

Part 15
Education

2-15-1501. State board of education.

Compiler's Comments

Executive Reorganization Implementation: Title 82A, ch. 5, R.C.M. 1947 (now 2-15-1501, 2-15-1511 through 2-15-1516, and 22-3-105), was implemented by Executive Reorganization Order 5-72, dated Sept. 15, 1972, effective Sept. 15, 1972.

2-15-1505. Board of regents of higher education.

Law Review Articles

The Legal Status of the Montana University System Under the New Montana Constitution, Schaefer, 35 Mont. L. Rev. 189 (1974).

2-15-1508. Appointments to board of public education and board of regents — conditions — vacancy.

Compiler's Comments

2003 Amendment: Chapter 254 in (1)(a) increased the number of board members who may be from one district from two to four. Amendment effective October 1, 2003.

Saving Clause: Section 5, Ch. 254, L. 2003, was a saving clause.

1999 Amendment: Chapter 206 in (3)(a) inserted fourth sentence that read: "The term begins July 1 and ends June 30 of the years designated by the governor"; inserted (3)(b) providing that the governor shall appoint the student based on a nomination by a student organization designated by the board of regents, requiring at least three nominees, allowing the governor to request a new slate of nominees, requiring the governor to be given the nominees in the March before the end of a regular term, requiring an appointment by the end of June, and providing for the filling of a vacancy; and made minor changes in style. Amendment effective October 1, 1999.

1993 Amendment: Chapter 52 in (1)(a) substituted "two" for "four" and substituted "district provided for in 5-1-102" for "congressional district"; and made minor changes in style. Amendment effective July 1, 1993.

Applicability: Section 13, Ch. 52, L. 1993, provided: "[This act] applies to appointments made after [the effective date of this act]." Effective July 1, 1993.

2-15-1512. Boards and offices associated with state historical society.

Compiler's Comments

1995 Amendment: Chapter 343 in (2)(b)(i), after "history", inserted "paleontology, historic property administration, curation, planning, landscape architecture, conservation, folklore, cultural anthropology, traditional cultural property expertise"; deleted former (2)(b)(ii) that read: "(ii) a professional paleontologist"; deleted (2)(b)(iii) that read: "(iii) the state liaison officer for the federal land and water conservation fund"; in (2)(b)(ii), at beginning, increased number of public members from two to four and after "public" substituted "who represent a broad spectrum of Montana society, who have demonstrated an interest in historic preservation, and whose views reflect the rich cultural heritage of the past as well as the opportunities of the future" for "who have actively demonstrated an interest in historic preservation matters"; in (3)(b), after "governor", inserted "from a list of three nominees submitted to the governor by the director of the Montana historical society with the approval of the Montana historical society board of trustees"; inserted (3)(c) regarding supervision of the historic preservation officer; and made minor changes in style. Amendment effective April 10, 1995.

Severability: Section 8, Ch. 343, L. 1995, was a severability clause.

1985 Amendment: In (2)(d) substituted language relating to compensation and travel expenses pursuant to 2-15-124 for: "Unless he is a full-time salaried officer or employee of this state or of a political subdivision, each member is entitled to be paid $25 a day for each day in which he is actually and necessarily engaged in board duties and to reimbursement for travel expenses, as provided for in 2-18-501 through 2-18-503, incurred in the performance of board duties".

Transition Period — Staggered Terms: Section 2, Ch. 563, L. 1979, provided for initial appointments for varying terms to provide for staggered terms.

2-15-1514. State library commission — natural resource data system advisory committee.

Compiler's Comments

2001 Amendment: Chapter 313 in (2)(a) inserted reference to the department of administration; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 545 in (2)(a), near middle, substituted "legislative services division" for "environmental quality council". Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1985 Amendment: In (2)(a) near middle, after "environmental quality council", inserted "of the state library"; and in (2)(b) near beginning, substituted "state library" for "department of administration", and near end substituted "library's" for "department's".

2-15-1515. Commission on federal higher education programs.

Compiler's Comments

1985 Amendment: In (1) after "programs", inserted clause making existence of Commission discretionary and inserted second sentence relating to appointments when Board called into existence; at end of (2)(b) inserted "upon the request of the board of regents of higher education" and deleted "Membership on the commission by these representatives is contingent upon their continued status as trustees"; in (3) substituted language relating to terms of members and vacancies for "The non ex officio members shall serve for terms as provided in 2-15-124(2)"; and inserted (8) allowing Board of Regents to terminate the Commission when there is no need for its existence.

2-15-1516. Fertilizer advisory committee.

Compiler's Comments

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

1985 Amendment: In (2) substituted language relating to appointment of seven members, consisting of five agricultural-fertilizer users and two members from the fertilizer industry appointed jointly by Directors of the Agricultural Experiment Station and the Cooperative Extension Service for: "The committee consists of five members. The members shall represent the fertilizer users of the state. The members shall be appointed by the dean of agriculture of Montana state university with the approval of the chairman of the Montana house of representatives agriculture and irrigation committee, the chairman of the Montana senate agriculture committee, the chairman of the Montana plant food association or its successor organization, the director of the cooperative extension service, and the director of the Montana agricultural experiment station"; inserted (3) providing that the Director of the Department of Agriculture is an ex officio member; and in (4) inserted exception and deleted "A member may not serve more than 7 consecutive years."

2-15-1518. Director of fire services training school.

Compiler's Comments

1989 Amendment: Near beginning of (1) substituted "board of regents" for "board of public education". Amendment effective July 1, 1989.

2-15-1519. Fire services training advisory council.

Compiler's Comments

1995 Amendment: Chapter 418 in (4) substituted "director of the department of natural resources and conservation" for "commissioner of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: At beginning of (4) substituted "A representative of the state fire prevention and investigation program of the department of justice" for "The state fire marshal". Amendment effective April 29, 1991.

1989 Amendment: Near beginning of (1) substituted "board of regents" for "board of public education". Amendment effective July 1, 1989.

1987 Amendment: In (1)(f) substituted "a representative of the insurance industry" for "an engineering representative of the insurance services office"; in (1)(g) substituted "a professional educator" for "a representative of the fire protection engineering industry"; deleted former (1)(h) requiring a fire control officer recommended by the administrator of the Division of Forestry; in (3) inserted clause allowing removal for cause; and in (4) inserted "a fire control officer designated by the commissioner of state lands" and made minor changes in phraseology.

2-15-1520. Student loan advisory council — terms — compensation.

Compiler's Comments

1997 Amendment: Chapter 243 in (2), in first sentence, substituted "eight members" for "seven members"; in (3)(e), near beginning, inserted "nonvoting"; inserted (3)(f) requiring one Council member to be representative of nonprofit corporation designated by Governor; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 308 in (3)(b) deleted second sentence that read: "One must be a representative of higher education, and one must be a representative for the vocational-technical centers"; and made minor changes in style. Amendment effective July 1, 1995.

1987 Amendment: Before "vocational-technical" deleted "postsecondary".

Transition Period — Staggered Terms: Section 2, Ch. 691, L. 1979, provided for initial appointments for varying terms to provide for staggered terms.

2-15-1521. Cultural and aesthetic projects advisory committee — terms and compensation.

Compiler's Comments

Initial Appointments: Section 6, Ch. 99, L. 1983, provided: "The initial appointments made under the provisions of 2-15-1521 shall be staggered in the following manner:

(1) Two of the members appointed by the Montana historical society and four of the members appointed by the Montana arts council shall serve 2-year terms.

(2) Two of the members appointed by the Montana historical society and two of the members appointed by the Montana arts council shall serve 3-year terms.

(3) Four of the members appointed by the Montana historical society and two of the members appointed by the Montana arts council shall serve 4-year terms."

Attorney General's Opinions

Responsibility for Identification of Potential Heritage Property: The historic preservation officer is required by 22-3-423 and 22-3-424 to share with state agencies the responsibility for identification of potential heritage properties on state-owned lands, and that responsibility may not be limited by an agency policy which restricts or abolishes the historic preservation officer's identification authority. 41 A.G. Op. 53 (1986).

Determination of "Heritage Properties" on State-Owned Land Within Exclusive Authority of Preservation Review Board: The state antiquities law gives exclusive authority to the Preservation Review Board to determine which properties on state-owned lands are "heritage properties" within the meaning of the law. 41 A.G. Op. 8 (1985).

2-15-1522. Certification standards and practices advisory council.

Compiler's Comments

1991 Amendment: At beginning of (2)(a) substituted "three" for "four"; in (2)(a)(ii), after "12", deleted "or at a designated vocational-technical center"; deleted former (2)(a)(iii) that read: "(iii) one who is employed as a specialist"; in (2)(a)(iii) inserted reference to subsection (2)(b); inserted (2)(b) requiring inclusion of specialist or K-12 specialist in Council membership; at end of (3) inserted "to serve the unexpired term"; and in (4) substituted provision for staggered 3-year terms for former language that read: "The term of office of an appointed member is 2 years". Amendment effective March 20, 1991.

Implementation of Staggered Terms: Section 3, Ch. 124, L. 1991, provided: "(1) To implement the staggered-term system provided for in 2-15-1522, the first terms of the successors to the five members whose terms expire June 1, 1991, are as follows:

(a) two members shall serve 2-year terms; and

(b) three members shall serve 3-year terms.

(2) Upon expiration of the terms provided for in subsection (1), each member shall serve a 3-year term." Effective March 20, 1991.

2-15-1523. Ground water assessment steering committee.

Compiler's Comments

1995 Amendments: Chapter 418 in (1)(b) substituted "department of environmental quality" for "department of health and environmental sciences"; deleted former (1)(d) that read: "(d) the department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 545 in (2)(a) substituted "legislative services division" for "environmental quality council"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

Effective Date: Section 21(1), Ch. 769, L. 1991, provided that this section is effective July 1, 1991.

2-15-1530. Montana university system interunit benefits advisory committee — composition.

Compiler's Comments

Effective Date: Section 8, Ch. 256, L. 1999, provided that this section was effective July 1, 1999.

Part 16
Department of Professional and Occupational Licensing (Renumbered and Repealed)

Part Compiler's Comments

Department of Professional and Occupational Licensing Abolished — Functions Transferred to Department of Commerce: Section 3, Ch. 274, L. 1981, provided: "The department of professional and occupational licensing is abolished and its functions are transferred to the department of commerce. Unless inconsistent with this act, any reference in the MCA, including laws passed by the 47th legislature, to the "department of professional and occupational licensing" or "department" or "director" (of professional and occupational licensing) is changed to the "department of commerce" or "department" or "director" (of commerce)." Chapter 483, L. 2001, allocated the boards to the Department of Labor and Industry.

Professional and Occupational Licensing Boards — Reallocation: Section 4, Ch. 274, L. 1981, provided: "All boards allocated to the department of professional and occupational licensing under Title 2, chapter 15, part 16, are reallocated to the department of commerce under Title 2, chapter 15, part 18. The code commissioner shall recodify those sections as an integral part of Title 2, chapter 15, part 18, and the provisions of Title 2, chapter 15, apply to those sections. The code commissioner shall change internal name and section number references accordingly."

Reorganization Procedure: Section 18, Ch. 274, L. 1981, provided: "The provisions of sections 2-15-131 through 2-15-137 govern the merger of the department of community affairs, the department of professional and occupational licensing, and the department of business regulation into the department of commerce and the transfer of the various functions contained in this act."

Part 17
Department of Labor and Industry

Part Compiler's Comments

Division of Employment Security and Certain Bureaus — Name Change: Section 1, Ch. 349, L. 1981, provided: "The division of employment security and its bureaus created in 2-15-1703 and 39-51-306 are abolished. Their functions are continued in the department of labor and industry provided for in Title 2, chapter 15, part 17. Unless inconsistent with this act, any reference in the MCA to "division of employment security", "division" (of employment security), or any bureau of the division of employment security, including "Montana state employment service bureau" or "unemployment insurance bureau", is changed to "department of labor and industry" or "department" (of labor and industry). Consistent with the intent of this section and without changing the meaning, the code commissioner shall remove any redundancies caused by such name changes."

2-15-1701. Department of labor and industry — head.

Compiler's Comments

1981 Amendment: In (2), substituted provision on appointment of commissioner under 2-15-111 for provisions relating to appointment by governor, confirmation by senate, and a term of 4 years and until his successor is appointed and qualified.

Executive Reorganization Implementation: Title 82A, ch. 10, R.C.M. 1947 (now Title 2, ch. 15, part 17), was implemented by Executive Reorganization Order 11-71, dated Dec. 10, 1971, effective Dec. 13, 1971.

Administrative Rules

Title 24, ARM Department of Labor and Industry.

Case Notes

Powers of Labor Commissioner: Although Commissioner of Labor (since reorganized) is required by section 41-701, R.C.M. 1947 (now 18-2-402, et seq.), to keep copies of collective bargaining agreements relating to public works, he has no power to make decisions with respect to labor agreements, and thus a letter of opinion as to the applicability of a labor contract does not constitute a determinative agency action. Sletten Constr. Co. v. Int'l Union of Operating Eng'rs, 383 F. Supp. 853 (D.C. Mont. 1974).

2-15-1704. Board of labor appeals — allocation — composition — function — quasi-judicial.

Administrative Rules

Title 24, chapter 7, ARM Board of Labor Appeals.

Case Notes

Board of Labor Appeals — Scope of Authority: The Board of Labor Appeals is a quasi-judicial board and as such may consider not only the record made before the appeals referee but also new evidence produced at the Board hearing. Billings v. Bd. of Labor Appeals, 204 M 38, 663 P2d 1167, 40 St. Rep. 648 (1983).

2-15-1705. Board of personnel appeals — allocation — composition — vote necessary for decision — quasi-judicial.

Compiler's Comments

1995 Amendment: Chapter 90 inserted (5) providing for a substitute member when a Board member other than the presiding officer is unable to participate in a proceeding before the Board; and made minor changes in style. Amendment effective March 9, 1995.

1991 Amendment: In (3)(a)(i), after "members", substituted "who are full-time management employees in organizations with collective bargaining units or who represent management in collective bargaining activities" for "each having management experience involving collective bargaining"; in (3)(a)(ii), after "members", substituted "who are full-time employees or elected officials of a labor union or an association recognized by the board" for "each having experience as a member or employee of an employee organization"; and in (3)(b), at end, substituted "of the organizations they represent" for "represented by their experience".

Applicability: Section 2, Ch. 239, L. 1991, provided: "[This act] applies to members appointed after [the effective date of this act]." Act effective October 1, 1991.

1983 Amendment: In (3)(a), after "governor" deleted "Two members shall represent management, two members shall represent employees or employee organizations of the state, and one member shall represent a neutral position", inserted (3)(a)(i), (3)(a)(ii), (3)(a)(iii), and (3)(b) providing that the members be selected on the basis of certain experience and serve as impartial decisionmakers; and in (4) at beginning of subsection after "When the" substituted "chairperson" for "member representing a neutral position", after "before the board" substituted "the remaining members" for "an equal number of management and labor members", after "who shall be a" substituted "person who qualifies under subsection (3)(a)(iii)" for "neutral person", after "in the place of the" changed "neutral member" to "chairperson", and in second sentence after "additional" changed "neutral person" to "chairperson replacement".

1981 Amendment: Inserted (4) providing for replacements; and inserted (5) relating to vote requirements.

Code Commissioner Correction: In subsection (5) changed "a least" to "at least" to correct obvious typographical error.

Administrative Rules

Title 24, chapter 26, ARM Board of Personnel Appeals.

2-15-1706. Commission for human rights — allocation — quasi-judicial.

Compiler's Comments

1997 Amendment: Chapter 467 at end of (4) deleted "except that the commission may hire its own personnel, may seek and receive private and federal funds in its own name, and may determine all matters of policy concerning the use of its budget. Subsection (2)(d) of 2-15-121 shall not apply for purposes of this section"; and made minor changes in style. Amendment effective July 1, 1997.

Staff Transfer: Section 17, Ch. 467, L. 1997, provided: "The staff of the commission is transferred to the department. The staff is under the direction and control of the commissioner of labor and industry. The staff shall perform functions as directed and in accordance with the express and implied purposes of [this act]. The transfer of staff is subject to 2-15-131 through 2-15-137."

Applicability — Saving Clause: Section 20, Ch. 467, L. 1997, provided: "[This act] does not affect any administrative or judicial proceeding pending or commenced prior to [the effective date of this act] [effective July 1, 1997]. [This act] applies to complaints or proceedings filed on or after [the effective date of this act]."

1985 Amendment: In (3) in middle of sentence, after "2-15-124", substituted "and" for "but" and at end substituted "2-15-124" for "37-1-133".

1981 Amendments: Chapter 247 inserted "with the consent of the senate" in (2).

Chapter 474 in (3), after "2-15-124", inserted "but its members shall be compensated and receive travel expenses as provided for in 37-1-133".

Administrative Rules

Title 24, chapter 9, ARM Human Rights Division.

2-15-1707. Office of workers' compensation judge — allocation — appointment — salary.

Compiler's Comments

1989 Amendment: In (1), in second sentence, changed "department of administration" to "department of labor and industry"; and made minor changes in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

Administrative Rules

Title 2, chapter 52, ARM Office of the workers' compensation judge and workers' compensation court.

Attorney General's Opinions

Employees of Office of Workers' Compensation Judge — Exempt From Classification Plan: The question of whether or not the employees of the office of the workers' compensation judge are exempt from the state classification plan (Title 2, ch. 18) depended upon whether the office was part of the judicial branch or the executive branch. The similarities to state courts, the qualifications for office, the statutory provisions regarding the judge and the court, statutory construction, and the legislative intent derived from the history supported the conclusion that the office performs a judicial function. Therefore, the employees are employees of the judicial branch and exempt from the state classification plan. 38 A.G. Op. 27 (1979).

2-15-1709. Workers' compensation regulation advisory council.

Compiler's Comments

Required Report: Section 5, Ch. 385, L. 1997, provided: "For purposes of fees assessed on or after July 1, 1999, each plan No. 1 employer, plan No. 2 insurer, and plan No. 3, the state fund, shall file on March 31, 1999, in the form and containing the information required by the department of labor and industry a report of paid losses." (Terminates June 30, 1999—sec. 8, Ch. 385, L. 1997.)

2-15-1730. Alternative health care board — composition — terms — allocation.

Compiler's Comments

2001 Amendment: Chapter 492 in (4) deleted former second sentence that read: "A member may not be appointed for more than two consecutive terms." Amendment effective October 1, 2001.

1993 Amendment: Chapter 314 near beginning of (2), before "members", inserted "six"; and at beginning of first sentence of (4) deleted "Following the initial appointment of members to the board" and after "serve" inserted "staggered". Amendment effective April 12, 1993.

Transition to Staggered Terms — Appointments: Section 2, Ch. 314, L. 1993, provided: "(1) On September 1, 1995, the governor shall make appointments to the alternative health care board as follows:

(a) one person who is a Montana physician whose practice includes obstetrics, to serve a 4-year term;

(b) one person who is a public member, to serve a 3-year term;

(c) one person who is a direct-entry midwife, to serve a 2-year term; and

(d) one person who is a naturopath, to serve a 1-year term.

(2) At the expiration of the 1-year and 2-year terms provided for in subsections (1)(c) and (1)(d), the governor shall appoint the person designated to fill the position to serve a 4-year term. At the expiration of these 4-year terms, the physician 4-year term, and the public member 3-year term, appointments must be made in accordance with 2-15-1840 [renumbered 2-15-1730].

(3) On September 1, 1997, the governor shall make appointments to the board as follows:

(a) one person who is a direct-entry midwife, to serve a 1-year term; and

(b) one person who is a naturopath, to serve a 2-year term.

(4) At the end of the terms provided for in subsection (3), the governor shall appoint the person designated to fill the positions to serve a 4-year term. At the expiration of these 4-year terms, appointments must be made in accordance with 2-15-1840 [renumbered 2-15-1730]."

1991 Statement of Intent: The statement of intent to Ch. 306, L. 1991, provided: "A statement of intent is required for this bill because [sections 7 and 10] [37-26-304 and 37-26-201] grant to the board of naturopathic physicians [now alternative health care board] rulemaking authority to implement the provisions of this bill. It is the intent of the legislature that the board, at a minimum, adopt rules:

(1) specifying the scope of practice of naturopathic medicine;

(2) establishing license application and examination procedures, fees, and criteria for minimal educational and clinical requirements;

(3) developing procedures for the issuance, renewal, suspension, revocation, and reciprocity of licenses and procedures for certificates of specialty practice; and

(4) establishing investigatory procedures for processing complaints."

Severability: Section 20, Ch. 306, L. 1991, was a severability clause.

Section Not Codified: Section 2, Ch. 524, L. 1991, providing for initial appointments to the Alternative Health Care Board, was not codified.

Effective Date: Section 5, Ch. 524, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 22, 1991.

Administrative Rules

Title 24, chapter 111, ARM Alternative Health Care Board.

2-15-1731. Board of medical examiners.

Compiler's Comments

1995 Amendment: Chapter 327 deleted former (5) and (6) that read: "(5) The member who is a licensed nutritionist may vote only on issues that affect the licensure and regulation of nutritionists.

(6) The member who is a licensed physician assistant-certified may vote only on issues that affect the licensure and regulation of physician assistants-certified"; and made minor changes in style.

1993 Amendment: Chapter 419 in (2) increased Board to 11 members from 10 members; inserted (2)(e) requiring one Board member to be licensed physician assistant-certified; in (4), at end after "at least 5 years", deleted "except that for 5 years after October 1, 1987, the number of years of licensure required for the nutritionist member is no greater than the number of years this act has been in effect"; inserted (6) regarding vote of physician assistant-certified; and made minor changes in style. Amendment effective April 20, 1993.

1987 Amendment: Added licensed nutritionist to Board of Medical Examiners by increasing board size and inserting reference to member who is licensed nutritionist; in third sentence of (4), after "have practiced medicine", inserted "or dietetics-nutrition" and inserted exception clause at end of sentence; and inserted (5) relating to voting powers of the nutritionist member.

1981 Amendments: Chapter 243 increased the number of board members from seven to eight; decreased members having degree of doctor of medicine from six to five; added two members of the general public; deleted "except for public members" after "each member" in the third sentence of (4); deleted "however the year requirement of practice and residency shall be waived for the initial term of appointment of the member having the degree and license of doctor of osteopathy" at the end of (4); and substituted staggered 4-year terms for term of 7 years in (5).

Chapter 470 added a licensed podiatrist.

Composite Section: Chapter 243, L. 1981, deleted one doctor board member and added two public members while Ch. 470 added a podiatrist. Since there is no conflict created by these changes, the board now has nine members.

Osteopathy — Transfer of Regulatory Authority:

Preamble: The preamble to SB 393 (Ch. 87, L. 1981) read:

"WHEREAS, the sunset law, sections 2-8-103 and 2-8-112, MCA, terminates the Board of Osteopathic Physicians and requires a performance evaluation of the Board by the Legislative Audit Committee; and

WHEREAS, as a result of the performance evaluation, the Legislative Audit Committee recommends that the Board of Osteopathic Physicians be terminated and that regulation of osteopathy be transferred to the Board of Medical Examiners." See State of Montana Report to the Legislature, Sunset Review Board of Osteopathic Physicians, 79SS-6, Legislative Auditor, 1980.

Rules Remain in Effect: Section 5, Ch. 87, L. 1981, provided: "Current rules of the board of osteopathic physicians remain in effect unless amended or repealed by the board of medical examiners."

Continuing Licensure of Current Osteopathic Licensees: Section 3, Ch. 87, L. 1981, provided: "Persons presently licensed by the board of osteopathic physicians shall continue to be eligible for licensure by meeting current qualifications for licensure. No new qualifications for licensure may be required of persons licensed prior to the effective date of this act [July 1, 1981]."

Transfer of Funds and Records: Section 4, Ch. 87, L. 1981, provided: "By the effective date of this act [July 1, 1981], all funds and records of the board of osteopathic physicians shall be transferred to the board of medical examiners."

Effective Date: Section 7, Ch. 87, L. 1981, provided: "This act is effective July 1, 1981, and the provisions of 2-8-121 do not apply to the board of osteopathic physicians."

Podiatry — Transfer of Regulatory Authority:

Preamble: The preamble to SB 392 (Ch. 470, L. 1981) read:

"WHEREAS, the sunset law, sections 2-8-103 and 2-8-112, terminates the Board of Podiatry Examiners and requires a performance evaluation by the Legislative Audit Committee; and

WHEREAS, as a result of the performance evaluation, the Legislative Audit Committee recommends that the Board of Podiatry Examiners be terminated, and that regulation of podiatrists be transferred to the Board of Medical Examiners." See State of Montana Report to the Legislature, Sunset Review Board of Podiatry Examiners, 79SS-8, Legislative Auditor, 1980.

Transfer of Funds and Records: Section 7, Ch. 470, L. 1981, provided: "By the effective date of this act [July 1, 1981], all funds and records of the board of podiatry examiners shall be transferred to the board of medical examiners."

Rules Remain in Effect: Section 8, Ch. 470, L. 1981, provided: "Existing rules of the board of podiatry examiners remain in effect unless amended or repealed by the board of medical examiners."

Effective Date: Section 11, Ch. 470, L. 1981, provided: "This act is effective July 1, 1981, and the provisions of 2-8-121 do not apply to the board of podiatry examiners."

Administrative Rules

Title 24, chapter 156, ARM Montana State Board of Medical Examiners.

2-15-1732. Board of dentistry.

Compiler's Comments

1997 Amendment: Chapter 481 near beginning of first sentence in (2), after "dentists," deleted "one of whom shall serve as a nonvoting member" and after "denturist" substituted "two dental hygienists" for "one dental hygienist" and near middle of third sentence, after "appointment", deleted "except as provided in subsection (2)(b)"; deleted (2)(b) that read: "(b) The provision in subsection (2)(a) requiring a licensed member to have actively practiced in this state for at least 5 continuous years immediately before his appointment does not apply to the first denturist appointed to the board"; deleted former second sentence in (3) that read: "Each dentist appointed to the board for a statutory 5-year term shall serve the first year of the term as a nonvoting member of the board"; and made minor changes in style.

1991 Amendment: Near beginning of (2)(a) increased number of dentist Board members from four to five and provided that one would serve as a nonvoting member; and in (3) inserted second sentence requiring that each dentist appointed to Board serve the first year as a nonvoting member. Amendment effective March 29, 1992.

1987 Amendment: In (2)(a) substituted a denturist for a dentist on the Board and added a senior citizen as a public member of the Board, inserted exception clause referring to subsection (2)(b), and deleted the U.S. citizenship requirement; and inserted (2)(b) exempting first denturist member from 5-year practice requirement.

Preamble: The preamble to Ch. 524, L. 1987, provided: "WHEREAS, Montana Initiative No. 97 created the Board of Denturitry; and

WHEREAS, Chapter 548, Laws of 1985, required the Legislative Audit Committee to conduct a review of the Board of Denturitry and to propose a bill to the 50th Legislature merging the Board of Denturitry and the Board of Dentistry if the Board of Denturitry has not licensed 30 denturists; and

WHEREAS, the Legislative Audit Committee has determined that the Board of Denturitry has not licensed 30 denturists."

1981 Amendments: Chapter 244 deleted the second and third sentences in (2) requiring appointments to be made from a list of names submitted by the Montana Dental Association and Montana Dental Hygienists' Association.

Chapter 247 inserted "with the consent of the senate" in (2).

Chapter 363 in (2), added a public member, deleted the requirement that the Governor appoint from a list submitted by the Montana Dental Hygienists' Association and the Montana Dental Association, and made minor changes in phraseology.

Chapter 575 substituted "as a dentist or dental hygienist" for "a dental profession" in the second sentence of (2).

Administrative Rules

Title 8, chapter 16, ARM Board of Dentistry.

2-15-1733. Board of pharmacy.

Compiler's Comments

2003 Amendment: Chapter 224 in (2) in first sentence increased board membership from five to six and in second sentence inserted "one member must be a registered pharmacy technician"; in three places in (2)(a) after "licensed" inserted "pharmacist"; inserted (2)(b) requiring pharmacy technician member to have at least 5 consecutive years of practical experience and providing for board disqualification if active status ceases; and made minor changes in style. Amendment effective July 1, 2003.

Severability: Section 34, Ch. 224, L. 2003, was a severability clause.

Saving Clause: Section 35, Ch. 224, L. 2003, was a saving clause.

2001 Amendment: Chapter 388 in (3) in second sentence after "serve" substituted "more than two consecutive full terms" for "consecutive 5-year terms on the board" and inserted third sentence providing that an appointment to fill an unexpired term does not constitute a full term; inserted (4)(b) providing that a member be removed from office upon refusal or inability to perform the duties of a board member in an efficient, responsible, and professional manner; and made minor changes in style. Amendment effective October 1, 2001.

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula".

1983 Amendment: In (1), changed "pharmacists" to "pharmacy"; in first sentence of (2)(a), substituted "Each licensed member must have graduated and received the first professional undergraduate degree from the school of pharmacy of the university of Montana or from an accredited pharmacy degree program that has been approved by the board." for "Each licensed member shall be a graduate of the college of pharmacy of the university of Montana or of a college or school of pharmacy accredited by the American council on pharmaceutical education."; inserted (2)(b) relating to public member qualifications; and in (3) changed "3-year" to "5-year" in first sentence and inserted second sentence concerning removal of a member from office.

1981 Amendments: Chapter 244 deleted language in (2) requiring the Governor to appoint members from a list of names submitted by the Montana pharmaceutical association.

Chapter 247 inserted "with the consent of the senate" in (2).

Chapter 362 changed provision for a three-member board to a five-member board; deleted the requirement that the Governor appoint from a list submitted by the Montana pharmaceutical association; required three members to be licensed pharmacists and two to be from the general public; provided for staggered 3-year terms; and made minor changes in phraseology.

Chapter 379 substituted requirement that board members be graduates of schools accredited by the council on pharmaceutical education for the requirement of recognition and approval of the schools or membership in the association of pharmacy schools near the middle of (2)(a); deleted "However, one member may be a registered pharmacist of 15 years' practical experience and actually engaged in the practice of pharmacy." after "before his appointment" near end of (2)(a).

Administrative Rules

Title 24, chapter 174, ARM Board of Pharmacy.

2-15-1734. Board of nursing.

Compiler's Comments

1987 Amendment: In (4) substituted "All members" for "Members".

1981 Amendments: Chapter 247 inserted "with the consent of the senate" in (2).

Chapter 248 increased the board from eight members to nine members; reduced the number of registered professional nurses on the board from five to four; deleted "who constitute the board—professional nursing administration" in (2)(a); reduced from three to one the number of members who must have had administrative, teaching, or supervisory experience, and increased the length of such experience from 3 years to 5 years; inserted "one or more" following

"experience in" in (2)(a); inserted "and at least one such member must be currently engaged in the administration, supervision, or provision of direct client care" in (2)(a); inserted "registered professional" in (2)(a)(ii); changed "have been actively" to "be currently" in (2)(a)(iv); inserted "the practice of professional" and "and have practiced" in (2)(a)(iv); increased the period of practice from 3 years to 5 years in (2)(a)(iv); deleted "immediately before appointment" in (2)(a)(iv); deleted "who constitute the board—practical nursing administration" in (2)(b); deleted "member" in (2)(b); increased the experience requirement from 3 years to 5 years in (2)(b)(iii); changed "have been actively" to "be currently" in (2)(b)(iv); inserted "and have practiced" in (2)(b)(iv); increased the period of practice from 2 years to 5 years in (2)(b)(iv); deleted "immediately before appointment" in (2)(b)(iv); inserted (2)(c) providing for two public members; changed the term of members to staggered 4-year terms from 5-year terms in (4).

Administrative Rules

Title 8, chapter 32, ARM Board of Nursing.

2-15-1735. Board of nursing home administrators.

Compiler's Comments

1995 Amendments — Composite Section: Chapter 418 in (3) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 at beginning of (3) substituted "The director of the department of public health and human services" for "The director of the department of health and environmental sciences or his designee and the director of the department of social and rehabilitation services"; and made minor changes in style. Amendment effective July 1, 1995.

Because one chapter amended the reference to the Department of Health and Environmental Sciences and the other chapter deleted it, the codifier has reflected the deletion.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1981 Amendments: Chapter 244 deleted former (4) requiring the governor to appoint members from a list of names submitted by the board of directors of the Montana nursing home association; and made minor changes in phraseology.

Chapter 247 added "with the consent of the senate" in (2).

Administrative Rules

Title 8, chapter 34, ARM Board of Nursing Home Administrators.

2-15-1736. Board of optometry.

Compiler's Comments

1993 Amendment: Chapter 121 in (1) changed name of Board of Optometrists to Board of Optometry.

1981 Amendments: Chapter 247 inserted "with the consent of the senate" in (2).

Chapter 543 changed (3) from "Each member shall serve for a term of 4 years" to "Members shall serve staggered 4-year terms."

Transition: Section 2, Ch. 41, L. 1979, provided: "Persons who are members of the board of optometrists on the effective date of this act shall serve the remainder of their 6-year terms. All appointments or reappointments to the board made after the effective date of this act are for 4-year terms as provided in section 1, subsection (3)."

Administrative Rules

Title 8, chapter 36, ARM Board of Optometry.

2-15-1737. Board of chiropractors.

Compiler's Comments

1981 Amendments: Chapter 155 added a public member to the board; made minor changes in grammar.

Chapter 247 inserted "with the consent of the senate" in (2).

Administrative Rules

Title 8, chapter 12, ARM Board of Chiropractors.

2-15-1738. Board of radiologic technologists.

Compiler's Comments

1985 Amendment: In (2)(a) reduced radiologist members from two to one; inserted (2)(b) providing for physician membership; and in (2)(c) before "permit", deleted "unlimited" and made minor changes in phraseology.

1981 Amendments: Chapter 247 inserted "with the consent of the senate" in (2).

Chapter 296 substituted "person granted an unlimited permit issued by the board pursuant to 37-14-306" for "physician licensed to practice medicine in Montana" in (2)(b); substituted "public member" for "chiropractor licensed to practice in Montana" in (2)(c).

Administrative Rules

Title 8, chapter 56, ARM Board of Radiologic Technologists.

2-15-1739. Board of speech-language pathologists and audiologists.

Compiler's Comments

1989 Amendment: In five places changed "speech" to "speech-language"; and in (3), after "public member", deleted "appointed by the governor with the consent of the senate".

1981 Amendments: Chapter 244 deleted language in (2) requiring the governor to appoint members from a list of names submitted by the Montana speech and hearing association; and deleted former subsection (4) outlining the recommendation of names by the association.

Chapter 247 inserted "with the consent of the senate" in (2)(a); inserted "appointed by the governor with the consent of the senate" in (3).

Administrative Rules

Title 8, chapter 62, ARM Board of Speech-Language Pathologists and Audiologists.

2-15-1740. Board of hearing aid dispensers.

Compiler's Comments

1997 Amendment: Chapter 481 in first sentence in (2) increased number of Board members from five to seven; in (2)(b) substituted language requiring two members to have been licensed hearing aid dispensers for 5 years, to be nationally certified, and to have a master's degree for "three members who have been licensed dispensers and fitters of hearing aids for at least 5 years before their appointment to the board"; in (2)(c) substituted language requiring two members who hold master's degree but have been licensed dispensers and fitters of hearing aids for 5 years before appointment for "one public member who is not in the hearing health care field"; inserted (2)(d) requiring two public members not in the hearing health care field, with one who uses hearing aid; and made minor changes in style.

1985 Amendment: In (2)(b) changed "qualified dispensers" to "licensed dispensers".

1981 Amendments: Chapter 244 deleted language in (2) and (3) requiring the Governor to appoint members from a list of names submitted by the Montana Academy of Oto-ophthalmology, Montana Speech and Hearing Association, and Montana Hearing Aid Dealers' Society; deleted former subsection (2)(d) providing for an alternate member; deleted the second sentence in (3) relating to filling a vacancy from a list; and made minor changes in phraseology.

Chapter 247 inserted "with the consent of the senate" in (2).

Chapter 444 deleted former subsection (2)(b), which required one member of the board to be selected from a list submitted by the Montana Speech and Hearing Association which member was to hold or be eligible for a certificate of clinical competence in audiology; inserted (2)(c) providing for a public member; and substituted "categories" for "list" in former subsection (2)(b) and in the former last sentence of subsection (3).

Composite Section: Chapter 244 and Ch. 444, L. 1981, amended the same subsections in several instances creating some inconsistencies in language. There were no apparent substantive conflicts and the Code Commissioner resolved the inconsistencies as follows:

(1) Chapter 444 restructured the board makeup, therefore its deletion of a member by striking subsection (2)(b) took precedence over Ch. 244, which amended (2)(b) with the intention of merely removing an appointment list requirement;

(2) Chapter 244 deleted the alternate board member provision by striking subsection (2)(d), therefore the minor amendment to (2)(d) made by Ch. 444 in order to accommodate the addition of a public member as a category was not codified; and

(3) Chapter 244 deleted the provision for filling vacancies by striking the second sentence of (3), therefore the minor amendment to that sentence made by Ch. 444 in order to accommodate the addition of a public member was not codified.

Administrative Rules

Title 24, chapter 150, ARM Board of Hearing Aid Dispensers.

2-15-1741. Board of psychologists.

Compiler's Comments

2001 Amendment: Chapter 492 inserted (4) regarding allocation of board to department for administrative purposes. Amendment effective October 1, 2001.

1999 Amendment: Chapter 230 in first sentence in (2) increased board membership from five to six and at beginning of second sentence increased number of licensed private psychologists on board from one to two; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendment: In (2), in third sentence after "may not", substituted "serve consecutive 5-year terms" for "succeed himself" and increased time before member may be reappointed from 3 years to 5 years; and in (3) increased term from 3 years to 5 years. Amendment effective July 1, 1991, except rules adopted by Board of Psychologists may not be implemented until January 1, 1992.

1991 Statement of Intent: The statement of intent to Ch. 671, L. 1991, provided: "A statement of intent is required for this bill because it grants the board of psychologists the authority to make rules for establishing and administering a continuing education program for psychologists. It is intended that rules require the number of hours of continuing education necessary to maintain professional competency."

Transition — Initial Appointments: Section 7, Ch. 671, L. 1991, provided: "(1) On September 1, 1991, the governor shall appoint one person to a 5-year term on the board of psychologists.

(2) On September 1, 1992, the governor shall appoint one person to a 5-year term on the board and one person to a 1-year term on the board. At the expiration of the 1-year term, the governor shall reappoint the same board member to a 5-year term. At the expiration of the 5-year term, appointments must be made in accordance with 2-15-1851 [renumbered 2-15-1741].

(3) On September 1, 1993, the governor shall appoint one person to a 1-year term on the board and one person to a 2-year term. At the end of those terms, the governor shall reappoint those same board members each to a 5-year term. At the expiration of the 5-year terms, appointments must be made in accordance with 2-15-1851 [renumbered 2-15-1741]."

Applicability: Section 9, Ch. 671, L. 1991, provided that this section applies to new appointments to the Board of Psychologists made after July 1, 1991.

1981 Amendments: Chapter 247 inserted "with the consent of the senate" in (2).

Chapter 324 increased the board from three to five members; substituted the membership list for "The governor shall appoint all members, including a member filling a vacancy for an unexpired term, from the list of licensed psychologists in this state" in (2); deleted "Each member shall be a citizen of the United States and a resident of this state" from the end of (2); in (3) substituted the provision for staggered 3-year terms for "Each member shall serve for a term of 3 years".

Administrative Rules

Title 8, chapter 52, ARM Board of Psychologists.

2-15-1742. Board of veterinary medicine.

Compiler's Comments

2001 Amendment: Chapter 483 in (2) at end substituted "labor and industry" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

1985 Amendment: In (1) substituted "board of veterinary medicine" for "board of veterinarians".

1981 Amendments: Chapter 244 deleted former subsection (3) requiring the governor to appoint members from a list of names submitted by the Montana veterinary medical association.

Chapter 247 inserted "with the consent of the senate" in (2).

Administrative Rules

Title 8, chapter 64, ARM Board of Veterinary Medicine.

2-15-1743. Board of funeral service.

Compiler's Comments

1997 Amendment: Chapter 52 near beginning of first sentence of (2) increased members from 5 to 6 and inserted fifth sentence that read: "One member must be a representative of a cemetery company governed by Title 37, chapter 19, part 8."

1993 Amendment: Chapter 38 in (1) changed name of Board of Morticians to Board of Funeral Service; in (2), in second sentence, reduced from four to three the number of Board members who must be licensed morticians and inserted fourth sentence requiring membership by a licensed crematory operator or technician or by a mortician engaged in a crematory operation; and made minor changes in style. Amendment effective February 10, 1993.

1981 Amendment: Chapter 378 reduced the number of board members from six to five and the members required to be morticians from five to four in (2); substituted "Board members" for "Each member" at the beginning of (3); substituted "staggered 5-year terms" for "for a term of 5 years" at the end of (3); deleted subsection (4), which provided that the public member of the board could not participate in examinations and inspections.

Administrative Rules

Title 24, chapter 147, ARM Board of Funeral Service.

2-15-1744. Board of social work examiners and professional counselors.

Compiler's Comments

1985 Amendment — Subsection Enactment: In (1)(a) after "examiners", inserted "and professional counselors" and increased membership from five to seven; in (1)(b) at beginning changed "Four" to "Three" and after "and", inserted "and three must be licensed professional counselors"; and deleted former (1)(a) through (1)(d) that read: "(a) one member must be in the private practice of social work;

(b) one member must be employed by a state social service agency;

(c) one member must be in the medical or social welfare field; and

(d) one member must be an educator in the field of social work".

Subsection (2), relating to licensure within 30 days of appointment, was enacted as a separate section by Ch. 572, L. 1985, but is codified in this section for logic and convenience.

2-15-1747. Board of barbers and cosmetologists.

Compiler's Comments

2003 Amendment: Chapter 243 in (1) inserted "barbers and"; in (2) in introductory clause increased membership from 7 to 9, provided for appointment by governor with senate's consent, and substituted "must include" for "may include"; deleted former (2)(a)(ii) through (2)(a)(iv) that read: "(ii) one licensed manicurist or licensed electrologist;

(iii) two persons who are members of or affiliated with a school of cosmetology; and

(iv) one public member who is not engaged in the practice of cosmetology, electrology, or manicuring"; in (2)(a) provided for 5-year residency and 5-year cosmetology work experience for cosmetologist members; inserted (2)(b) requiring one member to have been a licensed electrologist, esthetician, or manicurist in this state for 5 years; deleted former (2)(b) that read: "(b) Members are appointed by the governor with the consent of the senate"; inserted (2)(c) requiring three licensed barbers with 5 years residency and practice in this state; inserted (2)(d) requiring two public persons not practicing barbering, cosmetology, electrology, esthetics, or manicuring; in (3) deleted first and second sentences that read: "Each licensed member appointed shall have actively engaged in the profession of cosmetology, manicuring, or electrology for at least 5 years before his appointment and have been a resident of this state for at least 5 years immediately before his appointment. Each member shall be at least 18 years of age and a graduate of a high school or its equivalent"; at end of (3) after "school" deleted "of cosmetology"; inserted (4) providing for an alternative appointment if there is not a licensed barber or cosmetologist qualified and willing to serve on the board in one of the barber or cosmetologist positions; in (5) in first sentence increased term from 4 to 5 years and inserted second sentence providing that terms be staggered; and made minor changes in style. Amendment effective October 1, 2003.

Severability: Section 25, Ch. 243, L. 2003, was a severability clause.

1989 Amendment: In (2)(a) expanded Board membership from four to seven members by adding one licensed manicurist or licensed electrologist and two persons who are members of or affiliated with a school of cosmetology; in (2)(a)(iv), after "electrology", inserted "or manicuring"; near beginning of first sentence of (3), after "licensed", deleted "cosmetologist", after "cosmetology" inserted "manicuring, or electrology", and at beginning of third sentence, after "No", inserted "more than"; and made minor changes in phraseology and form.

1987 Amendment: In (2) removed brackets from "appointed by the governor".

1981 Amendments: Chapter 106 substituted "licensed cosmetologists" for "members who may be appointed by the governor from a list of six persons recommended by the Montana state

hairdressers' association" and added a public member at the beginning of (2); inserted "licensed cosmetologist" near the beginning of the second sentence of (2).

Chapter 247 inserted "with the consent of the senate" in (2).

Commissioner Clarification: In first sentence "[appointed by the governor]" was inserted by the Code Commissioner. Deletion of that language by sec. 3, Ch. 106, L. 1981, was an apparent oversight, since appointment is referred to several times without stating the appointing authority.

Administrative Rules

Title 24, chapter 132, ARM Board of Cosmetologists.

2-15-1748. Board of physical therapy examiners.

Compiler's Comments

1989 Amendment: Deleted former (4)(a) that read: "(a) Within 30 days following July 1, 1979, the governor shall make initial appointments to the board of physical therapy examiners. He shall appoint one member each to hold office for terms of 1 year, 2 years, and 3 years, respectively. At the end of each member's appointed term, a member shall be appointed for a full 3-year term."

1987 Amendment: In (2) increased Board membership to five from three and inserted lead-in and (2)(a) through (2)(c) listing membership qualifications; in (3) deleted requirement that each member be a physical therapist; and in (4) inserted (b) allowing submission of physician nominees' names by the Montana Medical Association.

Initial Appointments of Physician and Public Member: Section 1, Ch. 55, L. 1987, provided in part: "A physician and a member of the general public must be appointed to the board on or before January 1, 1988, for a 3-year term." The provision was not codified because it is temporary.

1981 Amendments: Chapter 244 deleted language in (2) requiring the governor to appoint members recommended by the Montana chapter of the American physical therapy association; deleted the language in (3) that stated an appointee need not be a member of the Montana chapter of the association; and deleted (5) and part of (6) concerning listing of nominees and filling vacancies from the list.

Chapter 247 inserted "with the consent of the senate" in (2).

Administrative Rules

Title 8, chapter 42, ARM Board of Physical Therapy Examiners.

2-15-1749. Board of occupational therapy practice.

Compiler's Comments

2001 Amendment: Chapter 483 in (7) after "department of" substituted "labor and industry" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

Grandfather Provisions: Section 20, Ch. 629, L. 1985, provided: "The board shall grant a license to any person certified as an occupational therapist registered (OTR) or a certified occupational therapy assistant (COTA) by the American occupational therapy association (AOTA) prior to [the effective date of this act (October 1, 1985)]."

Initial Board Appointment: Section 21, Ch. 629, L. 1985, provided: "(1) Notwithstanding the provisions of [section 5(, codified as 2-15-1859, renumbered 2-15-1749)], the governor shall within 60 days following [the effective date of this act (October 1, 1985)] appoint the initial board as follows:

(a) two members shall be appointed for a term of 2 years;

(b) two members shall be appointed for a term of 3 years; and

(c) one member shall be appointed for a term of 4 years.

(2) Initial appointments of occupational therapist and occupational therapist assistant members shall be made from persons eligible for licensure pursuant to [section 20].

(3) Initial board members shall serve through December 31 of the year in which they are appointed before commencing the terms prescribed by this section.

(4) The Montana occupational therapy association may nominate persons for initial membership on the board in compliance with 37-1-132."

Severability: Section 22, Ch. 629, L. 1985, was a severability clause.

Administrative Rules

Title 8, chapter 35, ARM Board of Occupational Therapists [sic].

2-15-1750. Board of respiratory care practitioners.

Compiler's Comments

2001 Amendment: Chapter 483 in (4) after "department of" substituted "labor and industry" for "commerce". Amendment effective July 1, 2001.

1991 Statement of Intent: The statement of intent to Ch. 532, L. 1991, provided: "A statement of intent is required for this bill because [section 5] [37-28-104] grants rulemaking authority to the board of respiratory care practitioners.

(1) In outlining the powers and responsibilities of the board of respiratory care practitioners, it is the intent of [section 5] [37-28-104] that the board have authority to adopt rules to implement and enforce [sections 1, 2, and 4 through 13] [Title 37, ch. 28] and specific authority to adopt rules regarding:

(a) license and temporary permit applications and procedures necessary to receive and process those applications;

(b) examinations and criteria for grading examinations;

(c) disciplinary standards for licensees and temporary permitholders, including definitions of conduct for which discipline may be appropriate;

(d) continuing education requirements;

(e) investigations of complaints;

(f) setting and modifying appropriate fees;

(g) a process for renewal of licenses and temporary permits, including procedures for late renewal;

(h) waiver of license requirements as provided in [section 7(2)] [37-28-202(2)]; and

(i) reciprocity conditions applicable to licensure.

(2) It is the intent of the legislature that the governor have the authority to implement staggered terms for board members during the appointment process."

Effective Date: Section 17, Ch. 532, L. 1991, provided: "[Sections 3 through 5, 14 through 16, and this section] are effective on passage and approval." Approved April 22, 1991.

2-15-1751. Board of sanitarians.

Compiler's Comments

1981 Amendments: Chapter 149 inserted "with the consent of the senate" in (2); in (2) inserted language to provide for a member on the board who is not a sanitarian; made minor changes in phraseology.

Chapter 247 inserted "with the consent of the senate" in (2).

Administrative Rules

Title 24, chapter 216, ARM Board of Sanitarians.

2-15-1753. Board of clinical laboratory science practitioners.

Compiler's Comments

1993 Statement of Intent: The statement of intent attached to Ch. 345, L. 1993, provided: "A statement of intent is needed for this bill because it establishes a board of clinical laboratory science practitioners and gives the board rulemaking authority. The board is required to adopt rules to establish licensing and certification procedures, educational requirements for licensure, and continuing education requirements. The board is also required to establish rules for the renewal, suspension, and revocation of licenses. The board shall establish an investigation and hearing procedure for handling complaints and shall set fees for administration of the board's duties. The fees must be commensurate with the costs of administration. The board shall also adopt rules implementing the requirement that a supervisor of a clinical laboratory technician must be accessible at all times that testing is being performed in order to provide onsite, telephonic, or electronic consultation."

Severability: Section 14, Ch. 345, L. 1993, was a severability clause.

Effective Date: Section 16, Ch. 345, L. 1993, provided that this section was effective on passage and approval. Approved April 16, 1993.

Administrative Rules

Title 24, chapter 129, ARM Board of Clinical Laboratory Science Practitioners.

2-15-1756. Board of public accountants.

Compiler's Comments

1989 Amendment: In (4) substituted "staggered 5-year terms" for "for a term of 3 years" and in second sentence, after "member", substituted language prohibiting consecutive 5-year terms

and language in third sentence regarding reappointment eligibility for "who has served two successive complete terms is not eligible for reappointment until after the lapse of 1 year"; and made minor change in phraseology. Amendment effective July 1, 1989.

Transition Section Not Codified: Section 4, Ch. 382, L. 1989, establishing transitional dates for the initial appointments by the Governor of members of the Board of Public Accountants to staggered 5-year terms, was not codified.

Transition: Section 24, Ch. 684, L. 1979, provided: "The terms of office of persons currently members of the Board of Public Accountants are not affected by this act. The governor shall make the appointment necessary to comply with the change in board composition contained in section 3 of this act upon the first available vacancy suitable for that purpose."

Administrative Rules

Title 8, chapter 54, ARM Board of Public Accountants.

2-15-1757. Board of realty regulation.

Compiler's Comments

1993 Amendment: Chapter 52 deleted former (2)(b) that read "(b) appointed so not more than three members are from the same congressional district"; and made minor changes in style. Amendment effective July 1, 1993.

Applicability: Section 13, Ch. 52, L. 1993, provided: "[This act] applies to appointments made after [the effective date of this act]." Effective July 1, 1993.

Transition: Section 10, Ch. 497, L. 1979, provided: "All orders and rules relating to regulation of the real estate industry made by the board of real estate remain in full force and effect until revoked or modified in accordance with law by the board of realty regulation. The records and documents of the board of real estate are transferred to the board of realty regulation. Licenses, permits, and certificates issued prior to the effective date of this act remain valid under the same terms and conditions as when issued and are subject to the provisions of Title 37, chapter 51."

Initial Appointments: Section 12, Ch. 497, L. 1979, provided: "Within 30 days of the effective date of this act, the governor shall appoint the initial board of realty regulation. The initial terms shall consist of one term of 1 year, one term of 2 years, one term of 3 years, and two terms of 4 years."

Administrative Rules

Title 8, chapter 58, ARM Board of Realty Regulation.

2-15-1758. Board of real estate appraisers.

Compiler's Comments

2001 Amendment: Chapter 492 in (2) increased number of board members from five to seven; in (3) increased number of board members who must be licensed or certified real estate appraisers from three to five; inserted (4) regarding composition and duties of screening panel; deleted former (4) and (5) that read: "(4) Only one member of the board may be primarily affiliated with the same recognized appraisal group defined by the appraisal foundation.

(5) (a) Before January 1, 1992, a real estate appraiser board member must be a designated member of a national real estate appraisal organization that requires for membership appraisal experience, certain educational qualifications, successful completion of an examination, and adherence to the standards of professional appraisal practice.

(b) On and after January 1, 1992, three real estate appraiser board members must be certified real estate appraisers"; in (8) deleted former second sentence that read: "Three members constitute a quorum for transacting business"; and made minor changes in style. Amendment effective October 1, 2001.

1991 Statement of Intent: The statement of intent to Ch. 409, L. 1991, provided: "A statement of intent is required for this bill because [section 4] [37-54-105] grants rulemaking authority to the newly established board of real estate appraisers.

(1) It is the intent of [section 4] [37-54-105] that the board have authority to adopt rules to implement and enforce [sections 1, 2, and 4 through 28] [Title 37, ch. 54], including specific authority to adopt rules regarding:

(a) license and certificate applications and procedures necessary to receive and process those applications;

(b) examinations and criteria for grading examinations;

(c) disciplinary standards for licensees and certificate holders, including definitions of conduct for which discipline may be appropriate;

(d) continuing education requirements;

(e) the investigation of complaints received under [section 10] [37-54-401, now repealed];
(f) the setting and modification of appropriate fees;
(g) a process for renewal of licenses and certificates, including a procedure for late renewal;
(h) the retention of board records;
(i) the adoption and modification of standards of professional appraisal practice as set out in [section 13] [37-54-403];
(j) reciprocity conditions applicable to licensure and certification as set out in [section 23] [37-54-417, now repealed]; and
(k) procedures for granting temporary permits as set out in [section 28] [37-54-406, now repealed].

(2) It is the intent of [section 3] [2-15-1868, renumbered 2-15-1758] that the governor have the authority to implement staggered terms for board members during the appointment process.

(3) It is intended that the board of real estate appraisers address by rule the implementation of practices mandated for the profession by future federal legislation and notify the department of commerce of statutory changes necessary to effect those practices, to allow consideration by the legislature."

Severability: Section 29, Ch. 409, L. 1991, was a severability clause.

Effective Date: Section 31, Ch. 409, L. 1991, provided that this section is effective on passage and approval. Approved April 9, 1991.

Administrative Rules

Title 24, chapter 207, ARM Board of Real Estate Appraisers.

2-15-1761. Board of architects.

Compiler's Comments

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

Transition: Section 10, Ch. 388, L. 1979, provided: "Section 3 [2-15-1651, as amended by Ch. 388, L. 1979 (now 2-15-1871, renumbered 2-15-1761)] does not affect the terms of office of persons who are members of the board on July 1, 1979, and such members shall serve the remainder of their unexpired terms. All appointments made and vacancies filled after July 1, 1979, must be in accordance with section 3."

Administrative Rules

Title 24, chapter 114, ARM Board of Architects.

2-15-1762. Board of landscape architects.

Compiler's Comments

2001 Amendment: Chapter 483 in (3) after "department of" substituted "labor and industry" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

1981 Amendments: Chapter 247 inserted "with the consent of the senate" in (2).

Chapter 274 substituted "department of commerce" for "department of professional and occupational licensing" in (3).

Transition: Section 12, Ch. 325, L. 1979, provided: "Section 3 does not affect the term of office of a person who is a member of the board of landscape architects on July 1, 1979, and he shall serve the remainder of his unexpired term. All appointments made and vacancies filled after July 1, 1979, must be in accordance with section 3."

Administrative Rules

Title 24, chapter 153, ARM Board of Landscape Architects.

2-15-1763. Board of professional engineers and professional land surveyors.

Compiler's Comments

2001 Amendment: Chapter 492 in (2)(a) in first sentence and in (2)(b) near end after "at least 5 years and" substituted "licensed" for "registered"; and made minor changes in style. Amendment effective October 1, 2001.

1985 Amendment: In (1) before "land surveyors", inserted "professional"; in (2)(b) at beginning, after "two", substituted "professional" for "registered"; in (4) at beginning, inserted exception clause; and in (4)(b) inserted "and may shorten the term of one public member so that it is not coincident with the term of the other public member".

1981 Amendment: Inserted "with the consent of the senate" in (2).

Transition: Section 9, Ch. 408, L. 1979, provided: "A person appointed prior to July 1, 1979, to the board of professional engineers and land surveyors [now Board of Professional Engineers and Professional Land Surveyors] for a 5-year term shall serve until the expiration of such term. A member of the board appointed after July 1, 1979, shall serve for a term of 4 years as provided in section 3."

Administrative Rules

Title 24, chapter 183, ARM Board of Professional Engineers and Land Surveyors.

2-15-1764. State electrical board.

Administrative Rules

Title 24, chapter 141, ARM State Electrical Board.

2-15-1765. Board of plumbers.

Compiler's Comments

1999 Amendment: Chapter 57 in (2)(d) substituted "one representative of the department of environmental quality, who must have experience in the regulation of drinking water systems" for "one appointed representative of the department of public health and human services, who must be a sanitary engineer and who is secretary of the board"; and made minor changes in style. Amendment effective March 15, 1999.

1995 Amendments: Chapter 418 in (2)(d) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (2)(d) substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1981 Amendment: Inserted "with the consent of the senate" in (2).

Administrative Rules

Title 8, chapter 44, ARM Board of Plumbers.

2-15-1772. Board of athletics.

Compiler's Comments

2001 Amendment: Chapter 483 in (4) after "department of" substituted "labor and industry" for "commerce". Amendment effective July 1, 2001.

1993 Amendment: Chapter 11 in (3) substituted "staggered 3-year terms" for "for a term of 3 years"; and made minor changes in style.

Transition: Section 3, Ch. 11, L. 1993, provided: "In order to establish staggered terms, the governor shall, after the expiration of the terms of the present members of the board of athletics on April 25, 1995, appoint one member to a 1-year term, one member to a 2-year term, and one member to a 3-year term."

Administrative Rules

Title 24, chapter 117, ARM Board of Athletics.

2-15-1773. Board of outfitters.

Compiler's Comments

2001 Amendment: Chapter 483 in (6) after "department of" substituted "labor and industry" for "commerce". Amendment effective July 1, 2001.

1999 Amendment: Chapter 543 in (2) before "seven" inserted "the following" and substituted language outlining required membership for former (2)(b) and (2)(c) that read: "(b) Five members must be licensed outfitters who are actively involved in the outfitting business. At least one of the outfitter members must be a person primarily engaged in the fishing outfitting business. Each outfitter member shall represent one of the five districts designated in 2-15-3402(2). Two qualified persons in each district must be nominated for appointment by the licensed outfitters residing in that district by submitting by mail a notarized ballot, in a form and manner prescribed by the board. The board shall also prescribe a procedure for selecting persons to be nominated by mail-in ballot. The two outfitters receiving the most votes must be nominated for appointment. The department of commerce is responsible for all notifications, reporting, and

counting of ballots. Names of nominees must be submitted to the governor, who will select one outfitter from each district to be a board member.

(c) The governor shall also appoint one member who is an employee of the department of fish, wildlife, and parks and one member from the general public"; inserted (3) requiring subcommittee to review net client hunter use expansion requests, requiring majority vote of board to adopt resolution, motion, or other decision, and requiring that subcommittee consist of two hunting outfitters, two sportspersons, and one public member from board; at end of (5) substituted "appointed" for "elected"; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 543, L. 1999, provided: "WHEREAS, private property rights and free market principles will result in a certain amount of ebb and flow of outfitter presence statewide or in any particular geographical region; and

WHEREAS, approval or denial of an outfitter's request for expansion of client service base is predicated upon the state's broad power to regulate for the public health, welfare, and safety, which includes wildlife held in public trust, public hunting, private property rights, and private enterprise; and

WHEREAS, approval or denial of a net client hunter use expansion request must provide due process for outfitters and the opportunity for public comment under the Montana Administrative Procedure Act, including agency response to those public comments; and

WHEREAS, implementing the regulations necessary to meet the Legislature's goal of a reduction in new hunting use of areas by outfitters when the new use will cause undue conflict with existing hunting uses in the areas, providing necessary due process to outfitters, and providing for and responding to public comment will require time, staff, and resources not currently available in agency budgets."

Termination Provision Repealed: Section 1, Ch. 143, L. 1991, repealed sec. 14, Ch. 528, L. 1987, which terminated the 1987 amendments to this section July 1, 1991. Effective March 25, 1991.

1989 Amendment (Temporary): Inserted second sentence of (2)(b) requiring that at least one Board member be engaged in the fishing outfitting business, in fourth sentence substituted language providing for the nomination of Board by notarized mail-in ballot for language that provided for nominating and electing members at annual meeting, and inserted fifth, sixth, and seventh sentences regarding selection and nomination of persons and Department responsibility in election.

1989 Amendment (Effective July 1, 1991): Inserted second sentence of (2) requiring that at least one Council member be engaged in the fishing outfitting business, in third sentence substituted language providing for selection of Council by notarized mail-in ballot for language relating to nominating and electing members at annual meeting, inserted fourth sentence requiring Council to prescribe a nominating procedure, at beginning of fifth sentence substituted "The outfitter receiving the highest number of votes" for "A majority vote" and after "ballot" deleted "of all the outfitters in attendance at the meeting", at beginning of sixth sentence substituted "The outfitter receiving the second highest number of votes" for "At the election an alternate member" and after "be" substituted "the alternate member" for "elected by written ballot"; in (3), after "member", substituted "and the" for "or"; and made minor changes in style and grammar.

1987 Amendment: In (1) changed "Montana outfitters' council" to "board of outfitters"; substituted (2)(a), setting forth Board size and gubernatorial appointment, for former (2) and (3) that read: "(2) The council consists of seven members. Each member shall be a licensed outfitter and shall represent one of the seven fish and game administrative districts. A member shall be selected by the licensed outfitters residing in that district by election at an annual meeting of the outfitters to be held in the city where the regional headquarters is located during the month of March. A majority vote cast by written ballot of all the outfitters in attendance at the meeting shall determine the member from the district. At the election an alternate member shall also be elected by written ballot to serve if the member is unable to act.

(3) If a member or alternate resigns or a vacancy exists for any reason on the council, the council at its next official meeting after the vacancy occurs shall recommend to the director of the department of fish, wildlife, and parks the names of two licensed outfitters residing in the administrative region where the vacancy occurred to fill the vacancy for the remainder of the unexpired term. If a vacancy cannot be filled from that administrative region, the appointment must be made from an adjoining region. If a vacancy cannot be filled from an adjoining region, the appointment must be made from any remaining region. The director shall fill the vacancy from the names submitted"; inserted (2)(b) providing qualifications for Board members who are

licensed outfitters; inserted (2)(c) requiring appointment of member from Department of Fish, Wildlife, and Parks and member of public; inserted (3) providing for vacancy on the Board; in (5) substituted "The board is allocated to the department of commerce for administrative purposes only as prescribed in 2-15-121" for "The council is allocated to the department"; inserted (6) governing compensation and travel expenses; and deleted former (6) and (7) that read: "(6) The council is not subject to the provisions of 2-15-122.

(7) Members of the council are entitled to be reimbursed and compensated as are members of advisory councils in 2-15-122(5)."

Transfer of Agency: Section 10, Ch. 528, L. 1987, provided: "Transfer of agency — name change — duties transferred. (1) The Montana outfitters' council is transferred to the department of commerce and is renamed the board of outfitters.

(2) The authority and functions of the department of fish, wildlife, and parks regarding licensing of outfitters and guides are transferred to the board of outfitters, and any reference in 87-4-122, 87-4-124, 87-4-125, 87-4-129, 87-4-131, and 87-4-143 to the department of fish, wildlife, and parks or to the department or director, meaning the department of fish, wildlife, and parks or the director of that department, is changed to the board, meaning the board of outfitters."

1983 Amendment: Near end of (2), changed "delegate" to "member" in three places; inserted (3) governing appointment to fill vacancies; and inserted (7) relating to compensation and reimbursement of members.

1981 Amendment: Changed "the district headquarters at 1:00 p.m. on the second Friday of March" to "the city where the regional headquarters is located during the month of March" and inserted "cast by written ballot" after "vote" in the middle of (2); changed "member" to "delegate" in the last two sentences of (2); and inserted "by written ballot" after "elected" in last sentence of (2).

Administrative Rules

Title 8, chapter 39, ARM Board of Outfitters.

2-15-1781. Board of private security patrol officers and investigators.

Compiler's Comments

1989 Amendment: In (1) changed "patrolmen" to "patrol officers".

Part 18
Department of Commerce

Part Compiler's Comments

Functions Transferred — 1983: Section 1, Ch. 287, L. 1983, provided: "(1) The functions of the department of administration of generally assisting political subdivisions, exercising oversight of financial and reporting systems, supervising records retention, and performing audits in Title 2, chapter 7, part 5; 2-9-702; 2-9-802; 7-1-4130; 7-1-4145; 7-1-4147; 7-1-4148; Title 7, chapter 2, part 49; 7-3-146; 7-3-153; 7-4-2634; 7-5-2132; 7-5-4124; 7-6-207; 7-6-209; 7-6-210 [now repealed]; 7-6-2114; 7-6-2203 [now repealed]; 7-6-2212 [now repealed]; 7-6-2302 [now repealed]; 7-6-2311 [now repealed]; 7-6-2314 [now repealed]; 7-6-2315 [now repealed]; 7-6-2322 [now repealed]; 7-6-2352 [now repealed]; 7-6-4111 [now repealed]; 7-6-4113 [now repealed]; 7-6-4205 [now repealed]; 7-6-4221 [now repealed]; 7-6-4225 [now repealed]; 7-6-4233 [now repealed]; 7-7-123; 17-6-103; 19-11-206 [renumbered 19-18-206]; 19-11-403 [renumbered 19-18-403]; 20-1-212; 20-9-203; 20-9-344; 20-9-504; 61-2-208; 85-7-1616; 85-7-1913; 85-7-2027; and 85-9-611 [now repealed] are transferred to the department of commerce. [Chapter 483, L. 2001, transferred the functions to the Department of Administration.]

(2) Any reference in the MCA to "department of administration" in the sections and parts listed in subsection (1) or related references to "department" or "director" (of the department of administration) are changed to "department" (of commerce) or "director" (of commerce)."

Reorganization Procedure: Section 18, Ch. 274, L. 1981, provided for the applicability of 2-15-131 through 2-15-137 to the creation of the Department of Commerce from agencies of other departments.

2-15-1801. Department of commerce — head.

Compiler's Comments

1981 Amendment: Substituted "commerce" for "business regulation" twice.

Administrative Rules

Title 8, ARM Department of Commerce.

Law Review Articles

Recent Consumer Protection Developments in Montana, Swartley, 37 Mont. L. Rev. 371 (1976).

2-15-1808. Board of investments — allocation — composition — quasi-judicial.

Compiler's Comments

1999 Amendment: Chapter 330 in (1) in second sentence near beginning after "employ" inserted "a chief" and after "officer" deleted "an assistant investment officer", deleted former third sentence that read: "The investment officer, assistant investment officer, and executive director serve at the pleasure of the board", in third sentence near middle before "investment" inserted "chief", after "officer" deleted "assistant investment officer", and near end increased the number of professional staff positions from three to six, and inserted fourth sentence stating that certain persons serve at the pleasure of the board; and made minor changes in style. Amendment effective July 1, 1999.

Boards Abolished — Functions Transferred: Sections 2 and 3 of Ch. 581, L. 1987, abolished the Montana Economic Development Board and the Board of Investments and transferred the functions of both Boards to a newly created Board of Investments. Section 2 stated: "The Montana economic development board, created by 2-15-1805, is abolished, and its functions are transferred to the board of investments created in section 1 [2-15-1808]." Section 3 stated: "The board of investments, created by 2-15-1005, is abolished, and its functions are transferred to the board of investments created in section 1 [2-15-1808]."

Administrative Rules

Title 8, chapter 97 ARM Board of Investments.

2-15-1814. Board of housing — allocation — composition — quasi-judicial.

Compiler's Comments

1981 Amendment: Substituted "department of commerce" for "department of administration" in (5).

Board of Housing — Reallocated to Department of Commerce: Section 11(1), Ch. 274, L. 1981, provided: "The board of housing created in 2-15-1008 [now 2-15-1814] and allocated to the department of administration is reallocated to the department of commerce. The code commissioner shall recodify that section in Title 2, chapter 15, part 18, and change internal name and section number references accordingly."

Administrative Rules

Title 8, chapter 111, ARM Board of Housing.

2-15-1815. Montana facility finance authority.

Compiler's Comments

2001 Amendment: Chapter 137 in (1) at end of first sentence substituted "Montana facility finance authority" for "Montana health facility authority"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 18, Ch. 137, L. 2001, was a saving clause.

Initial Appointments — Staggered Terms: Section 27, Ch. 703, L. 1983, provided: "Notwithstanding 2-15-1815, the members of the authority first appointed by the governor shall serve for terms to be designated by the governor and to expire on June 30 of the respective year. The terms of two members shall expire in 1984, two in 1985, and one each in 1986, 1987, and 1988."

Initial Appointments — Provision Not Codified: The Code Commissioner did not codify subsection (3) in the section as it was enacted because the subsection is temporary. The subsection reads: "(3) Members must be appointed within 60 days of [the effective date of this act] in accordance with the manner prescribed in 2-15-124." The effective date of the act was April 30, 1983.

2-15-1816. Tourism advisory council.

Compiler's Comments

1991 Amendment: In (2), near middle after "industry", inserted "and includes at least one member from Indian tribal governments"; inserted (4)(g) regarding promotion of tourist activities on reservations; and made minor changes in style.

1987 Statement of Intent: The statement of intent attached to Ch. 607, L. 1987, provided: "This bill needs a statement of intent because it allows the department of revenue and department of commerce to adopt rules negotiating the administration of this act.

The rules will be necessary to effectively and efficiently collect the tax and disburse the funds. This includes rules clarifying persons subject to the tax, reporting requirements, recordkeeping requirements, qualification for funds requirements, delineation/clarification of the statutorily created council powers, and other requirements. Since this is a new tax in Montana, it is anticipated that many issues will arise requiring rulemaking for resolution.

The intent of the legislature in exempting certain facilities that charge rates not exceeding 60% of the state rate for state officers and employees traveling in Montana is to avoid taxing rooms that are primarily used by pensioners and similarly disposed persons who may use a hotel as a residence, but who nonetheless rent a room by the day or week. Such facilities may also rent rooms to drop-in trade from time to time, but such trade is not the primary business of the facility. Rules adopted should be sensitive to drawing the distinction authorized by the legislature."

2-15-1819. Board of research and commercialization technology.

Compiler's Comments

Implementation — Staggered Terms: Section 21, Ch. 563, L. 1999, provided: "In order to implement staggered terms, the original appointments to the Montana board of research and commercialization technology must be for the following terms:

(1) the appointees of the president of the senate and minority leader of the house, 1 year;

(2) the appointees of the speaker of the house and the minority leader of the senate, 2 years; and

(3) the appointees of the governor to 1-year and 2-year terms respectively."

Effective Date: Section 25, Ch. 563, L. 1999, provided that this section is effective July 1, 1999.

2-15-1820. Economic development advisory council.

Compiler's Comments

Effective Date: Section 9(1), Ch. 351, L. 2003, provided that this section is effective on passage and approval. Approved April 16, 2003.

2-15-1821. Coal board — allocation — composition.

Compiler's Comments

2003 Amendment: Chapter 254 in (4)(a)(iii) increased the minimum number of members of the board from each district from one to two and increased the maximum number of board members from each district from two to four. Amendment effective October 1, 2003.

Saving Clause: Section 5, Ch. 254, L. 2003, was a saving clause.

1999 Enactment Not Codified: Because of the temporary nature of the enactment of the governor's local coal impact review council by Ch. 376, L. 1999, the code commissioner has not codified the enactment. Section 1, Ch. 376, L. 1999, provided: "**Governor's local coal impact review council — purpose — report — authority to accept donations.** (1) There is a governor's local coal impact review council. The council is attached to the department of commerce for administrative purposes only.

(2) The purpose of the council is to review and report on Montana's existing public policy regarding the impacts resulting from coal development and to develop findings, conclusions, and recommendations as to what the policies should be, both now and into the 21st century. The council shall, on or before December 1, 2000, prepare and deliver the report to the governor and, as provided in 5-11-210, to the 57th legislature.

(3) The council is composed of 10 members, each of whom must be appointed by the governor before July 15, 1999, as follows:

(a) one member from the coal board, established in 2-15-1821;

(b) two members, each of whom must be a county commissioner from a county within or containing a coal impact area;

(c) two members, each of whom must be either a mayor or city council or commission member from an incorporated city or town within a coal impact area;

(d) two members, each of whom must be a representative of the coal industry;

(e) one member who must be a state senator and one member who must be a state representative, each of whom must be from a coal impact area; and

(f) one member of the general public.

(4) For the purposes of this section, a coal impact area means the areas generally described in 90-6-207 affected by coal development.

(5) At its first meeting, the council shall elect from among its members a presiding officer and any other officers it considers to be necessary.

(6) Each member is appointed for a term of 2 years and serves at the pleasure of the governor.

(7) (a) Each member of the council except for the legislators appointed under subsection (3)(e), must be compensated as provided in 2-15-122(5).

(b) The legislative members of the council appointed under subsection (3)(e) must be compensated as provided in 5-2-302.

(8) On behalf of the council, the department of commerce may accept gifts, grants, or donations to cover the costs of the council's activities. The department shall account separately for any gifts, grants, or donations received on the council's behalf."

Preamble: The preamble attached to Ch. 376, L. 1999, provided: "WHEREAS, coal development and its effects are important to Montana's society and economy; and

WHEREAS, the traditions of Montana public policy development are citizen-inclusive; and

WHEREAS, public policy exists in an ever more dynamic and complex world; and

WHEREAS, Montana's state government has been dealing with local coal development impact mitigation for nearly 25 years; and

WHEREAS, time and the evolution of reality demand that existing public policies be clearly and openly reexamined for appropriateness and efficiency."

Effective Date: Section 3, Ch. 376, L. 1999, provided: "(1) Except as provided in subsection (2), [this act] is effective July 1, 1999.

(2) The governor may solicit applications from persons wishing to serve on the governor's local coal impact review council at any time following passage and approval of [this act]." Approved April 20, 1999.

Termination: Section 4, Ch. 376, L. 1999, provided: "[This act] terminates June 30, 2001."

1993 Amendment: Chapter 52 inserted (4)(a)(iii) regarding appointments from each district; deleted former (5) that read "(5) No more than four members may be residents of the same congressional district"; and made minor changes in style. Amendment effective July 1, 1993.

Applicability: Section 13, Ch. 52, L. 1993, provided: "[This act] applies to appointments made after [the effective date of this act]." Effective July 1, 1993.

1981 Amendment: Substituted "department of commerce" for "department of community affairs" in (2).

Administrative Rules

Title 8, chapter 101, ARM Coal Board.

2-15-1822. Hard-rock mining impact board.

Compiler's Comments

2003 Amendment: Chapter 254 in (3)(b) increased the minimum number of persons from each district from one to two. Amendment effective October 1, 2003.

Saving Clause: Section 5, Ch. 254, L. 2003, was a saving clause.

1993 Amendment: Chapter 52 substituted present (3)(b) concerning members from Commission districts for "no more than three persons from the same congressional district"; and made minor changes in style. Amendment effective July 1, 1993.

Applicability: Section 13, Ch. 52, L. 1993, provided: "[This act] applies to appointments made after [the effective date of this act]." Effective July 1, 1993.

1985 Amendment: In (3)(a) inserted "when appointed to the board" and "or expected to be impacted"; and in (3)(e) and (3)(f) inserted "a person who, when appointed to the board, is".

Coordination Clause: Section 14, Ch. 617, L. 1981, was a coordination provision for SB 432 (Ch. 274, L. 1981), which created the Department of Commerce, and SB 344 (not passed), which contained hard-rock mining impact provisions.

Severability: Section 15, Ch. 617, L. 1981, was a severability section.

2-15-1869. Developmental disabilities planning and advisory council.

Compiler's Comments

2003 Amendment: Chapter 478 in (1) at end inserted "codified at 42 U.S.C. 15001, et seq."; deleted former (2) that read: "(2) The council is composed of 29 members and includes the following:

(a) six persons with developmental disabilities;

(b) six persons who are:

(i) parents or guardians of a child with developmental disabilities; or

(ii) immediate relatives or guardians of adults with mentally impairing developmental disabilities who cannot advocate for themselves;

(c) six persons who may be:

(i) a person with a developmental disability;

(ii) a person who is the parent or guardian of a child with a developmental disability; or

(iii) a person who is an immediate relative or guardian of an adult with mentally impairing developmental disabilities who cannot self-advocate;

(d) a representative of the program of services provided under the authority of the Rehabilitation Act of 1973, 29 U.S.C. 701, et seq.;

(e) a representative of the program of services provided under the authority of the Older Americans Act of 1965, 42 U.S.C. 3001, et seq.;

(f) a representative of the program of services provided under the authority of Title V of the Social Security Act, 42 U.S.C. 701, et seq.;

(g) a representative of the programs of services provided under the authority of Title XIX of the Social Security Act, 42 U.S.C. 1396, et seq.;

(h) a representative of the program of services provided under the authority of the Individuals With Disabilities Education Act, 20 U.S.C. 1400, et seq.;

(i) one member of the state senate;

(j) one member of the state house of representatives;

(k) a representative of the university-affiliated or satellite program on developmental disabilities created pursuant to 42 U.S.C. 6061;

(l) a representative of the state protection and advocacy system created pursuant to 42 U.S.C. 6041; and

(m) two representatives of nongovernmental in-state entities that are concerned with the provision of services to persons with developmental disabilities"; inserted (2) requiring the council to include one member from the senate and one member from the house of representatives; in (3)(a) inserted sentence pertaining to 1-year terms of council members and deleted former language that read: "Nine of the members appointed to the council pursuant to subsections (2)(a) through (2)(c) must be appointed by the governor"; inserted (3)(b) containing an introductory clause referring to members to be appointed by the governor; in (3)(b)(i) at beginning inserted "not less than one-half of the members" and after "appointed" deleted "The remaining members serving on the council pursuant to subsections (2)(a) through (2)(c) must be appointed by the governor"; in (3)(b)(ii) at beginning inserted "the remaining members"; deleted former (4) and (5) that read: "(4) Members appointed to the council to fulfill representation requirements of subsections (2)(d) through (2)(m) serve 1-year terms.

(5) At least one member appointed to the council pursuant to subsections (2)(a) through (2)(c) must be either:

(a) a person with a developmental disability who resides or previously resided in an institution; or

(b) an immediate relative or guardian of a person with a developmental disability who resides or previously resided in an institution"; in (4) near beginning after "council" deleted "pursuant to subsections (2)(a) through (2)(c)"; in (5) in first sentence at beginning inserted exception clause and after "department" inserted "of commerce" and inserted second sentence providing that the department shall remain the designated agency if the council responsibilities are delegated to a nonprofit corporation; and made minor changes in style. Amendment effective July 1, 2003.

Preamble: The preamble attached to Ch. 478, L. 2003, provided: "WHEREAS, the Developmental Disabilities Assistance and Bill of Rights Act of 2000, Public Law 106-402, requires each state to have a state council on developmental disabilities and to designate a state agency to provide support and administrative services to the council without interference or placement of conditions upon the operations of the council; and

WHEREAS, the Developmental Disabilities Assistance and Bill of Rights Act of 2000 recognizes only one council in each state, which may take the form of a nonprofit corporation, and the state Developmental Disabilities Planning and Advisory Council is Montana's council; and

WHEREAS, the Developmental Disabilities Assistance and Bill of Rights Act of 2000 further states that each state is required to designate a state agency to administer the federal funds, but that the designated state agency may not provide or pay for services for individuals with developmental disabilities."

2001 Amendment: Chapter 154 in (1) at end substituted "the Developmental Disabilities Assistance and Bill of Rights Act of 2000, Public law 106-402" for "the provisions of this section";

in (2) near beginning substituted "composed of 29 members" for "composed of at least 23 but no more than 25 members"; inserted (2)(a), (2)(b), and (2)(c) requiring inclusion of members with developmental disabilities and parents, guardians, or immediate relatives of children or certain adults with developmental disabilities; deleted former (2)(e) that read: "(e) two recognized professionals, one each in the disciplines of medicine and law"; inserted (2)(f) requiring inclusion of representative of program of services provided under Title V of the Social Security Act; in (2)(g) at beginning substituted "a representative of the programs of services" for "a representative of the program of services for persons with developmental disabilities"; deleted former (2)(h) that read: "(h) 12 persons, each of whom has a developmental disability or who is an immediate family member or guardian of a person with a developmental disability"; in (2)(k) and (2)(l) at beginning substituted "a representative" for "the director" and at end deleted "or a designee of the director"; in (2)(m) at beginning substituted "two representatives of nongovernmental in-state entities that are concerned with the provision of services" for "a representative of a statewide developmental disabilities service provider organization whose member agencies provide direct services"; deleted former (3)(a) and (3)(b) that read: "(a) Each member who serves on the council pursuant to subsection (2)(a), (2)(b), (2)(c), or (2)(d) shall serve for a term concurrent with the respective term of the director of the agency that administers the program that the member represents. Upon the removal of an agency director from office, the representative's term as a member of the council is automatically terminated.

(b) Each member who serves on the council pursuant to subsection (2)(f) or (2)(g) must be appointed or reappointed annually by the governor"; in (3) at beginning of first sentence substituted "Nine of the members appointed to the council pursuant to subsections (2)(a) through (2)(c)" for "Eight of the members serving on the council pursuant to subsection (2)(e), (2)(h), (2)(k), or (3)(d)" and in second sentence near middle substituted "subsections (2)(a) through (2)(c)" for "subsection (2)(e), (2)(h), (2)(k), or (3)(d)"; inserted (4) pertaining to 1-year terms for certain members; inserted (5) providing for membership for a person with a developmental disability who resides or previously resided in an institution or an immediate relative or guardian of such a person; in (6) substituted "Members appointed to the council pursuant to subsections (2)(a) through (2)(c) may also be selected to represent the geographical regions and the racial and ethnic composition of the state, including American Indians" for "Representatives named to the council pursuant to this section, in addition to fulfilling the requirements listed in subsections (2)(a) through (2)(k), may also be selected to represent the following areas: psychology, social work, special education, and minority groups, including Native Americans with developmental disabilities. A minimum of one member of the council must represent each of these areas. In the event that the persons listed in subsections (2)(a) through (2)(k) do not represent all of the areas of psychology, social work, special education, and minority groups, including Native Americans with developmental disabilities, up to two representatives may be added to the membership of the council to represent not more than two of these groups"; and made minor changes in style. Amendment effective March 29, 2001.

1997 Amendments: Chapter 42 in (2)(i), after "U.S.C.", substituted "6061" for "6031"; and in (2)(j), after "U.S.C.", substituted "6041" for "6012". Amendment effective March 12, 1997.

Chapter 171 in (2)(h) increased from 7 to 12 the number of developmentally disabled members; deleted former (2)(i) that read: "one member of each of the five regional councils provided for in 53-20-207, each of whom has a developmental disability or who is an immediate family member or guardian of a person with a developmental disability"; adjusted subsection references; and made minor changes in style.

1995 Amendments — Composite Section: Chapter 418 in (2)(a) substituted "public health" for "health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (2) reduced number of Council members from "at least 24 but no more than 26" to "at least 23 but no more than 25"; in (2)(a) substituted current language relating to representative under authority of Rehabilitation Act of 1973 for "the directors of the departments of social and rehabilitation services, health and environmental sciences, corrections and human services, and family services or their designees"; inserted (2)(b) relating to representative under authority of Older Americans Act of 1965; inserted (2)(c) relating to representative under authority of Title XIX of the Social Security Act; in (2)(d) substituted current language relating to representative under authority of Individuals With Disabilities Education Act for "the superintendent of public instruction or a designee"; in (3)(a), at beginning of first sentence after "member", deleted "or his designee", substituted "subsection (2)(a), (2)(b), (2)(c), or (2)(d)" for "subsection (2)(a), (2)(b), (2)(h), or (2)(i)", and at end substituted "director of the agency that administers the program that the member represents" for "director or the

superintendent of public instruction, as the case may be" and in last sentence, at beginning, substituted "Upon the removal of an agency director from office, the representative's" for "Upon his removal from office, his or his designee's" and at end, after "terminated", deleted "and his successor in office or his successor's designee is automatically a member of the council"; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Because one chapter amended the reference to the Department of Health and Environmental Sciences and the other chapter deleted the reference, the codifier has reflected the deletion.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendments: The Code Commissioner changed reference to the Department of Institutions to reference to the Department of Corrections and Human Services, pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change whenever necessary in the Montana Code Annotated.

Chapter 443 in (2) increased number of Council members from 22 to no less than 24 and no more than 26; in (2)(a), near end after "institutions", inserted "and family services"; in (2)(c) substituted "two recognized professionals, one each in the disciplines of medicine and law" for "one recognized private professional in each discipline of medicine, law, psychology, social work, and special education"; in (2)(d) decreased number of members from Senate from two to one; in (2)(e) decreased number of members from House of Representatives from two to one; in (2)(f) substituted "seven persons each of whom has a developmental disability or who is an immediate family member or guardian of a person with a developmental disability" for "four consumers or representatives of consumers or consumer organizations in the discipline of developmental disabilities"; in (2)(g), after "who", substituted a person with a developmental disability or immediate family member or guardian of a person with developmental disability for a consumer or representative of consumers or consumer organizations in the discipline of developmental disabilities; inserted (2)(h) concerning membership of director of university-affiliated or satellite program on developmental disabilities; inserted (2)(i) concerning membership of director of state protection and advocacy system; inserted (2)(j) concerning membership of representative of statewide developmental disabilities service provider organization; in (3)(a), near beginning after "(2)(b)", inserted references to subsections (2)(h) and (2)(i); in (3)(c), near middle of first sentence after "(2)(g)", inserted references to subsections (2)(j) and (3)(d) and near beginning of second sentence, before "members", deleted "six" and after "council" inserted "pursuant to subsection (2)(c), (2)(f), (2)(g), (2)(j), or (3)(d)"; inserted (3)(d) concerning representation on Council of areas of psychology, social work, special education, and minority groups; and made minor changes in style.

Attorney General's Opinions

Authority of Developmental Disabilities Planning and Advisory Council to Set Staff Salaries: In accordance with the more recent and specific language of 53-20-206 and the exclusionary language of this section, the Developmental Disabilities Planning and Advisory Council has authority to set salaries of the Council's staff without reference to the state personnel classification plan established in 2-18-201. 44 A.G. Op. 1 (1991).

2-15-1870. State developmental disabilities planning and advisory council.

Compiler's Comments

Preamble: The preamble attached to Ch. 478, L. 2003, provided: "WHEREAS, the Developmental Disabilities Assistance and Bill of Rights Act of 2000, Public Law 106-402, requires each state to have a state council on developmental disabilities and to designate a state agency to provide support and administrative services to the council without interference or placement of conditions upon the operations of the council; and

WHEREAS, the Developmental Disabilities Assistance and Bill of Rights Act of 2000 recognizes only one council in each state, which may take the form of a nonprofit corporation, and the state Developmental Disabilities Planning and Advisory Council is Montana's council; and

WHEREAS, the Developmental Disabilities Assistance and Bill of Rights Act of 2000 further states that each state is required to designate a state agency to administer the federal funds, but that the designated state agency may not provide or pay for services for individuals with developmental disabilities."

Effective Date: Section 6, Ch. 478, L. 2003, provided that this section is effective July 1, 2003.

Part 19
Insurance and Investment

2-15-1901. Office of securities commissioner.

Compiler's Comments

Name Change: Section 8, Ch. 351, L. 1979, provided: "Whenever the term "investment commissioner", relating to the investment commissioner, state auditor's office, created by 2-15-1901, appears in the MCA, it means "securities commissioner". The code commissioner is empowered and instructed to change all such references to "investment commissioner" to "securities commissioner"."

Administrative Rules

Title 6, chapter 10, ARM Securities Department.

2-15-1902. Insurance department.

Administrative Rules

Title 6, chapter 6, ARM Insurance department.

Collateral References

Insurance *key* 10; States *key* 45.

44 C.J.S. Insurance §§36 through 38, 51; 81A C.J.S. States §§133, 134, 136 through 140.

2-15-1903. Commissioner of insurance designated.

Case Notes

State Auditor as Member of Hail Board — No Conflict of Interest: The State Auditor as ex officio Commissioner of Insurance is required to approve the form of all hail insurance policies issued in Montana and at the same time is required by law to sit as a member of the Board of Hail Insurance (Hail Board). The State Auditor is not compensated for service on the Hail Board, nor is there any compensation from any source for such duties. Thus, the Supreme Court held that the State Auditor as ex officio Commissioner of Insurance is not financially interested in the Hail Board within the meaning of 2-2-102. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

State Auditor as Member of Hail Board — Not Dual Office Holding: The State Auditor is a constitutional office with "such duties as are provided by law" (Art. VI, sec. 4, Mont. Const.). One of these prescribed duties is being a member of the Board of Hail Insurance established under 2-15-3003. The State Auditor does not hold dual offices by carrying out legislatively imposed duties. The only limitation on the Legislature in prescribing such duties is that the duties may not pertain to the legislative or judicial branch of government. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

Collateral References

States *key* 10.

81A C.J.S. States §134.

43 Am. Jur. 2d Insurance §51, et seq.

Part 20
Department of Justice

2-15-2001. Department of justice — head.

Compiler's Comments

Executive Reorganization Implementation: Title 82A, ch. 12, R.C.M. 1947 (now Title 2, ch. 15, part 20), was implemented by Executive Reorganization Order 3-72, dated Aug. 30, 1972, effective Sept. 1, 1972.

Administrative Rules

Title 23, ARM Department of Justice.

2-15-2005. State fire prevention and investigation program — advisory council.

Compiler's Comments

1991 Amendment: In (1), near beginning after "fire", substituted "prevention and investigation program" for "marshal"; in (2), near beginning after "appointed", substituted "to administer the fire prevention and investigation program shall represent the state of Montana

as the state fire marshal and must be a person qualified by experience, training, and high professional competence in matters of fire service and safety" for "state fire marshal shall have:

(a) at least 10 years of progressively responsible experience in fire protection;

(b) a 2-year associate degree in fire protection engineering from a recognized institution of higher education and 2 years' experience in fire protection; or

(c) a degree from a recognized institution of higher education in fire protection engineering or fire protection technology"; in (3), after "fire", substituted "prevention and investigation" for "marshal"; and made minor changes in style. Amendment effective April 29, 1991.

1985 Amendment: In (1) substituted "state fire marshal" for "fire marshal bureau"; and deleted former (2) that read: "The chief of the fire marshal bureau shall be appointed by the attorney general and shall serve at his pleasure. The chief of the fire marshal bureau is the state fire marshal."

Administrative Rules

Title 23, chapter 7, ARM State Fire Prevention and Investigation Bureau.

2-15-2006. Board of crime control — composition — allocation.

Administrative Rules

Title 23, chapter 14, ARM Board of Crime Control.

2-15-2012. Intent.

Compiler's Comments

Effective Date: Section 7, Ch. 581, L. 2001, provided: "[This act] is effective July 1, 2001."

2-15-2013. Office of restorative justice.

Compiler's Comments

Effective Date: Section 7, Ch. 581, L. 2001, provided: "[This act] is effective July 1, 2001."

2-15-2014. Restorative justice fund created — source of funding — use of fund.

Compiler's Comments

Effective Date: Section 7, Ch. 581, L. 2001, provided: "[This act] is effective July 1, 2001."

2-15-2015. Workers' compensation fraud investigation and prosecution office.

Compiler's Comments

1997 Amendment: Chapter 276 in second sentence of introduction and at end of (1), after "fund", inserted "or the department of labor and industry on behalf of the uninsured employers' fund"; at beginning of (1) substituted "one or more investigators" for "four persons"; at beginning of (2) substituted "one or more attorneys" for "one person"; inserted (3) requiring submission of one proposed biennial budget for the Workers' Compensation Fraud Office to Legislature and outlining basis of proposed budget; and made minor changes in style. Amendment effective July 1, 1997.

Name Change — Directions to Code Commissioner: Section 14, Ch. 630, L. 1993, provided: "Wherever the name "state compensation mutual insurance fund", meaning the fund established in 39-71-2313, appears in the Montana Code Annotated or in legislation enacted by the 1993 legislature, the code commissioner is directed to change the name to "state compensation insurance fund"." The phrase appeared in this section and was changed by the Code Commissioner as directed.

Effective Date: Section 9, Ch. 296, L. 1993, provided: "[This act] is effective July 1, 1993."

2-15-2016. Office of victims services.

Compiler's Comments

Effective Date: Section 24, Ch. 124, L. 2001, provided: "[This act] is effective July 1, 2001."

2-15-2017. Domestic violence fatality review commission — confidentiality of meetings and records — criminal liability for unauthorized disclosure — report to legislature.

Compiler's Comments

Effective Date: Section 3, Ch. 81, L. 2003, provided that this section is effective on passage and approval. Approved March 20, 2003.

Termination: Section 4, Ch. 81, L. 2003, provided: "[This act] terminates December 31, 2006."

2-15-2021. Gaming advisory council — allocation — composition — compensation — biennial report.

Compiler's Comments

1993 Amendments: Chapter 349 deleted second sentence of (8)(b) that read: "The department and council shall, as provided in 5-11-210, submit the two most recent department and council reports to the legislature"; and made minor changes in style.

Chapter 626 in (4), after "term of office", deleted "except that three of the first appointed original members shall serve a 1-year term, three (including both legislative members) shall serve a 2-year term, and three shall serve a 3-year term"; in (6), at beginning of first sentence, substituted "Members" for "Legislative members" and after "are entitled to" deleted "compensation and expenses, as provided in 5-2-302, while the council is meeting. The remaining members are entitled to" and inserted second sentence authorizing payment to members who are not full-time salaried officers or employees; and made minor changes in style.

1991 Amendments: Chapter 112 in second sentence of (8)(b), after "shall", inserted reference to 5-11-210 and after "reports to" deleted "each of the next two regular sessions of". Amendment effective March 20, 1991.

Chapter 647 in (8)(a) and (8)(b) substituted "biennial report" for "annual report"; in (8)(b), in first sentence, substituted "report on gambling in the state that the department submits that year" for "annual department report on gambling in the state"; and made minor changes in style. Amendment effective July 1, 1991.

Effective Date: Section 75, Ch. 642, L. 1989, provided that this section is effective May 5, 1989.

Part 21
Environmental Advisory Boards

2-15-2105. Water and wastewater operators' advisory council.

Compiler's Comments

1995 Amendment: Chapter 418 in (2)(a), (2)(b), (2)(e), and (3) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Special Session Amendment: Chapter 16 in (2)(e) substituted language concerning a member of the staff of the Department of Health and Environmental Sciences appointed by the Director for language concerning the administrator of the Division of Environmental Sciences of the Department of Health and Environmental Sciences or a member of the staff appointed by the administrator; and made minor changes in style. Amendment effective December 23, 1993.

1983 Amendment: In (1), changed name of "board of water and wastewater operators" to "water and wastewater operators' advisory council"; near beginning of (2), substituted "council" for "board"; deleted former (4), which read: "The board is allocated to the department for administrative purposes only as prescribed in 2-15-121."

Administrative Rules

Title 16, chapter 18, ARM Water treatment plants and operators.

2-15-2107. Water pollution control advisory council.

Compiler's Comments

2003 Amendment: Chapter 488 in (2) clarified that all members are appointed by the governor, deleted from council membership the director of fish, wildlife, and parks, the administrator of the water resources division of the department of natural resources and conservation, the director of agriculture, a livestock feeder, a representative of municipal government, a representative of an organization concerned with fishing for sport, a representative from labor, and a representative of an organization concerned with water recreation, and inserted as members an irrigated agriculture representative, a production agriculture representative, a person serving as public works director, director of public utilities, wastewater or public works superintendent, plant manager, or operator in charge of a publicly owned treatment works, a conservation organization representative, a realtor or developer representative, a licensed professional engineer with experience in sanitary engineering, a fisheries biologist, and a member of the public; and made minor changes in style. Amendment effective April 24, 2003.

2-15-2108. Petroleum tank release compensation board.

Compiler's Comments

1999 Amendment: Chapter 259 substituted (2)(a) concerning representative of financial or banking industry for former text that read: "the director of the department of environmental quality or the director's representative"; and substituted (2)(b) concerning attorney with experience in environmental law for former text that read: "a representative of the state fire prevention and investigation program of the department of justice". Amendment effective July 1, 1999.

1995 Amendments — Composite Section: Chapter 55 in (2)(c), at end, inserted "or a representative of the petroleum release remediation consultant industry"; and made minor changes in style. Amendment effective February 9, 1995.

Chapter 418 in (2)(a) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: In (2)(b) substituted "a representative of the state fire prevention and investigation program of the department of justice" for "the state fire marshal or his representative". Amendment effective April 29, 1991.

Effective Date: Section 16, Ch. 528, L. 1989, provided that this section is effective April 13, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 528, L. 1989, provided: "(1) It is the intent of the legislature that the petroleum tank release compensation board enact rules that:

(a) govern submission of claims by owners or operators to the department and board;

(b) provide procedures for determining owners or operators who are eligible for reimbursement and determining the validity of claims;

(c) provide procedures for the review and approval of corrective action plans;

(d) provide procedures for conducting board meetings, hearings, and other business that are necessary for the implementation of [sections 1 through 7 and 9 through 12] [Title 75, chapter 11, part 3]; and

(e) are necessary for the administration of [sections 1 through 7 and 9 through 12] [Title 75, chapter 11, part 3], provided that the rules do not alter or conflict with the eligibility requirements and procedures provided in [sections 1 through 7 and 9 through 12] [Title 75, chapter 11, part 3] or with the laws, rules, or procedures of the federal government or the department of health and environmental sciences [now department of environmental quality] that govern releases from petroleum storage tanks.

(2) The department of health and environmental sciences [now department of environmental quality] may adopt rules necessary to administer its responsibilities under [sections 1 through 7 and 9 through 12] [Title 75, chapter 11, part 3], including requirements for approval of corrective action plans.

(3) The department of revenue shall adopt rules governing the collection of the petroleum storage tank cleanup fee provided for in [section 7] [75-11-314]. The rules may include reporting and recordkeeping requirements, method and timing of payment, examination of records, and other provisions necessary to ensure that fees are properly and efficiently collected. The rules must be generally consistent with procedures governing the collection of the gasoline license tax provided for in Title 15, chapter 70, so that gasoline distributors experience minimum additional requirements or responsibilities."

Initial Appointments to Board: Section 14, Ch. 528, L. 1989, provided: "(1) Notwithstanding [section 8] [2-15-2108], the members of the petroleum tank release compensation board first appointed by the governor shall serve for terms to be designated by the governor and to expire on June 30 of the respective year. The terms of two members must expire in 1990, two in 1991, and three in 1992.

(2) The governor shall make the initial appointments to the board no later than June 30, 1989." Effective April 13, 1989.

Severability: Section 15, Ch. 528, L. 1989, was a severability clause.

2-15-2110. Small business compliance assistance advisory council.

Compiler's Comments

1995 Amendment: Chapter 418 in (2)(c) substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Effective Date: Section 24(1), Ch. 502, L. 1993, provided that this section is effective on passage and approval. Approved April 24, 1993.

Part 22
Department of Public Health and Human Services

2-15-2201. Department of public health and human services — head.

Compiler's Comments

1995 Amendment: Chapter 546 substituted "department of public health and human services" for "department of social and rehabilitation services" and substituted "director of public health and human services" for "director of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Executive Reorganization Implementation: Title 82A, ch. 19, R.C.M. 1947 (now Title 2, ch. 15, part 22), was implemented by Executive Reorganization Order 6-71, dated Oct. 28, 1971, effective Nov. 1, 1971.

Administrative Rules

Title 46, ARM Department of Social and Rehabilitation Services.

2-15-2203. Board of public assistance — allocation — quasi-judicial.

Compiler's Comments

1995 Amendment: Chapter 546 at end of (1) substituted "board of public assistance" for "board of social and rehabilitation appeals"; in (3) substituted "department of public health and human services" for "department of social and rehabilitation services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1987 Amendment: Substituted exception at end of (3) for "as follows:

(a) the director of the department, who shall act as chairman of the board. The director does not have a term on the board as a board member but shall serve at the pleasure of the governor.

(b) two members of the general public".

2-15-2205. Division of visual services.

Compiler's Comments

1997 Amendment: Chapter 472 at end substituted "persons with low vision" for "visually handicapped persons".

1995 Amendment: Chapter 546 in two places substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1989 Amendment: In second sentence, after "in accordance with", deleted reference to merit system.

2-15-2206. Office of aging.

Compiler's Comments

1995 Amendment: Chapter 546 in two places substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 336 at end of (1) and near end of (2) substituted "department of family services" for "governor's office"; deleted (3) and (4) that read: "(3) The coordinator of aging must be appointed by the governor after consultation with the advisory council and shall serve at the pleasure of the governor.

(4) The advisory council on aging shall act as the advisory board to the coordinator on aging." Amendment effective July 1, 1993.

1985 Amendment: In (2) in third sentence, substituted "staggered 3-year terms and until their successors are appointed" for "for 3-year terms".

2-15-2212. Committee on telecommunications access services for persons with disabilities — composition — allocation.

Compiler's Comments

2001 Amendment: Chapter 313 in (2) increased number of members to 13 from 12; inserted (2)(i) relating to the member from the department of administration; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendments — Composite Section: Chapter 396 in (1) and (2), in three places, substituted "disabled" for "handicapped"; in (1) inserted "Montana" and inserted "access"; in (2) substituted "12 members" for "11 members"; inserted (2)(h) adding licensed audiologist to Committee; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 472 throughout section substituted reference to persons with disabilities for reference to handicapped; and made minor changes in style.

Chapter 396 substituted "disabled" for "handicapped", and Ch. 472 substituted "persons with disabilities" for "handicapped". The codifier chose the latter change.

1995 Amendment: Chapter 546 in (2)(c) and (3) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Effective Date: Section 16, Ch. 669, L. 1989, provided that this section is effective July 1, 1989.

2-15-2214. Montana children's trust fund board.

Compiler's Comments

1995 Amendment: Chapter 546 in (2) substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: In (2) inserted last sentence relating to employment of staff.

1987 Amendment: In (2) substituted "department of family services" for "department of social and rehabilitation services".

Termination Provision Repealed: Section 2, Ch. 645, L. 1987, repealed sec. 13, Ch. 610, L. 1985, which would have terminated this section January 1, 1990.

2-15-2216. Trauma care committee.

Compiler's Comments

Code Commissioner Change: Pursuant to sec. 3, Ch. 546, L. 1995, the Code Commissioner substituted Department of Public Health and Human Services for Department of Health and Environmental Sciences.

Codification Explanation: The codification instruction directed the Code Commissioner to codify this section in Title 2, ch. 15, part 21. Because the entity is now part of the Department of Public Health and Human Services, the Code Commissioner has codified the section in this part.

2-15-2217. Traumatic brain injury advisory council.

Compiler's Comments

Effective Date: Section 5, Ch. 449, L. 2003, provided: "[This act] is effective January 1, 2004."

2-15-2218. Traumatic brain injury account.

Compiler's Comments

Effective Date: Section 5, Ch. 449, L. 2003, provided: "[This act] is effective January 1, 2004."

2-15-2221. Definitions.

Compiler's Comments

Effective Date: Section 8, Ch. 185, L. 2003, provided: "[This act] is effective July 1, 2003."

2-15-2222. Policy — performance measures.

Compiler's Comments

Effective Date: Section 8, Ch. 185, L. 2003, provided: "[This act] is effective July 1, 2003."

2-15-2223. Criteria for measurement system.

Compiler's Comments

Effective Date: Section 8, Ch. 185, L. 2003, provided: "[This act] is effective July 1, 2003."

2-15-2224. System requirements — input from legislative audit division.

Compiler's Comments

Effective Date: Section 8, Ch. 185, L. 2003, provided: "[This act] is effective July 1, 2003."

2-15-2225. Legislative use of performance measures.

Compiler's Comments

Effective Date: Section 8, Ch. 185, L. 2003, provided: "[This act] is effective July 1, 2003."

2-15-2226. Department and agency use of performance measures.

Compiler's Comments

Effective Date: Section 8, Ch. 185, L. 2003, provided: "[This act] is effective July 1, 2003."

Part 23
Department of Corrections

2-15-2301. Department of corrections — head.

Compiler's Comments

1995 Amendment: Chapter 546 substituted "department of corrections" for "department of corrections and human services" and substituted "director of corrections" for "director of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: In two places substituted "corrections and human services" for "institutions". Amendment effective July 1, 1991.

Name Change — Instructions to Code Commissioner: Section 1, Ch. 262, L. 1991, provided: "(1) The names of the department and the director of institutions are changed to the department and the director of corrections and human services.

(2) Wherever the terms "department of institutions" or "department" (of institutions) and "director of institutions" or "director" (of institutions) appear in the Montana Code Annotated, the code commissioner shall change the terms to the "department of corrections and human services" or "department" (of corrections and human services) and "director of corrections and human services" or "director" (of corrections and human services), as appropriate, and conform internal references and grammar to the changes."

Executive Reorganization Implementation: Title 82A, ch. 8, R.C.M. 1947 (now Title 2, ch. 15, part 23), was implemented by Executive Reorganization Order 13-71, dated Dec. 16, 1971, effective Dec. 17, 1971.

Administrative Rules

Title 20, ARM Department of Corrections.

Case Notes

Section 1983 Action for Damages and Declaratory and Injunctive Relief — State Agency Held Not a "Person" — Individual or Official Capacity of Individual Defendants Determined — Test for Qualified Immunity in Damages Action — Remington Overruled: Orozco, an inmate in the Montana State Prison, brought a civil action for damages pursuant to 42 U.S.C. 1983 against the Department of Corrections and Human Services (now Department of Corrections) and several Department employees for the denial of his due process rights in connection with the denial of his ability to earn good time credits. The Department moved for dismissal for failure to state a claim, based upon 11th amendment immunity. As to the Department, the Supreme Court held, citing Will v. Mich. Dept. of St. Police, 491 US 58 (1989), that because the Department has been created as part of the Executive Branch of state government, suing the Department is the same as suing the State of Montana, which is not a "person" for the purposes of a section 1983 action. In response to Orozco's argument that 2-9-305 required him to join the Department as a party, the Supreme Court noted that there is nothing in the text of that section that requires that the state be joined as a party; the section provides only for the tender of a defense and payment of damages by the state if a state employee is sued. Therefore, the Supreme Court held that the District Court correctly dismissed the action for damages against the Department. As to the individual defendants, the Supreme Court held that state employees acting in their official capacities are likewise not "persons" for the purposes of a section 1983 action but that state employees acting in

their individual capacities are "persons" within the meaning of section 1983. The Supreme Court noted that Orozco had not clearly indicated the capacities in which the individual defendants were being sued, and so it looked to other provisions of the complaint and to U.S. Supreme Court decisions in order to determine Orozco's intent and held that Orozco intended to sue the individual defendants in their individual capacities. For this reason, the Supreme Court held that the District Court erred in holding that the individually named defendants were not "persons" under 42 U.S.C. 1983 for the purposes of the action for damages. The Supreme Court also held that in enacting 53-30-105 (now repealed) mandating rules for the accrual of good time, the state had created a right to good time. The Supreme Court also held that the immunity analysis used in Remington v. Dept. of Corrections and Human Services, 255 M 480, 844 P2d 50 (1992), was incorrect in light of the later decision of the U.S. Supreme Court in Sandin v. Connor, 515 US 472 (1995), and overruled Remington, but, on the basis of the Sandin immunity analysis, determined that Orozco's liberty interest in the award of good time credits was not clearly established on the date of Orozco's hearing to reclassify him as a maximum security prisoner who was no longer entitled to earn good time credits. For this reason, the Supreme Court held that the Department employees who were sued in their individual capacities were to be given qualified immunity for the purposes of the action for damages but that the District Court improperly dismissed the action for declaratory and injunctive relief and remanded the case to the District Court for a determination of what process was due Orozco before his opportunity to earn good time was revoked and whether he received that process. Orozco v. Day, 281 M 341, 934 P2d 1009, 54 St. Rep. 200 (1997).

2-15-2302. Board of pardons and parole — composition — allocation — quasi-judicial.

Compiler's Comments

2003 Amendment: Chapter 559 in (2) in first sentence increased number of auxiliary members from two to four and substituted "each of whom must have knowledge of American Indian culture and problems gained through training as required by rules adopted by the board" for "at least one of whom must have particular knowledge of Indian culture and problems"; in (4) in second sentence increased number of auxiliary members appointed by governor in January of first year of governor's term from one to two and required appointment of one auxiliary member in January of second year of governor's term; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 13, Ch. 559, L. 2003, was a saving clause.

Severability: Section 14, Ch. 559, L. 2003, was a severability clause.

1997 Amendment: (Temporary version) Chapter 420 in (2) increased auxiliary Board members from one to two; substituted (4) concerning provision for the appointment of specified members for terms expiring in January of the years 2001, 2002, and 2003 for "One member and the auxiliary member shall serve terms concurrent with the governor. The remaining members shall serve staggered 4-year terms"; inserted (5) relating to terms and filling vacancies; inserted (8) providing that 2-15-124(2) does not apply to the Board; and made minor changes in style. Amendment effective April 29, 1997, and terminates December 31, 2000.

(Version effective January 1, 2001) In (4) substituted provision for appointment of Board members on staggered 4-year terms for temporary language that provided for expiration of terms on specified dates. Amendment effective January 1, 2001.

Retroactive Applicability: Section 5, Ch. 420, L. 1997, provided: "The terms of members and auxiliary members appointed pursuant to [section 1] [temporary version of 2-15-2302] apply retroactively, within the meaning of 1-2-109, to January 1, 1997."

1995 Amendment: Chapter 546 at end of (1), after "board of pardons", inserted "and parole"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1989 Amendment — Application and Implementation: Inserted (4) providing for staggered terms; and in (6) inserted last phrase relating to staggered terms. Amendment effective March 18, 1989. Section 2, Ch. 154, L. 1989, implements the staggering of terms of members of the Board and applies to Board members appointed after January 2, 1988. Section 2, Ch. 154, L. 1989, was not codified because it is temporary in nature. Effective March 18, 1989.

Administrative Rules

Title 20, chapter 25, ARM Board of Pardons and Parole.

Case Notes

Requirement That Parole Board Member With Knowledge of Native American Affairs Participate in Proceedings Regarding Native Americans: George, a Native American, contended

that he was entitled to have the member of the Board of Pardons and Parole with knowledge in Native American affairs (see 2003 amendment) participate in his parole review. The state contended otherwise, pursuant to a plain reading of this section, and asserted that had the Legislature intended to require participation by the particular Board member with knowledge in Native American affairs, it could have stated so directly or at least have required that the member with that knowledge be appointed as a regular Board member. The Supreme Court agreed with George. Cognizant of the role of the judge to examine the substance of statutes without inserting what has been omitted or omitting what has been inserted, the court agreed with the state that at least at first blush, this section does not appear to require that the member of the Board of Pardons and Parole with knowledge in Native American affairs participate in parole applications by Native Americans. However, the court could think of no other plausible reason for requiring such a member on the Board, so the court ruled that the parole Board member with knowledge in Native American affairs is required to participate in parole applications by Native Americans and remanded George's case for de novo review with the full participation by that Board member. George v. Bd. of Pardons, 2001 MT 163, 306 M 115, 30 P3d 1065 (2001).

Attorney General's Opinions

Final Authority in Department of Institutions (now Department of Corrections): Although the Board of Pardons (now Board of Pardons and Parole) has the authority to release prisoners on furlough, the Department of Institutions (now Department of Corrections) has final authority to approve or disapprove applications of prisoners for release on work furlough. 36 A.G. Op. 19 (1975).

Part 25
Department of Transportation

2-15-2501. Department of transportation — head.

Compiler's Comments

1991 Amendment: Substituted "department of transportation" for "department of highways" and "director of transportation" for "director of highways" and inserted final sentence outlining required Divisions of Department. Amendment effective July 1, 1991.

Executive Reorganization Implementation: Title 82A, ch. 7, R.C.M. 1947 (now Title 2, ch. 15, part 25), was implemented by Executive Reorganization Order 12-71, dated Dec. 15, 1971, effective Dec. 16, 1971.

Administrative Rules

Title 18, ARM Department of Transportation.

2-15-2502. Transportation commission.

Compiler's Comments

1999 Amendment: Chapter 587 inserted (2) requiring that one member of transportation commission have specific knowledge of Indian culture and tribal transportation needs; and made minor changes in style. Amendment effective May 10, 1999.

Applicability: Section 4, Ch. 587, L. 1999, provided: "[This act] applies to the next appointment period for transportation commission membership."

1995 Amendment: Chapter 75 at beginning of (1) substituted "There is a transportation commission composed" for "The highway commission consists"; at beginning of (9) substituted "director of transportation or the director's designee" for "administrator of the highway division" and before "commission" deleted "highway"; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 87 inserted (8) granting the Commission rulemaking authority; and made minor changes in style.

1991 Amendment: In (1), before "resident", deleted "bona fide"; in (6), after "department", inserted "of transportation"; inserted (8) relating to administrator of Highway Division as liaison; and made minor changes in style. Amendment effective July 1, 1991.

1983 Amendment: In (1)(a), deleted "Lewis and Clark, Jefferson, Broadwater" and inserted "Powell"; in (1)(b), deleted "Powell", "Wheatland", and "Sweetgrass" and inserted "Broadwater, Jefferson"; in (1)(c), deleted "Judith Basin" and inserted "Lewis and Clark"; in (1)(d), deleted "Fergus, Petroleum" and inserted "Carter, Powder River, Fallon, Custer, Rosebud"; in (1)(e), deleted "Rosebud" and "Custer, Powder River, Carter, Fallon" and inserted "Judith Basin, Fergus, Petroleum" and "Wheatland, Sweetgrass".

Administrative Rules

Title 18, ARM Department of Transportation.

Case Notes

Employment of Outside Counsel: Resolution adopted by Highway Commission (now Transportation Commission) authorizing chief counsel thereof "to employ and engage such outside fee counsel as he, in his discretion shall deem reasonable and necessary, to represent the Montana Highway Commission (now Transportation Commission) in whatever type of case arises" was proper and did not infringe on any powers, duties, or responsibilities of Attorney General. Woodahl v. St. Highway Comm'n, 155 M 32, 465 P2d 818 (1970).

2-15-2505. Purpose.

Compiler's Comments

Severability: Section 16, Ch. 512, L. 1991, was a severability clause.

Effective Date: Section 18, Ch. 512, L. 1991, provided that this section is effective July 1, 1991.

2-15-2506. Board of aeronautics — qualification — allocation — quasi-judicial.

Compiler's Comments

1993 Amendment: Chapter 394 at end of (1)(d), after "association", inserted "or the Montana league of cities and towns"; deleted former (1)(g) providing for representation by one member of the Montana League of Cities and Towns; and inserted (1)(h) providing for representation by one member of the Association of Montana Aerial Applicators.

1991 Amendment: In (3), after "department", inserted "of transportation"; and inserted (5) relating to administrator of Aeronautics Division as liaison. Amendment effective July 1, 1991.

1983 Amendment: In first sentence of (2), increased board membership from seven to nine; in (2)(c) substituted "one representative of the Montana airport management association" for "one member of the municipal league"; in (2)(d) inserted "Montana"; inserted (2)(g) providing for a member from the League of Cities and Towns; inserted (2)(h) providing for a public member; and in (2)(i) twice inserted "fixed" before "base operator".

Administrative Rules

Title 18, chapter 13, ARM Board of Aeronautics.

2-15-2507. Highway traffic safety program.

Compiler's Comments

1995 Amendment: Chapter 538 at beginning inserted exception clause, after "61-2-102" substituted "must be administered by" for "is attached to", and at end substituted "transportation" for "justice for administrative purposes only as prescribed in 2-15-121. However, the program may hire its own personnel, and 2-15-121(2)(d) does not apply." Amendment effective July 1, 1995.

1985 Amendment: Deleted brackets around "highway traffic safety", "provided for in 61-2-102", and "to the department of justice", which had been added by the Code Commissioner in 1981 codification to reflect the context in which the subsection was enacted.

Transfer of Function: Section 8(1), Ch. 274, L. 1981, provided: "The functions of the department of community affairs of administering the highway traffic safety program under 61-2-102 and 61-2-103 and of assisting in delivery of emergency medical services under 50-6-104 and 50-6-203 are transferred to the department of justice."

Part 26
Department of Public Service Regulation

2-15-2601. Department of public service regulation — head.

Compiler's Comments

Executive Reorganization Implementation: Title 82A, ch. 17, R.C.M. 1947 (now Title 2, ch. 15, part 26), was implemented by Executive Reorganization Order 5-71, dated Sept. 9, 1971, effective Sept. 9, 1971.

Administrative Rules

Title 38, ARM Department of Public Service Regulation.

2-15-2602. Public service commission — composition.

Administrative Rules

Title 38, ARM Department of Public Service Regulation.

Part 30
Department of Agriculture

2-15-3001. Department of agriculture — head.

Compiler's Comments

Executive Reorganization Implementation: Title 82A, ch. 3, R.C.M. 1947 (now Title 2, ch. 15, part 30), was implemented by Executive Reorganization Order 10-71, dated Dec. 9, 1971, effective Dec. 9, 1971.

Administrative Rules

Title 4, ARM Department of Agriculture.

2-15-3002. Montana wheat and barley committee — composition — allocation.

Compiler's Comments

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

1991 Amendment: In (6) inserted reference to Montana Women Involved in Farm Economics and substituted "submitted not more than 90 days but not less than 30 days" for "submitted within 91 days"; in (7) deleted last sentence that read: "The ex officio representative of the grain trade shall serve at the pleasure of the committee"; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: In (7) reduced term of Committee members from 5 years to 3 years and prohibited member from serving more than three consecutive 3-year terms. Amendment effective March 21, 1989.

1987 Amendment: Changed name to Wheat and Barley Committee from Wheat Research and Marketing Committee.

Administrative Rules

Title 4, chapter 9, ARM Wheat Research and Marketing Committee.

Attorney General's Opinions

Appropriations — Legislative Control Over Marketing Assessment Funds: Although the control of the Legislature over appropriations to state agencies is based upon broad constitutional provisions, certain money may either be exempt from the appropriation process or the purposes for which that money may be appropriated may be limited by statute. Thus, the Legislature may control appropriations from the Wheat Marketing and Research Account (now the Wheat and Barley Account), but those appropriations are subject to the statutorily stated purposes of the Account. Any attempt by the Legislature in an appropriation bill to alter the purposes for which appropriations from the Account are made is subject to the constitutional restriction that the purpose of legislation must be clearly stated in the title of the bill. 39 A.G. Op. 3 (1981).

Appropriation of Specially Assessed Funds — Due Process of Law: The Legislature may appropriate wheat research and marketing funds, which are funds derived from a special tax on the growers of wheat and barley, to the Centralized Services Division of the Department of Agriculture in order to pay for administrative services used by the Wheat Research and Marketing Committee (now the Wheat and Barley Committee) because the Committee is required by law to use the services of the Division and that requirement implies a duty to pay for the services. Because the money appropriated is taxed to the grower for a specific purpose, the amount appropriated to the Centralized Services Division must be for a purpose substantially related to the purposes of the tax. 39 A.G. Op. 3 (1981).

2-15-3003. Board of hail insurance.

Compiler's Comments

1983 Amendment: At end of (1), after "appointed by the governor" substituted "and confirmed by the senate" for "from names submitted by farmer organizations having a general membership throughout the state"; and in (6), inserted last two sentences providing the Department may charge the Board for services commensurate with costs.

Administrative Rules

Title 4, chapter 4, ARM Board of Hail Insurance.

Case Notes

State Auditor as Member of Hail Board — No Conflict of Interest: The State Auditor as ex officio Commissioner of Insurance is required to approve the form of all hail insurance policies issued in Montana and at the same time is required by law to sit as a member of the Board of Hail Insurance (Hail Board). The State Auditor is not compensated for service on the Hail Board, nor is there any compensation from any source for such duties. Thus, the Supreme Court held that the State Auditor as ex officio Commissioner of Insurance is not financially interested in the Hail Board within the meaning of 2-2-102. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

State Auditor as Member of Hail Board — Not Dual Office Holding: The State Auditor is a constitutional office with "such duties as are provided by law" (Art. VI, sec. 4, Mont. Const.). One of these prescribed duties is being a member of the Board of Hail Insurance established under 2-15-3003. The State Auditor does not hold dual offices by carrying out legislatively imposed duties. The only limitation on the Legislature in prescribing such duties is that the duties may not pertain to the legislative or judicial branch of government. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

2-15-3004. Montana alfalfa seed committee — composition — allocation.

Compiler's Comments

1997 Amendment: Chapter 4 in (1), in introductory clause, substituted "eight" for "seven"; inserted (1)(a) and (1)(b) regarding appointment and compensation of Committee members; at end of (1)(c) deleted "shall be an ex officio, nonvoting member of the committee"; deleted former (2) that read: "(2) Each of the appointed members shall be a citizen of Montana actively engaged in the growing of alfalfa seed within the state or deriving a substantial portion of his income from handling, packing, shipping, buying, or selling alfalfa seed or acting as a broker or factor of alfalfa seed. These qualifications of members must continue during their terms of office"; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 4, L. 1997, provided: "WHEREAS, the Legislature finds that the alfalfa seed industry and the alfalfa leaf-cutting bee industry are closely related; and

WHEREAS, the Legislature also finds that it is in the best interest of the people of the State of Montana to promote economy in government regulation of industry; and

WHEREAS, it is the intent of the Legislature to combine with the Montana Alfalfa Seed Committee the duties, responsibilities, and representation of the Alfalfa Leaf-Cutting Bee Committee and to grant the Montana Alfalfa Seed Committee the authority to administer the Alfalfa Leaf-Cutting Bee Management Act and the Alfalfa Seed Industry Act."

Transition: Section 4, Ch. 4, L. 1997, provided: "[This act] merges the alfalfa leaf-cutting bee committee into the Montana alfalfa seed committee and revises the membership of the Montana alfalfa seed committee to accommodate the merger. Because there are now incumbents holding positions on both committees, the legislature intends for the governor to make membership adjustments when necessary on and after [the effective date of this act] [effective July 1, 1997], in accordance with 2-15-3004 as amended by [this act]."

2-15-3006. Montana mint committee — composition — allocation.

Compiler's Comments

1997 Amendment: Chapter 102 in (1), in first sentence, increased committee from five to six members and in second sentence increased gubernatorial appointees from four to five; in (2), in first sentence, increased mint-growing members from four to five and at end inserted "and one of the appointed members must be a member of or otherwise represent the mint industry research council"; and in (4)(c) increased members from one to two.

Effective Date: Section 20, Ch. 182, L. 1989, provided that this section is effective July 1, 1989.

2-15-3015. Montana agriculture development council.

Compiler's Comments

1989 Amendment: In (1) changed "department of commerce" to "department of agriculture". Amendment effective February 4, 1989.

Part 31
Department of Livestock

2-15-3101. Department of livestock — head.

Compiler's Comments

Executive Reorganization Implementation: Title 82A, ch. 13, R.C.M. 1947 (now Title 2, ch. 15, part 31), was implemented by Executive Reorganization Order 8-71, dated Nov. 19, 1971, effective Nov. 22, 1971.

Administrative Rules

Title 32, ARM Department of Livestock.

2-15-3102. Board of livestock — composition.

Compiler's Comments

1993 Amendment: Chapter 52 revised (2)(a) to reflect appointment of a total of four cattle producers rather than one from each state congressional district and two at large; and made minor changes in style. Amendment effective July 1, 1993.

Applicability: Section 13, Ch. 52, L. 1993, provided: "[This act] applies to appointments made after [the effective date of this act]." Effective July 1, 1993.

Administrative Rules

Title 32, ARM Department of Livestock.

2-15-3105. Board of milk control — membership — allocation — quasi-judicial.

Compiler's Comments

1995 Amendment: Chapter 333 in (3), after "department", inserted "of livestock". Amendment effective July 1, 1995.

1993 Amendment: Chapter 52 in (2), at end, deleted "or residents of the same congressional district"; and made minor changes in style. Amendment effective July 1, 1993.

Applicability: Section 13, Ch. 52, L. 1993, provided: "[This act] applies to appointments made after [the effective date of this act]." Effective July 1, 1993.

Administrative Rules

Title 32, chapter 24, ARM Board of Milk Control.

2-15-3106. Board of horseracing.

Compiler's Comments

1995 Amendment: Chapter 353 in (2)(a) increased number of Board members from five to seven and deleted second sentence that read: "No person holding a financial interest in a racetrack or race meet, member of a county fair board, or owner, trainer, or breeder of a racehorse is eligible for membership on the board"; inserted (2)(b) requiring that two Board members be in the horseracing industry; in (3), at beginning, inserted exception clause; and made minor changes in style. Amendment effective April 11, 1995.

Transition — New Appointments: Section 2, Ch. 353, L. 1995, provided: "To provide for an orderly transition to the new board membership, the governor may replace present board members by immediately appointing new members who are in compliance with the new board membership requirements. The new members shall serve the remainder of the existing terms to provide for the staggered terms required under 2-15-1881(4)."

1983 Amendment: Substituted language (see Ch. 563, L. 1983, for text) for former text, which read: "(1) There is a board of horseracing.

(2) The board consists of five members appointed by the governor with the consent of the senate, who shall be citizens, residents, and qualified electors of this state. At least one member shall be a breeder of racing horses, one member shall be a member of an independent horseracing association, one member shall be a member of a county fair board that conducts a fair featuring parimutuel betting, and two members shall have occupations unrelated to horseracing.

(3) The governor shall not appoint any member who resides in the same county as a current member. The governor shall appoint members on the basis of experience, qualifications, and a reasonable geographical balance throughout the state.

(4) Each member shall serve for a term of 3 years. A member may be removed from office by the governor only for cause.

(5) The board is allocated to the department for administrative purposes only as prescribed in 2-15-121."

Administrative Rules
Title 32, chapter 28, ARM Board of Horseracing.

Part 33
Department of Natural Resources and Conservation

2-15-3301. Department of natural resources and conservation — head.

Compiler's Comments
Executive Reorganization Implementation: Title 82A, ch. 15, R.C.M. 1947 (now Title 2, ch. 15, part 33), was implemented by Executive Reorganization Order 14-71, dated Dec. 17, 1971, effective Dec. 20, 1971.

Administrative Rules
Title 36, ARM Department of Natural Resources and Conservation.

2-15-3303. Board of oil and gas conservation — composition — allocation — quasi-judicial.

Administrative Rules
Title 36, chapter 22, ARM Board of Oil and Gas Conservation.

2-15-3305. Rangeland resources committee.

Compiler's Comments
1985 Amendment: In (1) in lead-in after "committee", inserted "of six members", and deleted former (g) that provided: "a representative from each of the following agencies: Soil conservation service, United States forest service, Montana state university, Farmers home administration, Montana stockgrowers association, Office of economic development division, School of forestry of the university of Montana, Department of fish, wildlife, and parks, Bureau of land management, Montana wool growers association, Department of natural resources and conservation, Bureau of Indian affairs, Montana cattlemen's association, Department of state lands, Society for range management, United States fish and wildlife service, United States agricultural and stabilization service"; and in (2) deleted former (b) that read: "The governor shall select the members described in subsection (1)(g) from a list submitted by their respective agencies and/or organizations".

2-15-3307. Board of water well contractors.

Compiler's Comments
1995 Amendment: Chapter 418 in (2)(c) substituted "environmental quality" for "natural resources and conservation"; in (2)(d) substituted "natural resources and conservation" for "health and environmental sciences"; in (6), after "department", inserted "of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules
Title 36, chapter 21, ARM Board of Water Well Contractors.

2-15-3308. Drought advisory committee.

Compiler's Comments
1999 Amendment: Chapter 17 in (4) substituted March 15 for February 15; and in (5) substituted April 15 for March 15. Amendment effective February 17, 1999.
1995 Amendment: Chapter 418 in (1) substituted "in the department of natural resources and conservation" for "allocated to the department of natural resources and conservation for administrative purposes only as provided in 2-15-121"; in (2) substituted "environmental quality" for "health and environmental sciences" and deleted "state lands"; deleted former (4) that read: "(4) The department of natural resources and conservation shall provide staff assistance to the drought advisory committee"; and made minor changes in style. Amendment effective July 1, 1995.
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Effective Date: Section 3, Ch. 209, L. 1991, provided: "[This act] is effective on passage and approval." Approved March 27, 1991.

2-15-3330. Flathead basin commission — membership — compensation.

Compiler's Comments

2003 Amendment: Chapter 537 in (4) substituted "department of natural resources and conservation" for "governor's office". Amendment effective July 1, 2003, and terminates June 30, 2005.

1999 Amendment: Chapter 243 at end of (2)(a) after "governor's staff" deleted "and who also serves as the executive director". Amendment effective July 1, 1999.

1997 Amendment: Chapter 451 inserted (2)(h) concerning Flathead County conservation district board of supervisors; inserted (2)(i) concerning Lake County conservation district board of supervisors; in (2)(j) reduced ex officio members from six to four, and deleted "the administrator of the Bonneville power administration; the chief of engineers of the United States army corps of engineers"; and made minor changes in style.

1995 Amendment: Chapter 418 in (2)(b) substituted "director of the department of natural resources and conservation" for "commissioner of state lands"; in (2)(i) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1989 Amendment: In (2) increased Commission membership from 16 to 21; in (2)(a) increased industrial, environmental, and other interests appointees from four to seven and after "other" substituted "interests" for "groups"; in (2)(h) increased number of ex officio members from five to six, and after "agency" inserted provision for appointment by Bureau of Reclamation; in (2)(i) increased ex officio members from one to two and inserted Fish, Wildlife, and Parks Director as ex officio member; and made minor changes in phraseology.

1985 Amendment: In (2) increased number of commission members from 15 to 16; and inserted (2)(i) relating to membership of the Director of the Department of Health and Environmental Sciences.

2-15-3331. Flathead basin commission — term of appointment — quorum — vacancy — chairman — vote.

Compiler's Comments

Initial Terms of Commission Members: Section 12, Ch. 424, L. 1983, provided: "Five members of the original commission shall serve 2-year terms, thereby establishing staggered terms. Those members serving 2-year terms must be selected by lot at the first commission meeting."

2-15-3332. Flathead basin commission staff and office location.

Compiler's Comments

1999 Amendment: Chapter 243 deleted former (1) that read: "(1) The executive director of the commission shall be compensated on a pro rata basis from commission funds, calculated upon the time he is required by the governor to serve the commission"; inserted (1) allowing commission to hire staff; at end of (2) after "basin" deleted "and sufficient and appropriate staff must be assigned to serve the commission"; and made minor changes in style. Amendment effective July 1, 1999.

Part 34
Department of Fish, Wildlife, and Parks

Part Compiler's Comments

Change of Name: Section 2, Ch. 218, L. 1979, provided: "The code commissioner is authorized and instructed to change any references to the department of fish and game in the Montana Code Annotated to the department of fish, wildlife, and parks."

2-15-3401. Department of fish, wildlife, and parks — head.

Compiler's Comments

Executive Reorganization Implementation: Title 82A, ch. 20, R.C.M. 1947 (now Title 2, ch. 15, part 34), was implemented by Executive Reorganization Order 1-72, dated June 30, 1972, effective July 1, 1972.

Administrative Rules
Title 12, ARM Department of Fish, Wildlife, and Parks.

2-15-3402. Fish, wildlife, and parks commission — composition — qualifications — quasi-judicial.

Compiler's Comments
1991 Amendment: In (1) and (5) changed name of Fish and Game Commission to Fish, Wildlife, and Parks Commission; in (3), in second sentence after first "fish", inserted "parks", before second "fish" inserted "wildlife", and after second "fish" substituted "parks" for "game, game birds, animals"; and made minor changes in style.

Administrative Rules
Title 12, ARM Department of Fish, Wildlife, and Parks.

2-15-3404. Fish, wildlife, and parks crimestoppers board.

Compiler's Comments
1997 Amendment: Chapter 393 in (1) inserted "and parks"; in (2)(a)(ii) substituted "hunter's, angler's" for "sportsmen's"; in (2)(a)(iv) substituted "a member of the public with an interest in parks and recreation" for "a member of the public, appointed at large"; and made minor changes in style. Amendment effective April 28, 1997.
1991 Name Change: Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

2-15-3405. Appointment of wetlands protection advisory council.

Compiler's Comments
2003 Amendment: Chapter 381 near end of (1) after "under" substituted "87-2-411" for "87-2-412"; in (2) after "Montana" substituted "migratory game bird hunters" for "sportsmen"; and made minor changes in style. Amendment effective April 18, 2003.
Codification: Although sec. 4, Ch. 609, L. 1985, instructed that this section be codified in Title 87, it is codified in this chapter to continue the integrity of this chapter as a compilation of laws creating executive branch entities. This placement does not affect the meaning of this section or related provisions.

Part 35
Department of Environmental Quality

2-15-3501. Department of environmental quality — head.

Compiler's Comments
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.
Effective Date: Section 504, Ch. 418, L. 1995, provided that this section is effective July 1, 1995.

Administrative Rules
Title 17, ARM Environmental Quality.

2-15-3502. Board of environmental review.

Compiler's Comments
Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."
Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.
Effective Date: Section 504, Ch. 418, L. 1995, provided that this section is effective July 1, 1995.

CHAPTER 16
PUBLIC OFFICERS

Part 1
General Provisions

2-16-101. Classification of public officers.

Collateral References

Constitutional Law *key* 50, et seq., 67, et seq., 76, et seq.; States *key* 44.

16 C.J.S. Constitutional Law §104, et seq.; 81A C.J.S. States §82.

2-16-102. Qualifications generally — age and citizenship.

Attorney General's Opinions

Application to Legislator Appointment: An appointee to fill an unexpired term of a legislator must fulfill the requirements of this section and Article V, sec. 4, Montana Constitution. 36 A.G. Op. 59 (1976).

Collateral References

Officers and Public Employees *key* 18, 21.

67 C.J.S. Officers and Public Employees §§10, 11, 17.

63A Am. Jur. 2d Public Officers §36, et seq.

Conviction of crime within statutory or constitutional provision making conviction of crime ground of disqualification for public office. 71 ALR 2d 593.

Infamous crime or one involving moral turpitude constituting disqualification to hold office. 52 ALR 2d 1314.

Time as of which eligibility or ineligibility to office is to be determined. 88 ALR 812, supplemented by 143 ALR 1026.

2-16-111. Residence of officers.

Attorney General's Opinions

Absence of Public Service Commissioner From State on Military Duty — Vacancy in Office Not Created — No Additional Compensation:

Absence from the state attributable to active military duty does not result in a vacancy in the office of Public Service Commissioner. However, an elected member of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard. 43 A.G. Op. 32 (1989).

When asked to clarify his opinion in 43 A.G. Op. 32 (1989), the Attorney General looked to the nature of service and the source of payment as affecting the right of a state officer to receive additional compensation, noting that a National Guard member engaged in federal service and thus compensated by the federal government is subject to the duties and may receive the benefits of federal law, while a member engaged in purely state-oriented service and thus compensated by the state is subject to state regulation. Therefore, Art. VI, sec. 5, Mont. Const., prohibits an elected member of the Executive Branch from accepting compensation from the state for service in the Montana Army National Guard, beginning with the first instance of dual compensation. Further, a public officer has a duty to repay unauthorized compensation and the state, through the State Auditor, has a corresponding right to compel repayment of the unauthorized compensation. 43 A.G. Op. 43 (1989).

Collateral References

States *key* 68.

81A C.J.S. States §§130, 134, et seq.

2-16-112. Absence from the state.

Case Notes

Absence Due to Military Service: Legislature had power to amend this section and section 59-602(6), R.C.M. 1947 (now 2-16-502), as it did by enacting Ch. 47, L. 1941 (10-2-221, et seq.), providing for officers' leave of absence or for their temporary suspension or relief from duty during military service, except insofar as the result would be violative of some provision of the Constitution such as Art. VIII, sec. 37, 1889 Mont. Const. (now Art. VII, sec. 10, 1972 Mont. Const.), relating to judicial officers absenting themselves from the state for more than 60 consecutive days. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Collateral References
States *key* 68.
81A C.J.S. States §§130, 134, et seq.

2-16-113. Seals.

Collateral References
States *key* 23.
81A C.J.S. States §123.

2-16-114. Facsimile signatures and seals.

Commissioners' Prefatory Note
The National Conference of Commissioners on Uniform State Laws was requested some years ago through the Council of State Governments to draft a uniform act permitting the use of facsimile signatures by fiscal officers of the states on particularly large bond issues. At the present time, in most states, all bonds issued by states must be signed by, as a rule, the State Treasurer. This requires hours of time to sign each and every bond that will ultimately be sold by the underwriters.

The Investment Bankers Association likewise has urged the passage of acts in various states permitting the use of facsimile signatures by imprint, engraving or by some other mechanical means.

When this act came into the Conference, it was determined, as a matter of policy, that the act should be broadened in its scope to include not only the issuance of securities, such as bonds, by the states, permitting the use of facsimile signatures, but should also be broadened to cover checks, drafts, and warrants issued by the states, as well as by all of the political subdivisions of the states, counties, school districts, cities, etc.; hence the present draft of the act is all inclusive and, if adopted, would permit the use of facsimile signatures by the various disbursing and fiscal officers of the governmental units and agencies involved. It would be a tremendous time saver in the operation of these various state offices. The act makes it a felony to copy or improperly use any facsimile signature or facility for making a facsimile signature.

Compiler's Comments
Source — Uniform State Law: "Uniform Facsimile Signatures of Public Officials Act" was approved by the National Conference of Commissioners on Uniform State Laws, August 23, 1958, and adopted by the states of Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Kansas, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, New York, Oklahoma, Pennsylvania, Rhode Island, Texas, Washington, West Virginia, and Wyoming.

Collateral References
Bonds *key* 13; Signatures *key* 2; States *key* 156, 157.
11 C.J.S. Bonds §14; 80 C.J.S. Signatures §7; 81A C.J.S. States §255.
63A Am. Jur. 2d Public Officers §305.

2-16-115. Signature of officer acting ex officio.

Collateral References
Officers and Public Employees *key* 110.
67 C.J.S. Officers and Public Employees §§240, 241.

2-16-116. Power to administer oaths.

Collateral References
Oaths *key* 2.
67 C.J.S. Oaths and Affirmations §8.

2-16-117. Office hours.

Compiler's Comments
1997 Amendment: Chapter 3 in (1), near middle of first sentence, substituted "state executive branch offices" for "every officer" and near end inserted "Sundays"; inserted (3) allowing the Montana Historical Society to be open at other than prescribed hours; and made minor changes in style.

Attorney General's Opinions
Holiday Falling on Weekend — Closure of Offices on Friday or Monday: Public offices shall close on the appropriate day if their employees are entitled to have the Friday preceding a legal

holiday falling on a Saturday, or the Monday following a legal holiday falling on Sunday. 34 A.G. Op. 27 (1971).

Part 2
Accession to Office

2-16-201. Manner of election of certain officers.

Collateral References

States *key* 41, 42, 46.

81A C.J.S. States §83, et seq.

2-16-202. Title contested — salary withheld.

Case Notes

Operation and Effect: Failure of clerk to comply with this section did not prevent police officer from recovering salary for time during which he was wrongfully ousted and salary paid to a de facto officer. Furthermore, his earnings in other employments during his exclusion cannot be charged against his claim for salary. Wynne v. Butte, 45 M 417, 123 P 531 (1912).

Right to Receive Salary: This section recognizes the principle that one who has title to an office may receive the salary incident to it, whether he serves or not. Peterson v. Butte, 44 M 401, 120 P 483 (1912).

Collateral References

Clerks of Courts *key* 67; Officers and Public Employees *key* 94; States *key* 57.

21 C.J.S. Courts §251; 67 C.J.S. Officers and Public Employees §§270, 271, et seq.; 81A C.J.S. States §104, et seq.

2-16-203. Manner of appointments.

Collateral References

Officers and Public Employees *key* 6.

67 C.J.S. Officers and Public Employees §47.

63A Am. Jur. 2d Public Officers §93, et seq.

2-16-204. Gubernatorial commissions.

Collateral References

Officers and Public Employees *key* 38.

67 C.J.S. Officers and Public Employees §61.

38 Am. Jur. 2d Governor §§4, 9, 11; 63A Am. Jur. 2d Public Officers §121, et seq.

2-16-205. Other commissions.

Case Notes

Failure to Take Oath — Discharge at Will: Plaintiff served in the capacity of deputy clerk of the Supreme Court for 20 years. He ran for the Clerk of Court position but was defeated. The newly elected Clerk terminated plaintiff and appointed a new deputy. Plaintiff contended he was unlawfully discharged. Plaintiff was not appointed in writing as required by this section, nor did he subscribe, take, or file an oath of office as required by 3-2-406. When an officer's term is not definite, his appointment is at will. Section 2-16-213 provides that the term of the deputy clerk is at the pleasure of the appointing power. Under 2-16-501, an office becomes vacant upon refusal or neglect to file the official oath within the time prescribed. The court held that upon plaintiff's failure to file an oath of office, his term of office terminated and the Clerk of Court could at any time fill the vacancy by appointment. Conboy v. St., 214 M 492, 693 P2d 547, 42 St. Rep. 120 (1985).

2-16-211. Oaths — form — before whom — when.

Case Notes

Operation and Effect: This section does not make filing of oath of office a condition precedent to entering upon discharge of duties of office, but 2-16-501 declares that, if officer fails to file his official oath within the time prescribed, the office becomes vacant. State ex rel. Muzzy v. Uotila & Certain Intoxicating Liquors, 71 M 351, 229 P 724 (1924).

Collateral References

Officers and Public Employees *key* 36(1); States *key* 28.

67 C.J.S. Officers and Public Employees §§59, 60; 81A C.J.S. States §§44, 91.

63A Am. Jur. 2d Public Officers §4.

2-16-212. Filing.

Case Notes

Constitutionality: Article XIX, sec. 1, 1889 Mont. Const. (substantially the same as Art. III, sec. 3, 1972 Mont. Const.), requiring every public officer to take the official oath therein prescribed, is self-executing, mandatory, and conclusive upon the Legislature. Since the Legislature was not prohibited from requiring filing of oath, it could, as it did by this section, prescribe that such oath be filed without thereby rendering the section unconstitutional. State ex rel. Wallace v. Callow, 78 M 308, 254 P 187 (1927).

Operation and Effect:

This section is directory and not mandatory; but section 6-301, R.C.M. 1947 (now 2-9-506(part)), relative to filing of official bond within time prescribed for filing oath, is mandatory. State ex rel. Wallace v. Callow, 78 M 308, 254 P 187 (1927).

This section does not make filing of oath of office a condition precedent to entering upon discharge of duties of office, but 2-16-501 declares that, if officer fails to file his official oath within the time prescribed, the office becomes vacant. State ex rel. Muzzy v. Uotila & Certain Intoxicating Liquors, 71 M 351, 229 P 724 (1924).

Collateral References

Officers and Public Employees *key* 36(1).

67 C.J.S. Officers and Public Employees §§59, 60.

2-16-213. Term of office — holdover — assumption of office.

Compiler's Comments

1983 Amendment: Inserted (3) relating to appointments made prior to Senate confirmation.

Case Notes

Holdover 275
Term of Office 275

HOLDOVER

Constitutional Provision: Under Art. XV, sec. 6, 1889 Mont. Const. (no comparable provision under 1972 Mont. Const.), the terms of office of municipal officers must not exceed 2 years. Under this section, every officer must continue to discharge his duties, although his term has expired, until his successor has qualified. It was held that unless the term of office of such officers as fixed by statute is so plainly at odds with that prescribed by the constitutional provision above as to be wholly inconsistent with it, the statute should be upheld. State ex rel. Sandquist v. Rogers, 93 M 355, 18 P2d 617 (1933).

Vacancy in County Office: Where vacancy occurs in county office, Board of County Commissioners has general power and duty to prevent a lapse of government in the office and the consequent suspension of public business. Even though the proper authority may omit to call an election or cannot do so under the particular emergency, nevertheless the Board need not by subsequent neglect or inaction permit the public business to be suspended, and upon the happening of either contingency the appointed incumbent, as temporary substitute, must perform duties of office until his successor has qualified, so that a lapse of government can never happen in any public office. State ex rel. Rowe v. Kehoe, 49 M 582, 144 P 162 (1914), explained in Bailey v. Knight, 118 M 594, 168 P2d 843 (1946).

Public Policy: This provision is one usually found in the codes of the states, being based upon public policy, which demands that if, from any cause, the new incumbent fails to qualify or if there has not been an election of any person, there should not be a vacancy in the office and a consequent suspension of public business. State ex rel. Neill v. Page, 20 M 238, 50 P 719 (1897).

Resignations: This section is applicable only to a case where term of office of incumbent has expired; it does not refer to case of vacancy caused by resignation. State ex rel. Neill v. Page, 20 M 238, 50 P 719 (1897).

TERM OF OFFICE

Deputy State Officer's Failure to Take Oath — Discharge at Will: Plaintiff served in the capacity of deputy clerk of the Supreme Court for 20 years. He ran for the Clerk of Court position but was defeated. The newly elected Clerk terminated plaintiff and appointed a new deputy. Plaintiff contended he was unlawfully discharged. Plaintiff was not appointed in writing as required by 2-16-205, nor did he subscribe, take, or file an oath of office as required by 3-2-406. When an officer's term is not definite, his appointment is at will. This section provides that the term of the deputy clerk is at the pleasure of the appointing power. Under 2-16-501, an office

becomes vacant upon refusal or neglect to file the official oath within the time prescribed. The court held that upon plaintiff's failure to file an oath of office, his term of office terminated and the Clerk of Court could at any time fill the vacancy by appointment. Conboy v. St., 214 M 492, 693 P2d 547, 42 St. Rep. 120 (1985).

Removal of Director of Historical Society: Under this section, 22-3-104, and 22-3-107, power to remove Director of Historical Society lies in Society's Board of Trustees, and it may do so without notice or opportunity to be heard. State ex rel. MacGilvra v. District Court, 148 M 182, 418 P2d 874 (1966).

Employment Security Commission: Term of office of third member of employment security commission (since abolished) was not fixed by law; he therefore served at pleasure of the Governor. State ex rel. Bonner v. District Court, 122 M 464, 206 P2d 166 (1949).

Deputy Sheriff: The authority of a deputy sheriff may be revoked at any time with or without cause, and he holds no "term" of office. State ex rel. Rusch v. Bd. of County Comm'rs, 121 M 162, 191 P2d 670 (1948).

County Deputies and Assistants: Deputies and assistants of county officers enumerated in section 25-603, R.C.M. 1947 (since repealed), are not county officers since, under this section, they serve only at the will and pleasure of their respective principals. Adami v. Lewis & Clark County, 114 M 557, 138 P2d 969 (1943).

Collateral References

Officers and Public Employees *key* 54.
67 C.J.S. Officers and Public Employees §§95 through 99.
63A Am. Jur. 2d Public Officers §154, et seq.

2-16-214. Definition of current term for purposes of term limits.

Compiler's Comments

Effective Date: Section 3, Ch. 144, L. 2003, provided that this section is effective on passage and approval. Approved March 27, 2003.

Part 3
Deputies

2-16-301. Appointment of deputies and subordinate officers — number.

Compiler's Comments

1983 Amendment: In (3) after "deputies", deleted ", clerks, and subordinate officers, when".

Case Notes

Operation and Effect: Under this section and 7-4-2401, a County Attorney may appoint a deputy to serve without compensation, and such deputy may legally act in name of his principal in filing of informations and prosecution of criminal actions. St. v. Crouch, 70 M 551, 227 P 818 (1924).

Collateral References

Officers and Public Employees *key* 13, 47.
67 C.J.S. Officers and Public Employees §§42, et seq., 53, et seq., 351.
63A Am. Jur. 2d Public Officers §567, et seq.

2-16-302. Oath of deputies.

Compiler's Comments

1983 Amendment: After "Deputies", deleted ", clerks, and subordinate officers".

Collateral References

Officers and Public Employees *key* 36(1).
67 C.J.S. Officers and Public Employees §§59, 60.
63A Am. Jur. 2d Public Officers §4.

2-16-303. Powers.

Case Notes

Operation and Effect: Where public officer is authorized to appoint a deputy, authority of the deputy, unless otherwise limited, is commensurate with that of the appointing officer, and any act which the latter might do, the deputy may also do. St. v. Crouch, 70 M 551, 227 P 818 (1924). See also St. v. Larson, 75 M 274, 243 P 566 (1926).

Collateral References

Officers and Public Employees *key* 105.

67 C.J.S. Officers and Public Employees §353.

Liability of Clerk of Court, County Clerk or prothonotary, or surety on bond, for negligent or wrongful acts of deputies or assistants. 71 ALR 2d 1140.

Part 4
Salaries

Part Compiler's Comments

Repeal of Salary Commission: Chapter 158, L. 1985, was submitted to the voters to repeal Article XIII, section 3, of the Montana Constitution, establishing the Salary Commission. The electorate approved the constitutional repeal in 1986, and sections 2-16-401 and 2-16-402 were repealed effective July 1, 1987, in accordance with the provisions of sections 3 through 5, Ch. 236, L. 1985.

Salary Commission Reports: The Reports and Recommendations, Montana Salary Commission, are available from the Montana Legislative Council.

2-16-403. Salaries of supreme court justices.

Compiler's Comments

1999 Amendment: Chapter 51 deleted former (1) that read: "(1) Subject to subsection (3), the salary of the chief justice of the supreme court is as follows:

(a) $67,595 beginning July 1, 1995;

(b) $70,231 beginning January 1, 1996"; deleted former (2) that read: "(2) Subject to subsection (3), the salary of a justice of the supreme court is as follows:

(a) $66,289 beginning July 1, 1995;

(b) $68,874 beginning January 1, 1996"; near beginning of first sentence after "June 30" deleted "1996, and prior to June 30", near middle of third sentence after "July 1" substituted "of the year following the year in which the survey is conducted" for "1997", and deleted former fourth sentence that read: "In each year following the year in which a survey is conducted, the average salary is the new salary for the position"; and made minor changes in style. Amendment effective March 15, 1999.

2-16-405. Salaries of certain elected state officials.

Compiler's Comments

1999 Amendment: Chapter 51 in (1)(a) after "governor" deleted "$59,310"; in (1)(b) after "governor" deleted "$43,242"; in (1)(c) after "general" deleted "$54,329"; in (1)(d) after "auditor" deleted "$40,101"; in (1)(e) after "instruction" deleted "$47,208"; in (1)(f) after "officer" deleted "$44,615"; in (1)(g) after "officer" deleted "$43,242"; in (1)(h) after "state" deleted "$40,101"; in (1)(i) after "court" deleted "$39,044"; and made minor changes in style. Amendment effective March 15, 1999.

1997 Amendment: Chapter 417 in (1) deleted pre-1996 pay schedules for all officers (see 1995 Session Law for text); in (2), in first sentence, substituted "officials with similar titles to" for "officials similar to", at end of second sentence substituted "officials with similar titles" for "similar position", in third sentence substituted "official in Montana" for "similar position in Montana" and after "July 1" deleted "1997, the average is the new salary for that position", and at end of fourth sentence substituted "official" for "position"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 455 in (1), at beginning, inserted "Subject to subsection (2)"; substituted 1995 and 1996 pay schedules for 1992 pay schedule (see 1995 Session Law for text); inserted (2) requiring salary survey of Executive Branch officials; and made minor changes in style. Amendment effective April 14, 1995.

1991 Amendment: Changed references to fiscal year to reflect current fiscal year; and increased salary of enumerated officials by $1,248 in each year of biennium. Amendment effective April 29, 1991.

1989 Amendments: Chapter 462 deleted Supreme Court Justices from the salary schedule. Amendment effective July 1, 1989.

Chapter 660 near beginning, after "fiscal year", substituted "1990" for "1986"; deleted Supreme Court Justices from the salary schedule; and substituted salary schedules for former schedule (see 1987 MCA for text of former schedule). Amendment effective May 11, 1989.

1985 Amendment: In introductory clause, after "fiscal year", substituted "1986" for "1984"; and substituted salary table (see Ch. 693, L. 1985) for:

	"Fiscal Year 1984	Following June 30, 1984
Governor	$47,963	$48,923
Lieutenant governor	$34,344	$35,031
Chief justice of the supreme court	$49,168	$50,151
Justices of the supreme court, each	$47,963	$48,923
Attorney general	$43,745	$44,620
State auditor	$31,692	$32,326
Superintendent of public instruction	$37,719	$38,473
Public service commission chairman	$35,544	$36,255
Public service commissioners, other than chairman	$34,344	$35,031
Secretary of state	$31,692	$32,326
Clerk of the supreme court	$30,789	$31,404"

1983 Amendment: Increased salaries authorized for fiscal year 1982 and fiscal years thereafter of certain elected officials for fiscal year 1984 and for fiscal years thereafter as follows: Governor, from $43,360 and $47,023 to $47,963 and $48,923; Lieutenant Governor, from $31,077 and $33,671 to $34,344 and $35,031; Chief Justice of the Supreme Court, from $44,447 and $48,204 to $49,168 and $50,151; Justices of the Supreme Court, from $43,360 and $47,023 to $47,963 and $48,923; Attorney General, from $39,555 and $42,887 to $43,745 and $44,620; State Auditor, from $28,685 and $31,071 to $31,692 and $32,326; Superintendent of Public Instruction, from $34,120 and $36,979 to $37,719 and $38,473; Public Service Commissioners other than chairman, from $31,077 and $33,671 to $34,344 and $35,031; Secretary of State, from $28,685 and $31,071 to $31,692 and $32,326; Clerk of the Supreme Court, from $27,870 and $30,185 to $30,789 and $31,404; and inserted Public Service Commission Chairman at $35,544 and $36,255.

1981 Amendment: Changed 1980 to 1982 in three places; increased in the two columns the annual salaries of the governor from $37,500 and $40,000 to $43,360 and $47,023; of the lieutenant governor from $26,800 and $28,700 to $31,077 and $33,671; of the chief justice of the supreme court from $39,000 and $41,000 to $44,447 and $48,204; of the justices of the supreme court from $38,000 and $40,000 to $43,360 and $47,023; of the attorney general from $34,500 and $36,500 to $39,555 and $42,887; of the state auditor from $24,500 and $26,500 to $28,685 and $31,071; of the superintendent of public instruction from $29,400 and $31,500 to $34,120 and $36,979; of the public service commissioners from $26,800 and $28,700 to $31,077 and $33,671; of the secretary of state from $24,500 and $26,500 to $28,685 and $31,071; and of the clerk of the supreme court from $23,875 and $25,750 to $27,870 and $30,185.

Part 5
Vacancy and Succession

2-16-501. Vacancies created.

Compiler's Comments

1997 Amendment: Chapter 490 in (2), at end, substituted "the incumbent suffers from a mental disorder and is in need of commitment" for "he is seriously mentally ill"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 40, Ch. 490, L. 1997, was a saving clause.

Case Notes

Deputy State Officer's Failure to Take Oath — Discharge at Will: Plaintiff served in the capacity of deputy clerk of the Supreme Court for 20 years. He ran for the Clerk of Court position but was defeated. The newly elected Clerk terminated plaintiff and appointed a new deputy. Plaintiff contended he was unlawfully discharged. Plaintiff was not appointed in writing as required by 2-16-205, nor did he subscribe, take, or file an oath of office as required by 3-2-406. When an officer's term is not definite, his appointment is at will. Section 2-16-213 provides that the term of the deputy clerk is at the pleasure of the appointing power. Under this section, an office becomes vacant upon refusal or neglect to file the official oath within the time prescribed. The court held that upon plaintiff's failure to file an oath of office, his term of office terminated and the Clerk of Court could at any time fill the vacancy by appointment. Conboy v. St., 214 M 492, 693 P2d 547, 42 St. Rep. 120 (1985).

Not Exclusive — District Judgeship Vacancy: This statute does not provide the exclusive method by which office of District Judge can become vacant. The retirement of a District Judge creates vacancy which must be filled by Governor. State ex rel. Jardine v. Ford, 120 M 507, 188 P2d 422 (1948).

Absence From State — Implied Amendment: Legislature had power to amend this section and 2-16-112, as it did by enacting 10-2-228, providing for officers' leave of absence or for their temporary suspension or relief from duty during military service, except insofar as the result would be violative of some provision of the Constitution such as Art. VIII, sec. 3, 1889 Mont. Const. (now Art. VII, sec. 10, 1972 Mont. Const.), relating to judicial officers absenting themselves from state for more than 60 consecutive days. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

No Bond Filed — Still Holds Over Until New Appointee Is Confirmed by Senate: Any office becomes vacant under this section when person elected or appointed to it neglects, inter alia, to file his official bond within time prescribed, and the vacancy may be filled at once; but where the officer at fault occupies state office requiring confirmation by Senate, the appointment of successor is not effective to oust the incumbent until the new appointee is confirmed. State ex rel. Nagle v. Stafford, 99 M 88, 43 P2d 636 (1935).

Provisions, When Exclusive — No Senate Confirmation of Appointment: Where Commissioner of Agriculture, Labor, and Industry (since reorganized) was holding over until appointment and qualification of his successor and the appointment was not made until after adjournment of Legislature, preventing confirmation by Senate, there was no "vacancy" in the office as defined by this section, the provisions of which were exclusive and did not cover such a contingency; thus claim of appointee to office was without foundation. State ex rel. Nagle v. Stafford, 97 M 275, 34 P2d 372 (1934).

Lieutenant Governor Discharging Function of Resigned Governor — Office of Lieutenant Governor Not Vacant: Upon resignation of Governor and assumption of his duties and powers by Lieutenant Governor, no vacancy in office of Lieutenant Governor is created, he merely discharging functions of Governor under mandate of Constitution, and that by reason of being Lieutenant Governor. State ex rel. Lamey v. Mitchell, 97 M 252, 34 P2d 369 (1934). (Annotator's Note: See vacancy of office of Lieutenant Governor upon succession to Governor, Art. VI, sec. 6, Mont. Const.)

Construction — Prospective Effect: This section applies not only to persons, things, and conditions in being at time of its passage but also to such as came into existence thereafter and fell within its terms. State ex rel. Anderson v. Fousek, 91 M 448, 8 P2d 791, 84 ALR 303 (1932).

Conviction of a Felony: Conviction of a felony under either state or federal laws results in vacancy in office. In determining whether, under this section, office of city policeman automatically becomes vacant upon his conviction of conspiracy (a felony) under the federal law, Supreme Court may not consider mitigating circumstances or fact that if defendant had appealed, the judgment might have been set aside. State ex rel. Anderson v. Fousek, 91 M 448, 8 P2d 791, 84 ALR 303 (1932).

Police Officers as Incumbents: Member of city police force is incumbent of an office within this section. State ex rel. Anderson v. Fousek, 91 M 448, 8 P2d 791, 84 ALR 303 (1932).

Filing of Bond — Lack of Requisite Approval: Where County Commissioner-Elect after refusal of District Judge to approve his bond filed a new one but did not present it to Judge for approval, there was no legal filing of it at any time and vacancy was properly declared. State ex rel. Wallace v. Callow, 78 M 308, 254 P 187 (1927).

Provisions, When Not Exclusive — Additional Judgeship Created: Upon creation of additional judgeship in a judicial district, a vacancy existed until filled by appointment by Governor, this section, enumerating the instances when vacancies occur, not being exclusive. State ex rel. Patterson v. Lentz, 50 M 322, 146 P 932 (1915).

Resignation Impliedly Arising — Acceptance of Another, but Incompatible, Office: Though it may be granted that a vacancy is not created by any circumstance not mentioned in this section, it does not follow that a resignation, which is mentioned therein as a cause of vacancy, may not impliedly arise upon acceptance of an incompatible office. On the contrary, the authorities are practically unanimous that, as to an office which incumbent may vacate by his own act, a resignation does occur upon his acceptance of another office incompatible therewith. The office of city purchasing agent being incompatible with that of Alderman of a city, the acceptance of the former by such officer was equivalent to his resignation as Alderman, and a vacancy was thereby created which the City Council was authorized to fill by a majority vote of the members then composing the Council. State ex rel. Klick v. Wittmer, 50 M 22, 144 P 648 (1914).

Tie Vote on Election — No Vacancy Created: An office becomes vacant on happening of certain events enumerated in this section, which enumeration is exclusive. The contingency of a tie vote not being provided for, when the two candidates for County Superintendent of Schools received an equal number of votes, there was no vacancy and the previous incumbent was entitled to hold office until successor was regularly elected. State ex rel. Chenoweth v. Acton, 31 M 37, 77 P 299 (1904). See, however, State ex rel. Jones v. Foster, 39 M 583, 104 P 860 (1909); State ex rel. Klick v. Wittmer, 50 M 22, 144 P 648 (1914).

Resignation: When a public officer tendered resignation to Governor, to be effective at discretion of Governor, and Governor in writing accepted the resignation to take effect on a certain date, the incumbent, on that date, ceased to be a public officer without any action by governing board. State ex rel. Neill v. Page, 20 M 238, 50 P 719 (1897).

Attorney General's Opinions

Absence of Public Service Commissioner From State on Military Duty — Vacancy in Office Not Created — No Additional Compensation:

Absence from the state attributable to active military duty does not result in a vacancy in the office of Public Service Commissioner. However, an elected member of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard. 43 A.G. Op. 32 (1989).

When asked to clarify his opinion in 43 A.G. Op. 32 (1989), the Attorney General looked to the nature of service and the source of payment as affecting the right of a state officer to receive additional compensation, noting that a National Guard member engaged in federal service and thus compensated by the federal government is subject to the duties and may receive the benefits of federal law, while a member engaged in purely state-oriented service and thus compensated by the state is subject to state regulation. Therefore, Art. VI, sec. 5, Mont. Const., prohibits an elected member of the Executive Branch from accepting compensation from the state for service in the Montana Army National Guard, beginning with the first instance of dual compensation. Further, a public officer has a duty to repay unauthorized compensation and the state, through the State Auditor, has a corresponding right to compel repayment of the unauthorized compensation. 43 A.G. Op. 43 (1989).

De Facto Officials — No Vacancy: Local government officials elected on a nonpartisan basis rather than the partisan basis mandated by the adopted form of government serve as de facto public officials, and the statutory procedure for filling vacancies does not apply since no vacancies can be said to exist under this section. 41 A.G. Op. 37 (1985).

Loss of Office Caused by Change of Residency — Urban Renewal Agency Commissioner: Under 2-16-501, a member of a board of commissioners of an urban renewal agency loses his seat on the board if he ceases to be a resident of the municipality that created the board. 41 A.G. Op. 1 (1985).

Senate Vacancy Created at Time of Conviction: A vacancy was created in a senator's office at the time of his conviction of a felony, and any exercise of his voting privileges in his senatorial capacity after conviction is a nullity and of no legal effect. 35 A.G. Op. 97 (1974).

Procedure to Declare Vacancy in Legislature Upon Conviction of Felony: The proper procedure to declare that a vacancy exists in the office of a senator convicted of a felony is for the presiding judge who entered the judgment and sentencing of the senator to notify appropriate boards of county commissioners responsible for filling the vacancy. 35 A.G. Op. 97 (1974).

Collateral References

Officers and Public Employees *key* 55(1).

67 C.J.S. Officers and Public Employees §§100, 101.

63A Am. Jur. 2d Public Officers §§135, et seq., 219, et seq.

Removal of public officer for misconduct during previous term. 42 ALR 3d 691.

Acceptance of, or assertion of right to, pension or retirement as abandonment of public office or employment. 76 ALR 2d 1312.

Losses incurred by deprival of office as damages recoverable by successful plaintiff or relator in mandamus. 73 ALR 2d 921.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in public office. 71 ALR 2d 593.

What is an infamous crime or one involving moral turpitude constituting disqualification to hold public office. 52 ALR 2d 1314.

Assertion of immunity as ground for removing public officer. 44 ALR 2d 789.

Conviction of offense under federal law or law of another state or country as ground for removal from state or local office. 20 ALR 2d 732.

Induction or voluntary enlistment in military service as creating a vacancy in public office or employment. 150 ALR 1447, supplemented by 151 ALR 1462, 152 ALR 1459, 154 ALR 1456, 156 ALR 1457, and 157 ALR 1456.

Earnings or opportunity of earning from other sources as reducing claim of public officer or employee wrongfully excluded from his office or position. 150 ALR 100.

Acquiescence or delay as affecting rights of public employee illegally discharged, suspended, or transferred. 145 ALR 767.

Failure of public officer or employee to pay creditors on claims not related to his office or position as ground for removal or suspension. 127 ALR 495.

Mistreatment of prisoner as ground for removal of Sheriff or other police officer. 100 ALR 1401.

Power to remove public officer without notice and hearing. 99 ALR 336.

Implied power of appointing authorities to remove an officer whose tenure is not prescribed by law, but who has been appointed for a definite term. 91 ALR 1097.

Nepotism as a ground for removal of public officer. 88 ALR 1103.

Refusal of public officer to answer questions during an investigation as ground for removal. 77 ALR 616.

Conclusiveness of Governor's decision in removing officer. 52 ALR 7, supplemented by 92 ALR 998.

Physical or mental disability as disqualification or ground for removal or impeachment of public officer. 28 ALR 777.

Right to jury trial in proceeding for removal of public officer. 3 ALR 232, supplemented by 8 ALR 1476.

2-16-502. Resignations.

Compiler's Comments

1993 Amendment: Chapter 64 inserted (1)(f) to provide that the resignation of a school district trustee must be submitted to the clerk of the school district.

1981 Amendment: Substituted "secretary of state" for "governor" twice in (1)(c); added (2) relating to time a resignation becomes effective and to procedure for withdrawal of resignation.

Case Notes

State Land Agent: When a public officer sent his resignation in writing to Governor and the latter accepted it, vacancy existed in the office, even though governing board did not consent to acceptance. State ex rel. Neill v. Page, 20 M 238, 50 P 719 (1897).

Collateral References

Counties *key* 66; Officers and Public Employees *key* 62; States *key* 52.

20 C.J.S. Counties §§104 through 106; 67 C.J.S. Officers and Public Employees §135, et seq.; 81A C.J.S. States §97.

63A Am. Jur. 2d Public Officers §170, et seq.

Withdrawal of resignation made to be effective at future date. 82 ALR 2d 750.

Resignation of public officer, when effective. 95 ALR 215.

Resignation by public officer, right of. 19 ALR 39.

2-16-503. Notice of removal.

Compiler's Comments

1997 Amendment: Chapter 490 near beginning, after "removed", substituted "committed pursuant to 53-21-127" for "declared seriously mentally ill"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 40, Ch. 490, L. 1997, was a severability clause.

Attorney General's Opinions

Procedure to Declare Vacancy in Legislature Upon Conviction of Felony: The proper procedure to declare that a vacancy exists in the office of a senator convicted of a felony is for the presiding judge who entered the judgment and sentencing of the senator to notify appropriate boards of county commissioners responsible for filling the vacancy. 35 A.G. Op. 97 (1974).

Collateral References

Officers and Public Employees *key* 57.

67 C.J.S. Officers and Public Employees §§108, 109.

63A Am. Jur. 2d Public Officers §256, et seq.

2-16-506. Filling vacancies — recess appointments.

Case Notes

Not Applicable to Legislative Vacancies — 1889 Constitution:

In view of Art. V, sec. 45, and Art. III, sec. 29, 1889 Mont. Const., the method provided by this section for filling vacancies in office where no other "mode" is provided by law has no application to a legislative vacancy. State ex rel. Cutts v. Hart, 56 M 571, 185 P 769, 7 ALR 1678 (1919), explained in State ex rel. Greene v. Anderson, 113 M 582, 129 P2d 874 (1942).

This section does not, in view of Art. V, sec. 45, and Art. III, sec. 29, 1889 Mont. Const., authorize appointment by Governor to fill legislative vacancy, even though such vacancy occurred during session of Legislature. Legislator appointed by Governor was, at most, only a de facto officer. State ex rel. Cutts v. Hart, 56 M 571, 185 P 769, 7 ALR 1678 (1919), explained in State ex rel. Greene v. Anderson, 113 M 582, 129 P2d 874 (1942).

Operation and Effect: This section applies to all cases of vacancies where no mode is provided by law for filling the same. While consent of the board to an appointment by Governor is necessary where person is appointed to succeed one whose term has expired, where vacancy is to be filled in office under the board, the special provision relating to vacancies obtains, and the Governor alone must appoint, by granting a commission until end of next session of Legislature. State ex rel. Neill v. Page, 20 M 238, 50 P 719 (1897).

Collateral References

Officers and Public Employees *key* 57.

67 C.J.S. Officers and Public Employees §§103 through 106.

63A Am. Jur. 2d Public Officers §135, et seq.

2-16-507. Powers and duties of officer filling unexpired term.

Collateral References

Officers and Public Employees *key* 103.

67 C.J.S. Officers and Public Employees §§228 through 230.

Part 6
Montana Recall Act

Part Compiler's Comments

Severability and Construction: Section 25 of the Montana Recall and Advisory Recall Act, I.M. No. 73 (now the Montana Recall Act), approved November 2, 1976, read: "If any one or more articles, provision, section, subsection, clause, phrase or word of this act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. All people named hereby declare that they would have passed this part, and each article, provision, section, subsection, sentence, clause phrase or word thereof, irrespective of the fact that any one or more article, provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional."

Part Case Notes

Recall Act — When Attorney Fees Available: Section 2-16-615 of the Montana Recall Act provides two procedural remedies, depending on the relief sought. If an official refuses to accept a proper recall petition, relief is by mandamus and attorney fees may be recoverable. If a legally insufficient recall petition has been accepted for filing, relief is by injunction and attorney fees are not available. Thus, the right to attorney fees depends on the underlying action and is not reciprocal. Further, the statute does not provide for relief by writ of prohibition. Braach v. Graybeal, 1999 MT 234, 296 M 138, 988 P2d 761, 56 St. Rep. 919 (1999), affirming Sheehy v. Ferda, 235 M 63, 765 P2d 722, 45 St. Rep. 2162 (1988).

Legal Sufficiency of Petition a Judicial Question: Under the Montana Recall Act, the legal sufficiency of allegations in a recall petition is a judicial as opposed to a political question and is to be decided by the District Court. Foster v. Kovich, 207 M 139, 673 P2d 1239, 40 St. Rep. 1949 (1983), followed in Sheehy v. Ferda, 235 M 63, 765 P2d 722, 45 St. Rep. 2162 (1988).

Effect of Failure to Comply With Statutes: When the basis for the recall of elected officials is purely statutory, failure to comply with the statutes is fatal to a recall attempt. Even if the recall procedure stems from a constitutional provision, failure to substantially comply with statutory provisions is fatal to the recall attempt. State ex rel. Palmer v. Hart, 201 M 526, 655 P2d 965, 39 St. Rep. 2277 (1982).

"Petition" — Definition: As used in this part, "petition" refers to the collective group of circulation sheets containing the voters' signatures. State ex rel. Palmer v. Hart, 201 M 526, 655 P2d 965, 39 St. Rep. 2277 (1982).

2-16-602. Definitions.

Attorney General's Opinions

High School Superintendent Not "Public Officer": A high school district superintendent appointed under 20-4-401 does not hold a "public office" within the scope of the Montana Recall Act. 42 A.G. Op. 50 (1988).

2-16-603. Officers subject to recall — grounds for recall.

Case Notes

Legal Sufficiency of Petition a Judicial Question: Under the Montana Recall Act, the legal sufficiency of allegations in a recall petition is a judicial as opposed to a political question and is to be decided by the District Court. Foster v. Kovich, 207 M 139, 673 P2d 1239, 40 St. Rep. 1949 (1983), followed in Sheehy v. Ferda, 235 M 63, 765 P2d 722, 45 St. Rep. 2162 (1988).

Meaning of "Official Misconduct": The meaning of the term "official misconduct", for the purposes of the Montana Recall Act, is the meaning set forth in 45-7-401 of the criminal code. Foster v. Kovich, 207 M 139, 673 P2d 1239, 40 St. Rep. 1949 (1983).

No "Official Misconduct" Found: The following are not adequate grounds for recall of a mayor: demotion of a police officer, failure to hold an orderly city council meeting, and use of vulgar language. Foster v. Kovich, 207 M 139, 673 P2d 1239, 40 St. Rep. 1949 (1983).

Sufficiency of Statement of Reason for Recall: Where recall petition stated the grounds for recall as being official misconduct, without specifying the alleged acts constituting misconduct, the petition is deficient because it does not acquaint the public, whose signatures are requested, with the alleged acts constituting misconduct, nor does it permit the official to respond and defend himself adequately against the allegation of misconduct. Steadman v. Halland, 197 M 45, 641 P2d 448, 39 St. Rep. 343 (1982), followed in Foster v. Kovich, 207 M 139, 673 P2d 1239, 40 St. Rep. 1949 (1983), and in Sheehy v. Ferda, 235 M 63, 765 P2d 722, 45 St. Rep. 2162 (1988).

Attorney General's Opinions

High School Superintendent Not "Public Officer": A high school district superintendent appointed under 20-4-401 does not hold a "public office" within the scope of the Montana Recall Act. 42 A.G. Op. 50 (1988).

Basis for Recall: An allegation that a public official voted in a manner contrary to the wishes, will, or desires of his constituents is not a sufficient ground for recall. The only bases for recall are enumerated in 2-16-603. 38 A.G. Op. 41 (1979).

2-16-612. Persons qualified to petition — penalty for false signatures.

Compiler's Comments

Internal References: Section 45-7-203 referred to in this section is the criminal offense of unsworn falsification to authorities.

Section 45-7-208 referred to in this section is the criminal offense of tampering with public records or information.

Case Notes

Percentage to Apply to Alderman's District: In a case arising out of a recall attempt of city officials, the District Court held that in order to recall an alderman, 20% of the electors of the entire municipality must sign the petitions. The Supreme Court disagreed. Construing 2-16-612(3) and 2-16-614 together, the court held that only 20% of the qualified electors of an alderman's district need to sign a recall petition. Kotar v. Zupan, 202 M 429, 658 P2d 1095, 40 St. Rep. 189 (1983).

2-16-613. Limitations on recall petitions.

Compiler's Comments

1983 Amendment: In (2), after "petition" deleted "shall be filed"; after "officer" inserted "may be approved for circulation, as required in 2-16-617(3)".

Case Notes

Importance of Section: This section's limitations express a clear intent that the recall procedure not be lightly undertaken. State ex rel. Palmer v. Hart, 201 M 526, 655 P2d 965, 39 St. Rep. 2277 (1982).

Submission of Petition Prior to Proper Time: Submission of sample recall petitions that were required under 2-16-617 to be approved as to form in order to begin the recall process began the process and constituted a filing of the petitions in clear violation of this section's provision (prior to 1983 amendment) that a petition may not be "filed" against a person who has held office less than 2 months, when the submission occurred within 10 days of the officer's swearing-in. State ex rel. Palmer v. Hart, 201 M 526, 655 P2d 965, 39 St. Rep. 2277 (1982).

2-16-614. Number of electors required for recall petition.

Case Notes

Percentage to Apply to Alderman's District: In a case arising out of a recall attempt of city officials, the District Court held that in order to recall an alderman, 20% of the electors of the entire municipality must sign the petitions. The Supreme Court disagreed. Construing 2-16-612(3) and 2-16-614 together, the court held that only 20% of the qualified electors of an alderman's district need to sign a recall petition. Kotar v. Zupan, 202 M 429, 658 P2d 1095, 40 St. Rep. 189 (1983).

2-16-615. Filing of recall petitions — mandamus for refusal.

Case Notes

Recall Act — When Attorney Fees Available: This section provides two procedural remedies, depending on the relief sought. If an official refuses to accept a proper recall petition, relief is by mandamus and attorney fees may be recoverable. If a legally insufficient recall petition has been accepted for filing, relief is by injunction and attorney fees are not available. Thus, the right to attorney fees depends on the underlying action and is not reciprocal. Further, the statute does not provide for relief by writ of prohibition. Braach v. Graybeal, 1999 MT 234, 296 M 138, 988 P2d 761, 56 St. Rep. 919 (1999), affirming Sheehy v. Ferda, 235 M 63, 765 P2d 722, 45 St. Rep. 2162 (1988).

2-16-616. Form of recall petition.

Case Notes

Legal Sufficiency of Petition a Judicial Question: Under the Montana Recall Act, the legal sufficiency of allegations in a recall petition is a judicial as opposed to a political question and is to be decided by the District Court. Foster v. Kovich, 207 M 139, 673 P2d 1239, 40 St. Rep. 1949 (1983), followed in Sheehy v. Ferda, 235 M 63, 765 P2d 722, 45 St. Rep. 2162 (1988).

Warning and Heading Mandatory: During a recall petition drive, the warning provision required by 2-16-616 and the heading were omitted from some petitions. It was contended that these were clerical and technical errors. The Supreme Court held that the requirements of 2-16-616 are more than clerical or technical. The statutes are clear. The penalty provisions of the warning clearly mandate its inclusion. Kotar v. Zupan, 202 M 429, 658 P2d 1095, 40 St. Rep. 189 (1983).

Sufficiency of Statement of Reason for Recall: Where recall petition stated the grounds for recall as being official misconduct, without specifying the alleged acts constituting misconduct, the petition is deficient because it does not acquaint the public, whose signatures are requested, with the alleged acts constituting misconduct, nor does it permit the official to respond and defend himself adequately against the allegation of misconduct. Steadman v. Halland, 197 M 45, 641 P2d 448, 39 St. Rep. 343 (1982), followed in Sheehy v. Ferda, 235 M 63, 765 P2d 722, 45 St. Rep. 2162 (1988).

Insufficient Statement of Reason Constituting Defect in Form: Where proposed recall petition was defective for lack of specificity in the statement of reasons for recall, the defect is one of form and was properly rejected by the Election Administrator. Steadman v. Halland, 197 M 45, 641 P2d 448, 39 St. Rep. 343 (1982).

2-16-617. Form of circulation sheets.

Case Notes

Affidavit in Support of Recall Petition — "Best of Knowledge" Insufficient: Allegations in an affidavit seeking recall of a public official must be sworn to from the knowledge of the affiant and not from a lesser basis so that the electors, in voting on the recall petition, may rely on the truth of the grounds set forth. An affidavit based only on the "best" of the affiant's knowledge is deficient. Sheehy v. Ferda, 235 M 63, 765 P2d 722, 45 St. Rep. 2162 (1988).

Submission of Petition Prior to Proper Time: Submission of sample recall petitions that were required under this section to be approved as to form in order to begin the recall process began the process and constituted a filing of the petitions in clear violation of the provision in 2-16-613

(prior to 1983 amendment) that a petition may not be "filed" against a person who has held office less than 2 months, when the submission occurred within 10 days of the officer's swearing-in. State ex rel. Palmer v. Hart, 201 M 526, 655 P2d 965, 39 St. Rep. 2277 (1982).

Sufficiency of Statement of Reason for Recall: Where recall petition stated the grounds for recall as being official misconduct, without specifying the alleged acts constituting misconduct, the petition is deficient because it does not acquaint the public, whose signatures are requested, with the alleged acts constituting misconduct, nor does it permit the official to respond and defend himself adequately against the allegation of misconduct. Steadman v. Halland, 197 M 45, 641 P2d 448, 39 St. Rep. 343 (1982), followed in Sheehy v. Ferda, 235 M 63, 765 P2d 722, 45 St. Rep. 2162 (1988).

Insufficient Statement of Reason Constituting Defect in Form: Where proposed recall petition was defective for lack of specificity in the statement of reasons for recall, the defect is one of form and was properly rejected by the Election Administrator. Steadman v. Halland, 197 M 45, 641 P2d 448, 39 St. Rep. 343 (1982).

Attorney General's Opinions

Withdrawal and Addition of Signatures: Signatures may be withdrawn from a recall petition up to the time when the filing officer finally determines that the petition is sufficient and so notifies the official named in the petition. Signatures may be added to a recall petition within 3 months after the form of the petition is approved. 41 A.G. Op. 94 (1986).

Rejection of Petition by Secretary of State: The Secretary of State may, under his approval powers relating to form, reject a petition for recall of a public officer if it is not based on the statutory grounds for recall. 38 A.G. Op. 41 (1979).

2-16-618. Forms not mandatory.

Case Notes

Warning and Heading Mandatory: During a recall petition drive, the warning provision required by 2-16-616 and the heading were omitted from some petitions. It was contended that these were clerical and technical errors. The Supreme Court held that the requirements of 2-16-616 are more than clerical or technical. The statutes are clear. The penalty provisions of the warning clearly mandate its inclusion. Kotar v. Zupan, 202 M 429, 658 P2d 1095, 40 St. Rep. 189 (1983).

2-16-619. Submission of circulation sheets — certification of signatures.

Compiler's Comments

1999 Amendment: Chapter 51 in (2) near end after "Subscribed and sworn to me this .... day of ....." substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

2-16-620. County clerk to verify signatures.

Compiler's Comments

1983 Amendment: In (1), inserted "verify and" before "compare"; after "signatures of" substituted "each person who has signed the petition to assure that he is an elector in such county" for "the electors in such county with registration signatures on file in such clerk's office"; in middle of form in (1), substituted "in the manner prescribed by law" for "with the signatures of the registered voters as they appear upon the registration records of my office"; at beginning of (2), substituted "Such certificate is" for "Every such certificate shall be"; after "stated therein" deleted "and of the qualifications of the registered voters whose signatures are certified"; after "recall petition" substituted "may" for "shall"; near middle of (2), after "certified" deleted "provided that" and inserted "However"; in (3), substituted "portion of a petition" for "petition or any part of it"; increased the retention period from 15 to 30 days; after "days" inserted "following the receipt of that portion"; after "county clerk shall" inserted "certify the valid signatures on that portion of the petition and".

Case Notes

Fatally Faulty Signature Comparisons: This section's provision (prior to 1983 amendment) that the clerk "shall" compare signatures with registration signatures mandates that signatures be compared, and there was a substantial variance with that requirement that was fatal to the recall petition where clerk checked each signature against a computer listing of registered voters, compared the signature with the registration card signature if any question arose, compared 5 signatures out of 20 on each page of the petition with the registration card signature and if there was a mismatch compared all signatures on the page with the registration card, and

reviewed all pages for possible duplications, for a spouse signing for the other spouse, and for other questionable signatures. State ex rel. Palmer v. Hart, 201 M 526, 655 P2d 965, 39 St. Rep. 2277 (1982), followed in Kotar v. Zupan, 202 M 429, 658 P2d 1095, 40 St. Rep. 189 (1983).

Attorney General's Opinions

Withdrawal and Addition of Signatures: Signatures may be withdrawn from a recall petition up to the time when the filing officer finally determines that the petition is sufficient and so notifies the official named in the petition. Signatures may be added to a recall petition within 3 months after the form of the petition is approved. 41 A.G. Op. 94 (1986).

2-16-621. Notification to officer — statement of justification.

Compiler's Comments

1983 Amendment: Near beginning of section, inserted "or a portion of the petition containing the number of valid signatures required under 2-16-614".

CHAPTER 17
PROPERTY AND SYSTEMS DEVELOPMENT AND MANAGEMENT

Part 1
Real Property and Buildings

2-17-101. Allocation of space.

Compiler's Comments

1997 Amendment: Chapter 20 in (3)(b), at beginning, inserted "Subject to 2-17-108"; and made minor changes in style. Amendment effective February 12, 1997.

1995 Amendment: Chapter 530 in (4), at beginning of third sentence, deleted "State retail liquor stores, liquor retail agencies, and"; and made minor changes in style. Amendment effective April 25, 1995.

1993 Amendment: Chapter 7 in (3)(b), near beginning, substituted reference to Legislative Council for reference to Capitol Building and Planning Committee; and made minor changes in style.

1989 Amendment: Near beginning of first sentence of (1) substituted "determine the space required by" for "periodically survey the needs of", near middle substituted "allocate" for "assign", before "buildings" deleted "state", and after "buildings" substituted "owned or leased by the state, based on each agency's need" for "to such agencies" and inserted second sentence relating to Departmental identification of space used by each agency; inserted first three sentences of (2) regarding Department location of additional space; near end of (4), after "retail agencies", inserted "and offices of the law enforcement services division and motor vehicle division of the department of justice"; and made minor changes in phraseology and punctuation.

1985 Amendment: In (1) after "state agencies", deleted "located in Helena", and after "property for quarters", deleted "in Helena"; inserted (3) governing agencies other than those located in Helena.

1983 Amendment: In (1), inserted "other than the university system"; inserted (2) relating to the location of the House of Representatives and the Senate; and inserted (3) relating to allocation of space in the capitol.

Case Notes

Effect of 1985 Amendment of Law Enforcement Academy Statute: The 1985 amendment of 44-10-202 not only removed the requirement that the location of the Montana Law Enforcement Academy be at a university unit but also stripped the Department of Justice of the power to choose a site for the academy. The net effect was to require the Attorney General to get the approval of the Department of Administration before he can lease, rent, or purchase property for quarters under this section. Cornwall v. St., 231 M 58, 752 P2d 135, 45 St. Rep. 429 (1988).

Allocation of Space for Legislature: The Legislature is not a "state agency" within the meaning of this section, and although the Department of Administration can allocate space for the Legislature, the Legislature has the right as an independent body to determine where it will sit and must approve a relocation of the Senate chambers. (Decided prior to 1983 amendment.) Goodover v. Dept. of Administration, 201 M 92, 651 P2d 1005, 39 St. Rep. 1975 (1982).

2-17-103. Press room.

Compiler's Comments

1997 Amendment: Chapter 20 substituted present section allowing allocation of space in the Capitol for former language that read: "The department of administration is required to provide for the use of representatives of the press a room on the third floor of the capitol to be used as a permanent press room." Amendment effective February 12, 1997.

1983 Amendment: After "the capitol" deleted "building, adjacent to the assembly hall of the senate".

2-17-105. Insurance on state buildings — use of proceeds — building replacement.

Compiler's Comments

1997 Amendment: Chapter 422 in (1), at end, inserted last sentence providing for statutory appropriation; in (2), at beginning, deleted "These moneys are statutorily appropriated as provided in 17-7-502 and"; in (3), in first sentence after "responsible for the building may", substituted "request that" for "authorize" and at end deleted "and for this purpose the amounts available therefore are statutorily appropriated as provided in 17-7-502"; and made minor changes in style. Amendment effective July 1, 1997.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1985 Amendment: In introductory clause of (2) inserted "are statutorily appropriated as provided in 17-7-502"; and in (3) near end of first sentence inserted "and for this purpose the amounts available therefor are statutorily appropriated as provided in 17-7-502".

1983 Amendment: At end of (1), substituted "state special revenue fund" for "bond proceeds and insurance clearance fund".

2-17-108. Allocation of legislative rooms and offices.

Compiler's Comments

1997 Amendment: Chapter 20 substituted present section regarding allocation of legislative space in the Capitol for former language that read: "Notwithstanding the provisions of 2-17-101, the house of representatives and the senate shall continue to occupy and control the rooms and offices in the capitol building that they occupied and controlled during the 50th and 51st legislatures." Amendment effective February 12, 1997.

2-17-112. Fire protection for state-owned buildings — department of administration.

Compiler's Comments

2003 Amendment: Chapter 387 in first sentence after "firefighting" inserted "and hazardous materials storage" and at end after "problems" deleted "as determined by the state fire prevention and investigation program of the department of justice"; deleted former (2) that read: "(2) The department of justice shall review provisions for protection of state-owned buildings in connection with inspections conducted under 50-3-102"; and made minor changes in style. Amendment effective October 1, 2003.

Name Change — Code Commissioner Correction: Section 1, Ch. 706, L. 1991, provided: "(1) The name of the state fire marshal is changed to the state fire prevention and investigation program of the department of justice.

(2) Unless inconsistent with [sections 1 through 36] [Ch. 706, L. 1991], wherever the term "state fire marshal" or "fire marshal" appears in the Montana Code Annotated, the code commissioner shall change the term to the "state fire prevention and investigation program of the department of justice", "fire prevention and investigation program" (of the department of justice), or "program", as appropriate. The code commissioner shall also conform internal references and grammar to these changes". As directed, the Code Commissioner has changed the term, as appropriate, wherever it appears in this section. Amendment effective April 29, 1991.

1981 Amendment: Substituted "each biennium" for "the next session of the legislature" in the first sentence of (1).

Part 2
Property and Supplies

2-17-201. Inspection of property and warehouses.

Collateral References

States *key* 86.

2-17-202. Inventory — property to be charged to receiving agency.

Compiler's Comments

1999 Amendment: Chapter 441 in (2) inserted last sentence concerning accounting for property; and made minor changes in style. Amendment effective April 23, 1999.

Case Notes

Purpose to Secure Information: This statute is designed to secure an inventory for the information of the Department of Administration of the personal property of the from time to time put under the control of its various agencies. State ex rel. Olsen v. Sundling, 128 M 596, 281 P2d 499 (1955).

Sale of Property Not Conferred: The words "all other personal property thereafter placed at the disposal of any such state department" means "all other personal property thereafter placed under the control of any such state department" and does not confer the authority to sell property to anyone. State ex rel. Olsen v. Sundling, 128 M 596, 281 P2d 499 (1955).

Attorney General's Opinions

Exclusive Authority to Dispose of State Property Vested in Department of Administration: State agencies do not have authority to trade in state property without approval by the Department of Administration. 39 A.G. Op. 44 (1981).

Part 3
Mailing and Copying

2-17-301. Supervision of mailing and copying facilities.

Compiler's Comments

2001 Amendment: Chapter 313 in (1) in first sentence removed reference to duplicating and inserted last sentence relating to support within a 10-mile radius; deleted former (2) that read: "(2) The department shall maintain and supervise any central telephone switchboard for state agencies located in Helena"; inserted (3) relating to additional installations of mail equipment within a 10-mile radius of the capitol; and made minor changes in style. Amendment effective July 1, 2001.

1983 Amendment: In (1) following "messenger service", deleted "data processing".

Part 4
Vehicles

Part Compiler's Comments

Vehicle Purchases — Leasing Guideline: Section 1, Ch. 328, L. 2003, provided: "(1) (a) Prior to June 1, 2004, the office of budget and program planning, in conjunction with the motor vehicle pool, shall devise for use by state agencies a leasing preference guideline for light vehicles, as defined in 61-1-139. The guideline is intended to encourage appropriate, cost-effective use of light vehicles. Factors to be addressed include multiple occupant use versus single occupant use, weather conditions at the time of use, and vehicle destination. The guideline must include stringent limitations on the use of personal vehicles at state expense, including a requirement that employees accept substitute vehicles when requested vehicles are not available.

(b) The leasing preference guideline must be submitted for review to the revenue and transportation interim committee by July 1, 2004.

(2) Subsection (1) applies to the motor pools of the Montana university system. The board of regents may exempt a purchase on a case-by-case basis." Effective July 1, 2003.

2-17-402. Seal on motor vehicles.

Compiler's Comments

1999 Amendment: Chapter 431 after "seal" substituted "logo, or other form of state ownership identification" for "8 inches in diameter"; and at end deleted "in accordance with the rules adopted by the department of transportation". Amendment effective October 1, 1999.

1991 Amendments: Chapter 512 substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Chapter 535 at end deleted "motor pool division"; and made minor change in style.

2-17-403. Requisitions for purchases.

Compiler's Comments

2001 Amendment: Chapter 181 near middle after "administration" substituted "in the manner" for "twice yearly at the times" and deleted second sentence that read: "Other requisitions for automobile purchases may not be accepted by it unless the governor considers the purchase to be an emergency necessity"; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 28, Ch. 181, L. 2001, provided: "[This act] applies to contracts for which the contracting government entity begins the contracting process after October 1, 2001."

2-17-411. Motor pool — department of transportation — exceptions.

Compiler's Comments

1999 Amendment: Chapter 431 substituted (1) concerning motor pool responsibilities for former text that read: "(1) The department of transportation is the custodian of all motor vehicles operated out of the Helena area used primarily to carry passengers or having a cargo rating of three-quarters of a ton or less and which do not carry specialized equipment that would render them unfit for interagency use, owned or leased by the state or its agencies." Amendment effective October 1, 1999.

1991 Amendments: Chapter 512 substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Chapter 535 near beginning of (1) deleted "motor pool division".

2-17-412. Assignment and transfer.

Compiler's Comments

1991 Amendments: Chapter 512 substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Chapter 535 in (1), after "officers", substituted "state agencies" for "institutions"; near beginning of (1) and (2), after "highways", deleted "motor pool division"; in (2), after "custody of the", substituted "department" for "division"; and made minor changes in style.

2-17-414. State vehicles to use ethanol-blended fuel — definition.

Compiler's Comments

1999 Amendment: Chapter 70 throughout section changed "gasohol" to "ethanol-blended fuel"; near end of (1) before "commercially available" deleted "reasonably and"; in (2) substituted definition of ethanol-blended fuel for definition of gasohol that read: ""gasohol" means all products commonly or commercially known or sold as gasohol and used for the purpose of effectively and efficiently operating internal combustion engines, consisting of not less than 10% anhydrous ethanol produced from agricultural products, including wood or wood products"; deleted former (3) that read: "(3) An entity subject to the requirements of subsection (1) shall require that each purchase of gasohol by the operator of a motor vehicle using gasohol is reported to that entity by the motor vehicle operator"; deleted former (5) that read: "(5) An entity subject to the requirements of subsection (1) shall retain for the period of time required by law the record of the purchase of gasohol used. The purchase records must be reviewed by the legislative auditor during every financial audit of the entity"; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 70, L. 1999, provided: "WHEREAS, agriculture is a vital component of Montana's economy; and

WHEREAS, Governor Racicot has initiated Vision 2005, challenging a group of Montanans to devise strategies to increase the value of the state's raw agricultural products, specifically grain and wood; and

WHEREAS, raw agricultural materials, such as grain and wood, can be processed into high-octane fuel called ethanol; and

WHEREAS, ethanol is a clean, efficient, high-performance octane enhancer that replaces lead in motor fuel; and

WHEREAS, widespread use of ethanol could result in reducing the United States' reliance on imported oil; and

WHEREAS, eliminating the requirement that ethanol use in state vehicles be reported will reduce paperwork, making it easier for state employees to use ethanol-blended fuel, thus creating a larger market for the product and encouraging the establishment of ethanol production facilities."

2-17-421. Use — state business only — exception — compensation for driving personal vehicle — penalty for private use.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 226 at beginning of (1) inserted exception clause; at beginning of (2) substituted exception clause for "The department of transportation may require that", in middle substituted "windshield of each state-owned or leased vehicle" for "instrument panel of each state-owned vehicle", and in quoted material after "state-owned" substituted "or leased motor vehicle in violation of the acceptable use rules provided for in 2-17-424" for "motor-propelled vehicle, or of any motor-propelled vehicle leased by the state government, for other than official purposes"; deleted former (3) that read: "(3) The private use of state-owned or leased motor vehicles for emergency travel-related purposes or exceptional circumstances by employees in a travel status may be approved by the head of the department or agency concerned"; in (3) after "agency" deleted "concerned", after "personal" deleted "or private", and after "use" inserted "in violation of the rules provided for in 2-17-424"; and made minor changes in style. Amendment effective April 1, 1999.

Chapter 431 at beginning of (2) deleted "The department of transportation may require that" and substituted "windshield" for "instrument panel"; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendment: Inserted (2) concerning information on decal that Department of Transportation may require on instrument panel of state-owned vehicles; inserted (3) concerning private use of state-owned or leased vehicles for emergency purposes or exceptional circumstances; and inserted (4) concerning termination of employee by Department or agency head for private use of state-owned or leased vehicle.

Name Change: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

2-17-422. Operating history.

Compiler's Comments

1999 Amendment: Chapter 431 substituted first sentence concerning maintenance of records for former text that read: "All motor vehicle operating history records for motor vehicles under control of the department of transportation must be entered in the department of transportation." Amendment effective October 1, 1999.

1991 Amendments: Chapter 512 substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Chapter 535 in first sentence, in two places, deleted "motor pool division"; and made minor changes in style.

2-17-423. Rules.

Compiler's Comments

1999 Amendment: Chapter 431 in (1) after "governing the" substituted "maintenance" for "use"; substituted (2)(a) concerning rent or lease of vehicles for former (2)(a) and (2)(b) that read: "(a) employee responsibility for misuse and negligent damage of state-owned or leased vehicles;

(b) determination of when the use of privately owned vehicles on state business may be justified as in the best interest of the state"; inserted (2)(c) concerning rental charges; substituted (3)(a) concerning scheduling and application for former text that read: "(a) for filing an application for travel showing necessity for trips, points to be visited, approximate time of departure and return"; in (3)(b) after "showing" deleted "actual points reached" and at end substituted "date and time of return" for "car cost record data"; deleted former (3)(c) that read: "(c) for recording in the car operating history record book all items of expense incurred in the purchase of gas, oil, repairs, labor, storage, or service"; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendments: Chapter 512 substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Chapter 535 in (1), in two places, deleted "motor pool division"; at beginning of (3) substituted "department" for "division"; deleted (3)(d) concerning information contained on decal affixed to instrument panel of every state-owned vehicle regarding removal from office for unauthorized use of a state motor vehicle; and made minor changes in style.

Case Notes

State Vehicle Used for Private Purposes — Discharge Erroneous — Lack of Proper Policy: An employee of the state was discharged from employment because he used a state-owned vehicle

for private purposes. He appealed the decision of the Department of Fish, Wildlife, and Parks, and the Board of Personnel Appeals ruled that though his discharge was properly justified, the Department had never adopted a policy regarding such use of vehicles and had not punished similar usage. Thus, the discharge was wrongful and he was entitled to reinstatement, but without backpay and benefits. Hutchin v. St., 213 M 15, 688 P2d 1257, 41 St. Rep. 1916 (1984).

2-17-424. Acceptable uses — rulemaking.

Compiler's Comments

Effective Date: Section 4, Ch. 226, L. 1999, provided that this section is effective on passage and approval. Approved April 1, 1999.

2-17-432. Violation a misdemeanor.

Compiler's Comments

1991 Amendment: After "misdemeanor" deleted "and upon conviction shall be dismissed from state employment".

Part 5
Information Technology — Internet Privacy

Part Compiler's Comments

Preamble: The preamble attached to Ch. 313, L. 2001, provided: "WHEREAS, the Legislature finds that information technology is becoming a critical component of the methods used by state agencies in providing information and services to Montana citizens; and

WHEREAS, the cost for information technology is increasing both in absolute and relative terms in agency budgets; and

WHEREAS, information technology, in order to be deployed most effectively, must be carefully managed and coordinated throughout state agencies."

Enacted Without Appropriation: Section 45, Ch. 313, L. 2001, provided: "The legislature has determined that [this act] can be implemented within existing appropriations, and therefore no separate appropriation of state money is necessary to carry out the purposes of [this act]."

Part Administrative Rules

Title 2, chapter 12, subchapter 1, ARM Regulation of computer facilities.

2-17-504. Short title.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-505. Policy.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-506. Definitions.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-511. Chief information officer — duties.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-512. Powers and duties of department.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 92 in (1)(g) at end of second sentence inserted "including an estimate of the useful life of the asset proposed for purchase and whether the amount should be expensed or capitalized, based on state accounting policy established by the department"; and made minor changes in style. Amendment effective July 1, 2003.

Chapter 114 in (1) at end of first sentence inserted exception clause; and in (1)(c) substituted "office of economic development" for "department of commerce". Amendment effective October 1, 2003.

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-513. Duties of board.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-514. Department — enforcement responsibilities.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-515. Granting exceptions to state agencies.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-516. Exemptions — university system — office of public instruction — national guard.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-517. Legislative and judicial branch information sharing.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-518. Rulemaking authority.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-521. State strategic information technology plan — biennial report.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-522. State strategic information technology plan — distribution.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-523. Agency information technology plans — policy.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-524. Agency information technology plans — form and content — performance reports.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-526. Information technology project budget summary.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-527. Agency information technology plans — review and approval — updates.

Compiler's Comments

Effective Date: Section 47, Ch. 313, L. 2001, provided that this section is effective July 1, 2001.

2-17-531. Transfer of funds, equipment, facilities, and employees.

Compiler's Comments

2001 Amendment: Chapter 313 in (1) in first sentence substituted "The department shall provide for the cost-effective use of information technology resources" for "In order to provide for a centralized, economical, efficient, and effective maintenance program for all state communications equipment and facilities" and in last sentence substituted "A credit account must be used to defray the costs of associated charges from the department as provided in 2-17-512" for "Such credit account shall be used to defray the costs of maintenance and repair as provided in 2-17-302(1)(e)"; and made minor changes in style. Amendment effective July 1, 2001.

2-17-532. Establishment.

Compiler's Comments

2001 Amendment: Chapter 313 in (1) at end of first sentence substituted "to provide direct electronic access to information and services by citizens, businesses, and other government entities" for "as a means of conveying information to the citizens of Montana", in second sentence substituted "shall" for "may", and in last sentence inserted "providing services"; inserted (1)(a) relating to descriptions of agency function and contact information; inserted (1)(b) relating to agency program services provided to certain entities; in (2) inserted "business and other governmental entity" and at end inserted "and services"; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendment: Chapter 440 in (1), near middle of first sentence, substituted "maintain appropriate electronic access systems" for "maintain a centralized electronic bulletin board system", inserted second sentence authorizing state agencies to establish electronic access systems, and in third sentence substituted "shall use these systems to provide appropriate information to the public" for "shall maintain appropriate information on the bulletin board system"; and in (2) substituted "The purpose of electronic access systems" for "The purpose of the centralized electronic bulletin board system".

1993 Amendment: Chapter 166 in (1), in first sentence after "maintain", deleted "as a pilot project"; inserted (1)(a) through (1)(g) regarding information to be maintained on the bulletin board system; in (2), near beginning, substituted "the centralized electronic bulletin board system" for "this pilot project"; and made minor changes in style.

Report to the Legislature: Section 4, Ch. 268, L. 1989, provided: "The department of administration shall submit a report to the 52nd legislature that evaluates the effectiveness of the centralized electronic bulletin board system, provides a cost analysis of the system, and presents recommendations for improving or enhancing the system."

2-17-533. Responsibilities.

Compiler's Comments

2001 Amendment: Chapter 313 in (1)(a) at beginning substituted "establish policies, standards, and procedures" for "in collaboration with other state agencies, set standards for the selection of software"; in (1)(c) after "user-friendly" deleted "file transfer and message", substituted "including but not limited to citizens, businesses, and other governmental entities" for "such as professional associations and citizen groups", and at end inserted "and as a means to obtain information and services faster and in a more cost-effective manner"; deleted former (1)(d) that read: "(d) determine procedures for use of the electronic access systems"; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendment: Chapter 440 in (1)(a), at beginning, inserted "in collaboration with other state agencies" and at end substituted "for the electronic access systems" for "for the electronic bulletin boards"; in (1)(b) substituted "services to support state agencies' use of the electronic access systems" for "services on the centralized electronic bulletin board system to support file transfer by all state agencies"; at end of (1)(d) substituted "for use of the electronic access systems" for "for bulletin board use"; in (2), at end of first sentence, substituted "integrity of its electronic access systems" for "integrity of its electronic bulletin board system" and at end of second sentence substituted "in the electronic access systems" for "in the system"; and in (3)

substituted "the electronic access systems that the department provides" for "the electronic bulletin board system".

1993 Amendment: Chapter 166 inserted (1)(b) requiring establishment of services to support file transfers; and inserted (1)(c) requiring development of user-friendly file transfer and message systems and promotion of system use.

2-17-534. Security responsibilities of department.

Compiler's Comments

2001 Amendment: Chapter 313 in (1) substituted "security of the central computer center, statewide telecommunications network, and backup facilities" for "security of central and backup computer facilities"; in (2) substituted "information technology" for "electronic data processing"; in (3) substituted "between any agency information technology resource and any other state agency, private entity, or public entity" for "between data centers or departments by hardwired or nondedicated telecommunications"; in (6) at end substituted "information technology security" for "the security program"; and made minor changes in style. Amendment effective July 1, 2001.

2-17-543. Rulemaking authority.

Compiler's Comments

Statement of Intent: Chapter 228, L. 1983, contained a statement of intent that read:

"A statement of intent is required for this bill because it grants rulemaking authority to the Department of Administration in 2-17-313 [renumbered 2-17-543].

(1) The Legislature intends that in developing a statewide frequency utilization plan, the Department address the following:

(a) interagency communications;

(b) a statewide mutual aid frequency; and

(c) participation by state and local radio users.

(2) The Legislature does not intend that rules adopted by the Department make entry into the plan by local government units mandatory."

2-17-546. Exemption of law enforcement telecommunications system — exception.

Compiler's Comments

2001 Amendment: Chapter 313 in three places substituted references to telecommunications for references to communications; and made minor changes in style. Amendment effective July 1, 2001.

2-17-550. Short title.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

Codification Change: Section 5, Ch. 219, L. 2001, provided that this section was to be codified as an integral part of Title 2, chapter 17, part 3. Except for 2-17-301, that part was renumbered to Title 2, chapter 17, part 5, by Ch. 313, L. 2001. In order to preserve the intent of Ch. 219, the code commissioner has codified sections 1 through 4 of Ch. 219 in Title 2, chapter 17, part 5.

Law Review Articles

Privacy in Cyberspace, Harvey, 61 Mont. L. Rev. 285 (2000).

Privacy in Cyberspace, panel discussion, 61 Mont. L. Rev. 43 (2000).

The Taxation of E-Commerce, panel discussion, 61 Mont. L. Rev. 1 (2000).

2-17-551. Definitions.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

Codification Change: Section 5, Ch. 219, L. 2001, provided that this section was to be codified as an integral part of Title 2, chapter 17, part 3. Except for 2-17-301, that part was renumbered to Title 2, chapter 17, part 5, by Ch. 313, L. 2001. In order to preserve the intent of Ch. 219, the code commissioner has codified sections 1 through 4 of Ch. 219 in Title 2, chapter 17, part 5.

2-17-552. Collection of personally identifiable information — requirements.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

Codification Change: Section 5, Ch. 219, L. 2001, provided that this section was to be codified as an integral part of Title 2, chapter 17, part 3. Except for 2-17-301, that part was renumbered

to Title 2, chapter 17, part 5, by Ch. 313, L. 2001. In order to preserve the intent of Ch. 219, the code commissioner has codified sections 1 through 4 of Ch. 219 in Title 2, chapter 17, part 5.

2-17-553. No change of privacy right or public right to know.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

Codification Change: Section 5, Ch. 219, L. 2001, provided that this section was to be codified as an integral part of Title 2, chapter 17, part 3. Except for 2-17-301, that part was renumbered to Title 2, chapter 17, part 5, by Ch. 313, L. 2001. In order to preserve the intent of Ch. 219, the code commissioner has codified sections 1 through 4 of Ch. 219 in Title 2, chapter 17, part 5.

Part 6
Government Competition With Private Internet Providers

Part Compiler's Comments

Effective Date: Section 6, Ch. 547, L. 2001, provided that this part is effective July 1, 2001.

Part Law Review Articles

Taxing the Internet: The States' Next Frontier, Kee, 19 J. St. Tax'n 1 (2001).

Part 8
Capitol Complex Master Plan Act

2-17-803. Capitol complex advisory council established — membership — staff services — compensation.

Compiler's Comments

2003 Amendment: Chapter 56 in (3) at end inserted "and share the costs associated with council operations". Amendment effective October 1, 2003.

1999 Amendment: Chapter 51 in (4)(a) near beginning after "exceed the" substituted "daily allowance" for "amount"; and made minor changes in style. Amendment effective March 15, 1999.

2-17-804. Council duties and responsibilities.

Compiler's Comments

2003 Amendment: Chapter 56 inserted (1)(a) requiring adoption of an art and memorial plan; in (1)(b) near beginning after "proposals for" substituted "long-term displays of up to 50 years, subject to renewal, in the capitol complex and on the capitol complex grounds and for" for "permanent displays or" and near end after "buildings" inserted "spaces, and rooms"; in (1)(c) after "displays of a" substituted "long-term" for "permanent" and near middle after "complex" inserted "and on the capitol complex grounds"; in (2) in introductory clause after "legislature on" substituted "long-term" for "permanent"; in (2)(a) after "fits the" inserted "long-range"; in (2)(b) after "appearance of the" deleted "capitol or other" and after "complex" deleted "buildings"; in (3) near middle of first sentence after "buildings" inserted "spaces, and rooms", after "and for" deleted "permanently", and after "in the capitol" inserted "complex" and at end of second sentence substituted "part" for "section"; and made minor changes in style. Amendment effective October 1, 2003.

2-17-805. Function of department of administration — capitol area master plan — advice of capitol complex advisory council and legislative council.

Compiler's Comments

2003 Amendment: Chapter 56 in (1) at end of first sentence after "development" substituted "of the capitol complex" for "of state buildings in the immediate area of the capital city"; in (1)(c) at end substituted "capitol complex" for "immediate area of the capital city"; in (3) near beginning after "preserve" inserted "all publicly held" and after "capitol" inserted "complex"; and made minor changes in style. Amendment effective October 1, 2003.

1997 Amendment: Chapter 476 at beginning of (1) substituted "With advice from the council, the departments of administration and fish, wildlife, and parks" for "The department of administration" and in two places, before "master plan", inserted "long-range"; deleted former (3) that read: "The legislative council shall consult with and advise the Montana historical society on the placement of busts, statues, memorials, or art displays of a permanent nature

within public areas of the capitol building. An item may not be permanently displayed unless approved by the legislature"; and made minor changes in style.

1993 Amendment: Chapter 7 at beginning of (1) substituted reference to Department of Administration for reference to Capitol Building and Planning Committee; at beginning of (2) and (5) substituted reference to Legislative Council for reference to Capitol Building and Planning Committee; substituted (3) regarding placement and display of material in the capitol building for former language in (2) concerning placement and display of material in the capitol complex; inserted (4) regarding preservation of capitol building artwork; at end of (5) deleted "complex"; and made minor changes in style.

1983 Amendment: Deleted (4), which read: "The committee shall serve as the legislature's representative in the preparation and implementation of plans for renovation and remodeling of the capitol. In this capacity the committee may decide, based on its study and analysis, the allocation and use of space in the capitol, including without limitation the location of legislative chambers and committee rooms following any remodeling. Allocation of space shall include adequate space in the capitol for the staff of the legislative finance committee, legislative audit committee, and the legislative council."

1981 Amendment: Added subsection (4) authorizing the committee to determine allocation and use of space in the Capitol by the Legislative Branch.

Case Notes

Decision on Location of Legislative Chambers — Legislative Approval Required: Prior to 1983 amendments, this section's provision that the Capitol Building and Planning Committee may decide the location of legislative chambers, when read together with the provision in 5-17-103 (renumbered 2-17-825) that the Committee shall report its recommendations to each regular session of the Legislature, means that the Committee must report its decision to the Legislature and that the Legislature is not bound by the decision of the Committee and may either approve or disapprove the decision. Since the decision must be approved by the Legislature, the Legislature did not unconstitutionally delegate its authority to the Committee in violation of the separation of powers provision of the Montana Constitution. Goodover v. Dept. of Administration, 201 M 92, 651 P2d 1005, 39 St. Rep. 1975 (1982).

Location of Legislative Chambers — Effect of Consent by Appropriation Under Statute: The Legislature's consent to certain construction or renovation, in the form of an appropriation or joint resolution, is required by 18-2-102. This section's directive to the Capitol Building and Planning Committee to decide the location of legislative chambers belies the contention that the Legislature consented, under 18-2-102, to relocation of the Senate chambers when the Legislature passed an appropriation for a capitol renovation project. Goodover v. Dept. of Administration, 201 M 92, 651 P2d 1005, 39 St. Rep. 1975 (1982).

Senate's Right to Decide Where It Will Sit: The Montana State Senate, a distinguished, honorable, and independent arm of the legislative body, has the right to determine where it will sit. Goodover v. Dept. of Administration, 201 M 92, 651 P2d 1005, 39 St. Rep. 1975 (1982).

Collateral References

Capitol Master Plan: Reports and Recommendations, 1977-78 Interim Report, Montana Legislative Council.

2-17-807. Approval for displays and naming buildings, spaces, and rooms.

Compiler's Comments

2003 Amendment: Chapter 56 in (1) near beginning after "building" inserted "space, or room", near middle after "may not be" deleted "permanently", after "displayed" inserted "on a long-term basis", after "capitol" inserted "complex", after "building" inserted "space, or room", and at end substituted "part" for "section"; in (2) near beginning after "building" inserted "space, or room", after "individual" inserted "or a bust, statue, memorial, monument, or art display commemorating an individual may not be displayed on a long-term basis in the capitol complex", and at end substituted "10 years" for "5 years"; inserted (3) providing that art commemorating an event may not be displayed on a long-term basis until 10 years after the event; inserted (5) allowing the department of administration to review and approve temporary displays for up to 1 year; and made minor changes in style. Amendment effective October 1, 2003.

2-17-808. Placement of certain busts, statues, memorials, monuments, and art displays.

Compiler's Comments

2003 Amendment — Coordination: Section 3, Ch. 62, L. 2003, a coordination section, inserted (4) concerning placement of senate sculpture.

Effective Date: This section is effective October 1, 2003.

2-17-809. Lewis and Clark expedition sculpture.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

2-17-810. Remodeling and renovation — senate chambers and former supreme court chambers to be preserved.

Compiler's Comments

1993 Amendment: Chapter 7 deleted former (1) through (3) that read: "(1) Notwithstanding the provisions of Title 5, chapter 17, part 1, the department of administration shall proceed with the plans for the remodeling and renovation of the state capitol for which moneys were appropriated by the 47th legislature and reappropriated by the 48th legislature.

(2) In proceeding with such plans, the department of administration shall consult with the capitol building and planning committee provided for in 5-17-101; however, such plans and the implementation of such plans need not be reported to the 49th legislature before implementation.

(3) The department of administration, in the implementation of such plans, shall keep and maintain the senate chambers in its present location"; and made minor changes in style.

2-17-811. Custodial care of capitol buildings and grounds.

Compiler's Comments

1991 Amendment: In (2) deleted requirement that Department include in its budget necessary requests for appropriations for maintenance, repair, replacement, renewal, and additions to state buildings and equipment in the state capitol area. Amendment effective July 1, 1991.

1989 Amendment: In (1), at end, inserted "which is the geographic area within a 10-mile radius of the state capitol"; in (2) inserted third sentence requiring Department to provide or approve all custodial, maintenance, and security work done on state-owned or leased buildings in State Capitol area; in (4), near middle, inserted "or approve the maintenance of"; and made minor changes in phraseology.

1985 Amendment: In (2) near beginning and near end, deleted "and grounds" before "in the capitol area"; and inserted (4) assigning capitol area grounds maintenance to the Department of Fish, Wildlife, and Parks.

Administrative Rules

Title 2, chapter 11, subchapter 1, ARM Regulation of capitol complex buildings.

Case Notes

Competitive Bidding: Contract to provide janitorial services, maintenance service, and supplies for Capitol complex required competitive bidding. State ex rel. Great Falls Mr. Klean v. St. Bd. of Examiners, 153 M 220, 456 P2d 278 (1969).

Attorney General's Opinions

Sale or Lease of Capitol Complex Lands: This section does not authorize the Department of Administration to sell, lease, or otherwise dispose of any interest in state lands within the capitol complex without the approval of the Board of Land Commissioners (now Department of Natural Resources and Conservation). 35 A.G. Op. 41 (1973).

2-17-812. Inventory of improvements

Compiler's Comments

2003 Amendment: Chapter 56 in (2) at beginning substituted "Montana historical society" for "department of administration", after "inventory of" inserted "all publicly held", after "plaques" deleted "and other improvements", and after "capitol" substituted "complex" for "building"; in (3) at beginning after "Both" substituted "agencies" for "departments"; and made minor changes in style. Amendment effective October 1, 2003.

2-17-813. Certain items entrusted to Montana historical society.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

2-17-817. Highway patrol officers' memorial.

Compiler's Comments

Preamble: The preamble attached to Ch. 163, L. 1995, provided: "WHEREAS, on March 14, 1935, the 24th Montana Legislative Assembly established the Montana Highway Patrol to reduce the number of deaths on state highways; and

WHEREAS, officers of the Montana Highway Patrol have dedicated their lives to traffic law enforcement service for 60 years; and

WHEREAS, four officers have given their lives in service to the Montana Highway Patrol and citizens of Montana; and

WHEREAS, the memory of these officers' service will always be honored by family, friends, and fellow workers; and

WHEREAS, the State of Montana desires to recognize and remember the dedicated service of fallen Montana Highway Patrol officers."

2-17-825. Report to legislature.

Compiler's Comments

1993 Amendments: Chapter 7 at beginning substituted "legislative council may" for "committee shall", near middle substituted "related to its duties under 5-11-115(2) [renumbered 2-17-805(2)]" for "and present the report to the legislature as provided in 5-11-210", and deleted former second sentence that read: "To prepare its report and recommendations, the committee may receive assistance from the legislative council"; and made minor changes in style.

Chapter 349 at beginning substituted "may" for "shall"; and made minor changes in style.

1991 Amendment: Near middle of first sentence substituted "as provided in 5-11-210" for "at each regular session". Amendment effective March 20, 1991.

1983 Amendment: Inserted "for the purpose of assisting the legislature in determining if such recommendations should be implemented".

Case Notes

Decision on Location of Legislative Chambers — Legislative Approval Required: The provision in 5-17-102 (since amended and renumbered 2-17-805) that the Capitol Building and Planning Committee may decide the location of legislative chambers, when read together with this section's provision that the Committee shall report its recommendations to each regular session of the Legislature, means that the Committee must report its decision to the Legislature and that the Legislature is not bound by the decision of the Committee and may either approve or disapprove the decision. Since the decision must be approved by the Legislature, the Legislature did not unconstitutionally delegate its authority to the Committee in violation of the separation of powers provision of the Montana Constitution. Goodover v. Dept. of Administration, 201 M 92, 651 P2d 1005, 39 St. Rep. 1975 (1982).

Collateral References

Capitol Building and Planning Committee, A Report to the 50th Legislature, 1985-86 Interim Report, Montana Legislative Council.

Capitol Master Plan: Reports and Recommendations, 1977-78 Interim Report, Montana Legislative Council.

Part 11
Montana Electronic Government Services Act

Part Compiler's Comments

Preamble: The preamble attached to Ch. 265, L. 2001, provided: "WHEREAS, dramatic changes in technology clearly point to a future where the state of Montana will need to conduct business electronically; and

WHEREAS, Montana's citizens and businesses are expecting state government to deliver more of its services and information through the Internet; and

WHEREAS, the offering of government services through electronic means can make businesses more effective and profitable and provide for greater convenience for citizens; and

WHEREAS, traditional means of obtaining government services will continue to be offered; and

WHEREAS, an optional method of providing government services can be established electronically; and

WHEREAS, the state of Montana is committed to offering government services electronically to its citizens and businesses."

Effective Date: Section 7, Ch. 265, L. 2001, provided: "[This act] [2-17-1101 through 2-17-1105] is effective on passage and approval." Approved April 19, 2001.

Part Law Review Articles

Privacy in Cyberspace, Harvey, 61 Mont. L. Rev. 285 (2000).

Privacy in Cyberspace, panel discussion, 61 Mont. L. Rev. 43 (2000).

CHAPTER 18
STATE EMPLOYEE CLASSIFICATION, COMPENSATION, AND BENEFITS

Chapter Compiler's Comments

Preamble: The preamble attached to Ch. 6, Sp. L. August 2002, provided: "WHEREAS, the savings from wages and some overhead costs through the implementation of a freeze on hiring will assist with the budget emergency."

State Government Hiring Freeze: Section 1, Ch. 6, Sp. L. August 2002, provided: "Fiscal year 2003 hiring freeze — exemption. (1) Except as provided in subsections (2) and (3), an agency of state government, as defined in 2-18-601, may not hire any employee after [the effective date of this act].

(2) An agency may hire an employee if that agency's approving authority, as defined in 17-7-102, approves the hiring in writing and transmits the approval to the governor's office of budget and program planning for input into the statewide accounting, budgeting, and human resources system. An approving authority may approve the hiring of an employee to protect the public health, safety, and welfare of the citizens of the state and to avoid significant disruptions to critical state services. The governor's office of budget and program planning, in conjunction with the state personnel division of the department of administration, shall, within 30 days of [the effective date of this act], develop general criteria that are to be used by the governor for executive branch agencies and that may be used by other approving authorities to determine which vacant positions may be exempted from the hiring freeze.

(3) This section does not apply to the Montana university system." This provision was not codified because it is temporary.

Effective Date: Section 2, Ch. 6, Sp. L. August 2002, provided: "[This act] is effective on passage and approval." Approved August 13, 2002.

Termination: Section 3, Ch. 6, Sp. L. August 2002, provided: "[This act] terminates June 30, 2003."

Alternative Classification and Pay System: Section 1, Ch. 417, L. 1997, provided: "Competency-based personnel systems. The department [of administration] shall develop an alternative classification and pay system that is consistent with the market-based approach to pay administration but that emphasizes individual skills, competencies, and contributions in addition to the criteria provided in 2-18-202. The compensation system must provide for the means of identifying the requisite skills and competencies necessary for the state and its separate departments and agencies to provide service excellence to Montana's citizens. Each agency, when possible, shall implement the compensation plan in a manner that results in a flatter management structure. Employee recruitment, selection, evaluation, and compensation must be based, at least in part, on the demonstration of these necessary skills and competencies. The department shall develop the alternative system in consultation with employee representatives. The department shall test the effectiveness of the program through the implementation of pilot projects. Insofar as a pilot project applies to employees of a collective bargaining unit, its implementation is a negotiable subject under 39-31-305. The department shall present a proposal for an alternative system to the 56th legislature."

Severability Clause: Section 17, Ch. 440, L. 1973, was a severability clause.

Chapter Case Notes

Prospective Legislative Change in Compensation: An employee's right to compensation vests or accrues only after the employee has performed the required services for that pay period. Thus, highway patrol officers had no vested rights to continue to receive 1% longevity increases in salary that were established by a statute repealed when the state pay plan was established and

when their base pay under the pay plan included earned longevity, because such prospective alteration of salary prior to vesting is permissible. In re the Wage Appeal of Highway Patrol Officers v. Bd. of Personnel Appeals, 208 M 33, 676 P2d 194, 41 St. Rep. 154 (1984).

Statutes Fixing Terms and Conditions of State Employment — Presumed Not to Be Contractual: Highway patrolmen had no vested right to receive 1% longevity increases established by a statute repealed when the state pay plan was instituted. Unless the circumstances and language of the statute manifest a legislative intent to create private rights of a contractual nature, enforceable against the state, a statute fixing certain terms of public employment, such as salary or compensation, is presumed not to create contractual rights but merely to declare a policy to be pursued until the Legislature declares otherwise. In re the Wage Appeal of Highway Patrol Officers v. Bd. of Personnel Appeals, 208 M 33, 676 P2d 194, 41 St. Rep. 154 (1984).

Chapter Collateral References

Who are "public employers" or "public employees" within the meaning of state whistleblower protection acts. 90 ALR 5th 687.

Validity of federal regulation of wage rates and hours of service as affected by Commerce Clause of Federal Constitution. 83 L Ed 2d 1163, §5[a, b].

Part 1
General Provisions

Part Attorney General's Opinions

Employees of Office of Workers' Compensation Judge — Exempt From Classification Plan: The question of whether or not the employees of the office of the workers' compensation judge are exempt from the state classification plan (Title 2, ch. 18) depended upon whether the office was part of the judicial branch or the executive branch. The similarities to state courts, the qualifications for office, the statutory provisions regarding the judge and the court, statutory construction, and the legislative intent derived from the history supported the conclusion that the office performs a judicial function. Therefore, the employees are employees of the judicial branch and exempt from the state classification plan. 38 A.G. Op. 27 (1979).

2-18-101. Definitions.

Compiler's Comments

1999 Amendment: Chapter 558 inserted definition of competencies; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendment: Chapter 339 inserted definitions of permanent employee, seasonal employee, short-term worker, and temporary employee; deleted definitions of permanent position, seasonal position, and temporary position (see 1997 Session Law for former text); in definition of job sharing, after "position", deleted "that is considered an aggregate or permanent position"; in definition of permanent status, at end after "period", deleted "in a permanent position"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 455 inserted definitions of anniversary date, class series benchmark, and market ratio; in definition of market salary inserted "midpoint in a pay grade provided in 2-18-312, based on the" and substituted "comparable occupations" for "occupations comparable to occupations in a grade provided in 2-18-312"; and made minor changes in style. Amendment effective April 14, 1995.

1991 Amendment: Inserted definitions of base salary, entry salary, and market salary. Amendment effective April 29, 1991.

1983 Amendment: Inserted definition of "job sharing".

1981 Amendment: Inserted "and part 10" in the introductory clause; added definitions of "Board", "Class", "Class specification", and "Grade"; added "created in 2-15-1001" in definition of "Department".

Constitutional Officers: The elected officials enumerated in Art. VI, sec. 1, Mont. Const., are the Governor, Lieutenant Governor, Secretary of State, Attorney General, Superintendent of Public Instruction, and Auditor.

Case Notes

Judgment Against "State" Binding Against Two Agencies — Retirement Benefits Setoff Barred as Compulsory Counterclaim: During a longstanding dispute by firefighters employed by the Montana Air National Guard and involving several separate lawsuits, the plaintiff was fired and began receiving retirement benefits. The plaintiff sued "the State" for reinstatement of employment, lost wages, employment benefits during the period of termination, liquidated

damages, and attorney fees and costs. After other firefighters' suits were decided in the firefighters' favor, the plaintiff settled with the Department of Military Affairs (DMA) for reinstatement, lost wages, lost annual leave and sick leave benefits, retirement contributions that the DMA would have made during the termination period, and attorney fees and costs of suit. After settlement, the Public Employees' Retirement System (PERS) claimed that it was entitled to repayment of the retirement benefits that the plaintiff had been paid before reinstatement. The DMA and PERS agreed to offset the settlement damages by the retirement amount. The Supreme Court held that the state's setoff claim was barred as a compulsory counterclaim, that both agencies were bound by the DMA's settlement agreement because they were the same party collectively known as the "State of Montana", and that the plaintiff was entitled to the full settlement amount without setoff. Peters v. St., 285 M 345, 948 P2d 250, 54 St. Rep. 1185 (1997).

Permanent Status Protection: Where department employee had achieved "permanent status" in one position and was subsequently promoted to another position on a probationary basis and terminated when she did not perform satisfactorily, she remains on a permanent status and must be accorded the same protections as a permanent employee, including a showing by the Department of just cause for termination. Nye v. Dept. of Livestock, 196 M 222, 639 P2d 498, 39 St. Rep. 49 (1982).

2-18-102. Personnel administration — general policy setting.

Compiler's Comments

1997 Amendment: Chapter 339 in (1)(b), near beginning after "capable persons for", substituted "employment" for "permanent, seasonal, temporary, and other types of positions". Amendment effective July 1, 1997.

1995 Amendments — Composite Section: Chapter 84 at end of first sentence of (3) inserted "and shall adopt rules to implement this part, except 2-18-111"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 562 in (1)(b) inserted "ethical conduct"; inserted (4) regarding model rules; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

1995 Statement of Intent: The statement of intent attached to Ch. 84, L. 1995, provided: "A statement of intent is required for this bill because 2-18-102 requires the department of administration to adopt administrative rules containing personnel policies and 2-18-401 authorizes the department to adopt rules regarding the operation of the state central payroll system.

The legislature intends that rules containing personnel policies should address employee records, performance appraisals, grievances, discipline, reductions in force, recruitment, selection, and training.

The legislature intends that rules concerning payroll deductions should address the payroll deduction process and should set criteria for the kinds of payments that can be made through payroll deductions. Examples of types of payroll deductions that should be addressed by the rules are payment of insurance premiums, bank and credit union payments, charitable contributions, and wage garnishments."

Preamble: The preamble attached to Ch. 562, L. 1995, provided: "WHEREAS, Article XIII, section 4, of the Montana Constitution is unambiguous in its intent of prohibiting conflict between public duty and private interest for members of the Legislature and for all state and local government officers and employees."

Severability: Section 25, Ch. 562, L. 1995, was a severability clause.

1983 Amendment: Inserted (1)(c) relating to job sharing.

Administrative Rules

ARM 2.21.6611 Access to employee personnel records.

Case Notes

State's Administrative Rules Abrogate "At Will" Employment Relationship — Due Process Required: Plaintiff sued, alleging constructive discharge from state employment. The District Court dismissed the complaint for failure to state a claim on which relief can be granted. The Supreme Court reversed, holding that the state's adoption of administrative rules that limit discharge of an employee without a showing of "just cause" confer upon employees a specified term of employment and create a property interest in the continuation of that employment. Adoption of the rules abrogated the "at will" employment relationship. The property interest in

continued employment is protected by the due process provisions of the state and federal constitutions. Boreen v. Christensen, 267 M 405, 884 P2d 761, 51 St. Rep. 1014 (1994).

State Employee Preference as Tie-Breaker: The intent, interpretation, and constant application of the Department of Administration policy on preference in rehiring state employees who lose their jobs because of a reduction in force, as outlined in ARM 2.21.5007, are that the policy is to be applied as a tie-breaker preference, not an absolute preference. Easy v. Dept. of Natural Resources and Conservation, 231 M 306, 752 P2d 746, 45 St. Rep. 631 (1988).

Circumstances Warranting Good Faith Discharge — Claim Not Stating Public Concern — Summary Judgment Proper: An employee was issued reprimands, notices of corrective discipline, and notices of punitive discipline but still failed to perform assigned duties or correct job inadequacies. He had the chance to rebut charges of incompetency but chose not to do so. He had the right of grievance but failed to exercise it. His claim of wrongful discharge did not state a public policy concern, but rather was a personal matter. The Supreme Court declined to interfere with the employer's right to manage its affairs and hire employees who will perform their jobs so long as there is a standard of discipline and the employer abides by it in good faith. Summary dismissal of the wrongful discharge claim was proper. Belcher v. Dept. of State Lands, 228 M 352, 742 P2d 475, 44 St. Rep. 1591 (1987).

2-18-103. Officers and employees excepted.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 313 inserted (19) relating to the chief information officer. Amendment effective July 1, 2001.

Chapter 483 inserted (20) excepting the chief business development officer and six professional staff positions in the office of economic development. Amendment effective July 1, 2001.

1997 Amendments: Chapter 339 in introductory clause substituted "Parts 1 through 3 and 10 do not apply to the following officers and employees in state government" for "Parts 1 and 2 do not apply to the following positions in state government" and deleted former (1)(j) that read: "(j) teachers under the authority of the department of corrections or the department of public health and human services"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 417 in introductory clause substituted "Parts 1 through 3 and 10" for "Parts 1 and 2" and substituted "officers and employees" for "positions"; inserted (19) ((18) in version effective July 1, 1999) relating to legislative employees; deleted former (2) that read: "(2) Employees of an entity of the legislative branch, other than the office of consumer counsel, are exempt from the application of 2-18-1011 through 2-18-1013. With respect to entities of the legislative branch, other than the office of consumer counsel:

(a) as used in parts 1 through 3 of this chapter, references to the "department of administration" or "department" apply to the legislative council established by 5-11-101, which may delegate administrative duties to the legislative services division established by 5-11-111;

(b) as used in 2-18-102, the term "governor" applies to the legislature; and

(c) as used in 2-18-204, the term "budget director" applies to the "approving authority" as defined in 17-7-102"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 549 in (10) substituted "five" for "three"; deleted former (1)(n) that read: "(n) executive director and senior investment officer of the Montana board of science and technology development"; and made minor changes in style. Amendment effective July 1, 1999.

1995 Amendments: Chapter 455 inserted (1)(s) regarding training coordinator for County Attorneys; and made minor changes in style. Amendment effective April 14, 1995.

Chapter 545 in (1)(c) substituted "employees of the office of consumer counsel" for "officers and employees of the legislative branch"; inserted (2) regarding exemption of certain employees of the Legislative Branch; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1)(j) substituted "department of corrections or the department of public health and human services" for "department of corrections and human services or family services". Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround"

process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 395 inserted (18) concerning Commissioner of Banking and Financial Institutions; and made minor changes in style.

Name Change — Directions to Code Commissioner: Section 14, Ch. 630, L. 1993, provided: "Wherever the name "state compensation mutual insurance fund", meaning the fund established in 39-71-2313, appears in the Montana Code Annotated or in legislation enacted by the 1993 legislature, the code commissioner is directed to change the name to "state compensation insurance fund"." The phrase appeared in this section and was changed by the Code Commissioner as directed.

1991 Amendments — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Chapter 447 inserted (16) concerning state racing stewards; and made minor change in style. Amendment effective April 16, 1991.

Chapter 507 inserted (17) relating to executive director of Montana Wheat and Barley Committee; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendments: Chapter 316 inserted (14) relating to Montana Board of Science and Technology Development. Amendment effective March 24, 1989.

Chapter 613 inserted (15) exempting executive director and employees of state compensation mutual insurance fund; and made minor change in phraseology. Amendment effective April 21, 1989.

Chapter 660 at end of (10) inserted "or family services"; and made minor changes in phraseology. Amendment effective May 11, 1989.

1987 Amendments: Chapter 161 inserted (13) relating to the lottery security position.

Chapter 581 in (11), relating to the Board of Investments, inserted "executive director, and three professional staff positions".

1983 Amendment: In (9) relating to the Montana School for the Deaf and Blind, inserted "and live-in houseparents".

Case Notes

State Firefighter Reclassification Plan Violative of Fair Labor Standards Act: In 1985, the U.S. Supreme Court in Garcia v. Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985), reversed previous case law that excluded state jobs from coverage under the federal Fair Labor Standards Act of 1938 (FLSA), making FLSA provisions binding on state and local governments. Under the FLSA, a firefighter must be paid at the overtime rate if the firefighter's tour of duty exceeds 212 hours in 28 days. The Montana Department of Military Affairs employed certain firefighters, the cost of whose jobs was paid by the federal government through a cooperative arrangement with the state. In response to Garcia, the Department proposed changes in the manner in which the firefighters were paid and, in 1986, an exclusion from the state pay matrix was granted under this section. Following the reclassification, the firefighters' wages were reduced. The firefighters sought compensation for unpaid "straight time" and for discrimination in violation of the FLSA. The state's economic necessity argument failed because under Blanton v. Murfreesboro, 856 F2d 731 (6th Cir. 1988), the state could not prove that the wages were reduced from fiscal concern that was not attributable to the extra cost of complying with the FLSA nor could the state show that it could not augment federal funds with state funds or implement a different plan without violating the FLSA. The state's contention that the firefighters were not reclassified in response to their assertion of coverage under the FLSA because violations were not asserted until 1988 also was invalid because under Drollinger v. Ariz., 962 F2d 956 (9th Cir. 1992), the FLSA also prohibits violations in

anticipation of assertions of coverage. The state's argument that the firefighters ratified the wage cuts when they signed agreements reducing their hourly wage also was incorrect because under Barrentine v. Ark.-Best Freight Sys., 450 US 728, 67 L Ed 2d 641, 101 S Ct 1437 (1981), employees' rights under the FLSA cannot be abridged by contract or otherwise. Cumulatively, the uncontroverted evidence established a state violation of the FLSA, and summary judgment was proper. Tefft v. St., 271 M 82, 894 P2d 317, 52 St. Rep. 357 (1995).

Attorney General's Opinions

Chief Water Judge Not Subject to State Leave Policies — Executive Branch Not to Supervise Judicial Branch: Although the Chief Water Judge is appointed and not elected, the Chief Water Judge is a judicial officer and is not subject to the vacation leave policies of the Department of Administration. This interpretation of the statutes is also required by the application of the separation of powers clause of the Montana Constitution. To hold otherwise would subject a judicial officer to control by the Executive Branch of state government and not to the control of the Montana Supreme Court or the Judicial Standards Commission. 48 A.G. Op. 2 (1999).

Authority to Classify Positions of State Librarian and Director of Montana Historical Society: Although repeals by implication are not favored, it would frustrate the purpose of the classification and pay plan law to hold that the positions of state librarian and Director of the Montana Historical Society are exempt from classification when the Legislature has not expressly approved such exemption in 2-18-103. Thus, the provisions of 22-3-107 and 22-1-102, which authorize the Board of Trustees of the historical society and the State Library Commission to set salary, are superseded by the classification and pay plan law, Title 2, ch. 18, parts 1 through 3. The Board and the Commission retain the authority to hire and to assign duties and responsibilities. 40 A.G. Op. 68 (1984).

Employees of Office of Workers' Compensation Judge — Exempt From Classification Plan: The question of whether or not the employees of the office of the workers' compensation judge are exempt from the state classification plan (Title 2, ch. 18) depended upon whether the office was part of the judicial branch or the executive branch. The similarities to state courts, the qualifications for office, the statutory provisions regarding the judge and the court, statutory construction, and the legislative intent derived from the history supported the conclusion that the office performs a judicial function. Therefore, the employees are employees of the judicial branch and exempt from the state classification plan. 38 A.G. Op. 27 (1979).

Attorneys — State Classification and Pay Plan: Exemptions to the state classification and pay plan do not apply to attorneys employed by state agencies who are commissioned as Special Assistant Attorneys General, unless those attorneys are under the immediate supervision or control of the Attorney General. 37 A.G. Op. 95 (1977).

Public Employee Classification Plan: The state employee classification plan is applicable to employees of state agencies administered by the merit system. 36 A.G. Op. 29 (1975).

2-18-104. Exemption for personal staff — limit.

Compiler's Comments

1997 Amendment: Chapter 339 in (1), at end after "from", substituted "parts 1 through 3 and 10" for "the application of 2-18-204, 2-18-205, 2-18-207, and 2-18-1011 through 2-18-1013". Amendment effective July 1, 1997.

1989 Amendment: Deleted former (4) that read: "(4) A person occupying an exempt position under 2-18-103 or this section may not receive an increase in compensation unless the person changes positions or successfully completes a probationary period in fiscal year 1988 or 1989." Amendment effective July 1, 1989.

1987 Amendment: Inserted (4) freezing compensation for exempt positions.

1983 Amendment: In (3), increased number of exempted staffers from 5 to 10 and at end deleted "and must be approved by the department according to criteria approved by the department".

2-18-106. No limitation on legislative authority — transfer of funds.

Compiler's Comments

1983 Amendment: In (2), substituted language allowing unexpended balances to be transferred to second year in a biennium to offset pay increases for former text that read: "Appropriated funds not spent at the end of the fiscal year shall revert to the fund from which appropriated."

Case Notes

Prospective Legislative Change in Compensation: An employee's right to compensation vests or accrues only after the employee has performed the required services for that pay period. Thus, highway patrol officers had no vested rights to continue to receive 1% longevity increases in salary that were established by a statute repealed when the state pay plan was established and when their base pay under the pay plan included earned longevity, because such prospective alteration of salary prior to vesting is permissible. In re the Wage Appeal of Highway Patrol Officers v. Bd. of Personnel Appeals, 208 M 33, 676 P2d 194, 41 St. Rep. 154 (1984).

Statutes Fixing Terms and Conditions of State Employment — Presumed Not to Be Contractual: Highway patrolmen had no vested right to receive 1% longevity increases established by a statute repealed when the state pay plan was instituted. Unless the circumstances and language of the statute manifest a legislative intent to create private rights of a contractual nature, enforceable against the state, a statute fixing certain terms of public employment, such as salary or compensation, is presumed not to create contractual rights but merely to declare a policy to be pursued until the Legislature declares otherwise. In re the Wage Appeal of Highway Patrol Officers v. Bd. of Personnel Appeals, 208 M 33, 676 P2d 194, 41 St. Rep. 154 (1984).

2-18-107. Job-sharing positions — benefits.

Compiler's Comments

1985 Amendment: In (2) substituted language providing that job-sharing benefits are to be provided in the same manner as for permanent part-time employees for former text that read: "Employee holiday pay, annual leave, sick leave, and health benefits for a full-time equivalent position filled by job sharing must be divided on a pro rata basis between the persons filling such position."

Legislative Intent — Report: Section 4, Ch. 684, L. 1983, provided: "The legislature intends that the state permit job sharing in certain positions when it is done to maintain or increase efficiency in such positions and actively promote the hiring of new employees or the filling of vacant positions by using job sharing. The legislature does not intend that the state actively promote replacement of current full-time employees with job sharing employees. The legislative fiscal analyst shall report to the 49th legislature on the success of agencies in implementing this intent."

See "Job Sharing in Montana State Government", Report to Legislative Finance Committee by the Office of the Legislative Fiscal Analyst, Oct. 31, 1984.

2-18-110. Shift differential and hazardous duty pay negotiated.

Compiler's Comments

Effective Date: Section 19(1), Ch. 720, L. 1991, provided that this section is effective on passage and approval. Approved April 29, 1991.

2-18-111. Hiring preference for residents of Indian reservations for state jobs within reservation — rules.

Compiler's Comments

1997 Amendment: Chapter 339 in (1), near middle after "hiring for", deleted "a position of"; in (3) inserted definition of employment and deleted definition of position (see 1997 Session Law for former text); and made minor changes in style. Amendment effective July 1, 1997.

1991 Statement of Intent: The statement of intent to Ch. 506, L. 1991, provided: "A statement of intent is required for this bill because [sections 1 and 2] [2-18-111 and 18-1-110] direct the commissioner of labor and industry to adopt rules to implement [sections 1 and 2] [2-18-111 and 18-1-110]. It is the intent of the legislature that the rules also be designed to assist the commissioner of labor and industry to enforce the provisions of [sections 1 and 2] [2-18-111 and 18-1-110] and to investigate complaints of any violations of law, as provided in [sections 1 and 2] [2-18-111 and 18-1-110]."

Applicability: Section 7, Ch. 506, L. 1991, provided: "[This act] applies to hiring for vacancies in state agency or state construction project positions within an Indian reservation that occur after [the effective date of this act] [effective October 1, 1991]."

Case Notes

Conditions of Tribal Affiliation Applicable to Indian Hiring Preference — Status of Individual Indian Not Controlling: Schmasow claimed that the Native American Center (NAC) should have hired her as executive director pursuant to an Indian employment preference

provision, 25 U.S.C. 450e(b), that was contained in the NAC's contract with the Indian Health Service. The NAC instead hired Shield, another Indian, but Schmasow contended that Shield did not qualify for the employment preference because he was a member of the Little Shell Chippewa Tribe, which is not a federally recognized tribe listed by the U.S. Secretary of the Interior under 25 U.S.C. 479a-1. The District Court concluded that Shield was eligible for the preference, and Schmasow appealed. In affirming the District Court, the Supreme Court held that in order to satisfy the definitions of Indian and Indian tribe in the preference law, one must establish that the hired person's tribe is itself eligible for the health care benefits and that the status of an individual Indian is not controlling. The Little Shell Chippewa Tribe fits the definition of Indian tribe because it is part of an Indian community that receives federal Indian funding for special programs and services, even though it is not a federally recognized tribe. Because Shield was an enrolled member of the Little Shell Chippewa Tribe, he satisfied the definition of Indian and was eligible for the hiring preference. Schmasow v. Native Am. Center, 1999 MT 49, 293 M 382, 978 P2d 304, 56 St. Rep. 198 (1999).

2-18-115. Exemption for certain university temporary employees — "temporary employee" defined.

Compiler's Comments

Effective Date: Section 4, Ch. 121, L. 1995, provided that this section is effective March 10, 1995.

Part 2
Classification

2-18-201. Development of personnel classification plan.

Compiler's Comments

1995 Amendment: Chapter 545 inserted second sentence regarding development of a Legislative Branch classification plan. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

Case Notes

Prospective Legislative Change in Compensation: An employee's right to compensation vests or accrues only after the employee has performed the required services for that pay period. Thus, highway patrol officers had no vested rights to continue to receive 1% longevity increases in salary that were established by a statute repealed when the state pay plan was established and when their base pay under the pay plan included earned longevity, because such prospective alteration of salary prior to vesting is permissible. In re the Wage Appeal of Highway Patrol Officers v. Bd. of Personnel Appeals, 208 M 33, 676 P2d 194, 41 St. Rep. 154 (1984).

Attorney General's Opinions

Authority of Developmental Disabilities Planning and Advisory Council to Set Staff Salaries: In accordance with the more recent and specific language of 53-20-206 and the exclusionary language of 2-15-2204 (renumbered 2-15-1869), the Developmental Disabilities Planning and

Advisory Council has authority to set salaries of the Council's staff without reference to the state personnel classification plan established in this section. 44 A.G. Op. 1 (1991).

Authority to Classify Positions of State Librarian and Director of Montana Historical Society: Although repeals by implication are not favored, it would frustrate the purpose of the classification and pay plan law to hold that the positions of state librarian and Director of the Montana Historical Society are exempt from classification when the Legislature has not expressly approved such exemption in 2-18-103. Thus, the provisions of 22-3-107 and 22-1-102, which authorize the Board of Trustees of the historical society and the State Library Commission to set salary, are superseded by the classification and pay plan law, Title 2, ch. 18, parts 1 through 3. The Board and the Commission retain the authority to hire and to assign duties and responsibilities. 40 A.G. Op. 68 (1984).

Collateral References

What constitutes "salary," "wages," "pay," or the like, within pension law basing benefits thereon. 91 ALR 5th 225.

2-18-202. Guidelines for classification.

Case Notes

Board Modification of Hearings Examiner Findings Warranted Regarding Classification of Child Support Enforcement Investigators: Under 2-4-704 and St. v. Shodair Hosp., 273 M 155, 902 P2d 21 (1995), a reviewing court may reverse a decision by the Board of Personnel Appeals if it was arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. Here, the Board properly rejected a portion of a hearings examiner's findings that 80% of child support enforcement investigators' work involved case monitoring, and, absent substantial evidence, it was error for a District Court to find that the Board's rejection was improper. Further, the Board was correct in concluding that the hearings examiner mistakenly omitted the investigators' proposed findings regarding establishment duties, and the District Court erred in holding that the Board's modified findings failed to reflect the investigators' predominant duties under the predominant duty rule. St. Personnel Div. v. Child Support Investigators, 2002 MT 46, 308 M 365, 43 P3d 305 (2002).

Board of Personnel Appeals Not Bound by Findings and Conclusions of Hearings Examiner — District Court Bound by Board Conclusions if Correct: The interpretation of an administrative rule and an agency's policy is a question of law, and in its final order, an agency may reject or modify a hearings officer's conclusion of law and interpretation of administrative rules in the proposal for decision. As the final administrative authority in the state employee classification process, the Board of Personnel Appeals must review and interpret applicable rules promulgated by the Department of Administration. Thus, the Board is not bound by a hearings officer's conclusions and interpretations. However, the District Court is bound by the Board's conclusions of law and interpretation of administrative rules, if correct. In the present case, the Board reasonably interpreted applicable employee classification rules and correctly concluded that child support enforcement investigators were improperly classified in violation of this section, and the District Court erred in reversing the Board's final order. St. Personnel Div. v. Child Support Investigators, 2002 MT 46, 308 M 365, 43 P3d 305 (2002). See also Weber v. Pub. Employees' Retirement Bd., 270 M 239, 890 P2d 1296 (1995), and In re Grievance of Brady, 1999 MT 153, 295 M 75, 983 P2d 292 (1999).

Department to Develop Guidelines for Classification — Board Limited to Determining Proper Classification: Certain highway patrol officers successfully appealed to the Personnel Division of the Department of Administration to have their grade raised pursuant to 2-18-203. In response, other officers filed a grievance pursuant to 2-18-1011, seeking reclassification of their positions and grades. Appeal was permissible under 2-18-203 as it existed at the time. The Division reclassified their positions using a "five factor" formula. The affected officers appealed their resulting grade reassignment to the Board of Personnel Appeals, which issued an order to the Division requiring reclassification of certain positions. The Board subsequently rejected the Division's classification recommendations and upheld the so-called "practice" of maintaining a grade difference between supervisors and persons they supervise. In the subsequent appeal from the classification process used by the Division, the Supreme Court held: (1) the Division's failure to follow a "practice" or "rule of thumb" is not an abuse of discretion because it followed the factors set forth in its rules and offered legitimate reasons for deviating from the "practice"; (2) the Board is limited to determining whether a position is properly classified; (3) the function of developing guidelines for classification is assigned to the Department; and (4) the state has a legitimate interest in preserving the state pay classification system, and the amended statute

rationally relates toward effectuating that objective. St. Personnel Div. v. Bd. of Personnel Appeals, 235 M 208, 766 P2d 1300, 45 St. Rep. 2324 (1988).

2-18-203. Review of positions — change in classification.

Compiler's Comments

1997 Amendment: Chapter 42 in (1), in second sentence after "teachers"', deleted "and liquor store clerks"'; and made minor changes in style. Amendment effective March 12, 1997.

1995 Amendment: Chapter 455 in (1), near middle, substituted "class specifications" for "classification specifications", inserted "class series benchmarks", after "positions" substituted "to classes" for "in the classification specifications", and at end substituted "Title 39, chapter 31" for "the Collective Bargaining Act"; in (2), in second sentence, inserted "and factors assigned to class series benchmarks"; in (3) deleted last sentence that read: "This provision shall not affect a classification or position appeal already in process on April 26, 1977"; and made minor changes in style. Amendment effective April 14, 1995.

1981 Amendment: Substituted "the allocation or reallocation of a position to a class" in (2) for "any changes in classifications or positions"; added last sentence of (2) relating to grade assigned to class is not appealable; deleted "or position" after "retroactive pay for a classification" near the beginning of (3).

Case Notes

Board of Personnel Appeals Not Bound by Findings and Conclusions of Hearings Examiner — District Court Bound by Board Conclusions if Correct: The interpretation of an administrative rule and an agency's policy is a question of law, and in its final order, an agency may reject or modify a hearings officer's conclusion of law and interpretation of administrative rules in the proposal for decision. As the final administrative authority in the state employee classification process, the Board of Personnel Appeals must review and interpret applicable rules promulgated by the Department of Administration. Thus, the Board is not bound by a hearings officer's conclusions and interpretations. However, the District Court is bound by the Board's conclusions of law and interpretation of administrative rules, if correct. In the present case, the Board reasonably interpreted applicable employee classification rules and correctly concluded that child support enforcement investigators were improperly classified in violation of 2-18-202, and the District Court erred in reversing the Board's final order. St. Personnel Div. v. Child Support Investigators, 2002 MT 46, 308 M 365, 43 P3d 305 (2002). See also Weber v. Pub. Employees' Retirement Bd., 270 M 239, 890 P2d 1296 (1995), and In re Grievance of Brady, 1999 MT 153, 295 M 75, 983 P2d 292 (1999).

Board Power in Classification Appeal — Resolution of Grievance: Under this section and the holding in St. Personnel Div. v. Bd. of Personnel Appeals, 235 M 208, 766 P2d 1300 (1988) (also known as the Mead decision), in a classification appeal, the Board of Personnel Appeals is limited to determining whether a position is properly classified. If the Board determines that the position is improperly classified and the employee is therefore aggrieved, the Board can resolve the grievance under 2-18-1012 by ordering the State Personnel Division to reclassify the employee's position and, as appropriate, order other remedies, such as retroactive pay. In the present case, the Board exceeded its authority by granting retroactive pay even though there was no finding of improper classification or that the employees were aggrieved. St. Personnel Div. v. Bd. of Personnel Appeals, 255 M 507, 844 P2d 68, 49 St. Rep. 1087 (1992), distinguishing Hutchin v. St., 213 M 15, 688 P2d 1257 (1984).

Alleged Loss of Backpay as Damages: Marshall pleaded attorney fees and loss of backpay as his damages. Attorney fees are not allowed as damages in contract unless provided for by contract or statute. However, the alleged loss of backpay can be contract damages. Marshall v. St., 253 M 23, 830 P2d 1250, 49 St. Rep. 336 (1992).

Department to Develop Guidelines for Classification — Board Limited to Determining Proper Classification: Certain highway patrol officers successfully appealed to the Personnel Division of the Department of Administration to have their grade raised pursuant to this section. In response, other officers filed a grievance pursuant to 2-18-1011, seeking reclassification of their positions and grades. Appeal was permissible under this section as it existed at the time. The Division reclassified their positions using a "five factor" formula. The affected officers appealed their resulting grade reassignment to the Board of Personnel Appeals, which issued an order to the Division requiring reclassification of certain positions. The Board subsequently rejected the Division's classification recommendations and upheld the so-called "practice" of maintaining a grade difference between supervisors and persons they supervise. In the subsequent appeal from the classification process used by the Division, the Supreme Court held: (1) the Division's failure

to follow a "practice" or "rule of thumb" is not an abuse of discretion because it followed the factors set forth in its rules and offered legitimate reasons for deviating from the "practice"; (2) the Board is limited to determining whether a position is properly classified; (3) the function of developing guidelines for classification is assigned to the Department; and (4) the state has a legitimate interest in preserving the state pay classification system, and the amended statute rationally relates toward effectuating that objective. St. Personnel Div. v. Bd. of Personnel Appeals, 235 M 208, 766 P2d 1300, 45 St. Rep. 2324 (1988).

2-18-208. Comparable worth.

Compiler's Comments

Preamble: The preamble to Ch. 310, L. 1983, read: "WHEREAS, Article II, section 4, of the Montana Constitution prohibits discrimination against any person in the exercise of his or her civil rights on the basis of sex; and

WHEREAS, Montana laws prohibit compensation of women "less than that paid to men for equivalent service"; and

WHEREAS, pay disparities between men and women still exist in Montana in general and in state government in particular because of both overt sex discrimination and subtle biases which, although more difficult to recognize, inherently undervalue the work of women; and

WHEREAS, statistics for state government employees in Montana reveal that, for the 15-month period ending March 31, 1982:

(1) the average female employee earned only 69.4% as much as the average male employee;

(2) females held 90.2% of all clerical positions, 32.5% of all professional positions, 17.8% of all managerial positions, and 1.7% of all skilled craft jobs; and

(3) compared to large private-sector employers in Montana (in 1978), a woman employed by state government is half as likely to be a professional or managerial employee as her private-sector colleague; and

WHEREAS, studies being conducted throughout the states are revealing that jobs dominated by women are accorded less value than comparable jobs dominated by men; and

WHEREAS, state government in Montana should serve as a model for the equal employment opportunity that is required under the State's Constitution and state and federal statutes and by our basic commitment to human rights and human dignity."

2-18-209. Periodic evaluation.

Compiler's Comments

1993 Amendment: Chapter 349 near beginning of first sentence, after "shall", substituted "periodically evaluate" for "as provided in 5-11-210, report to the legislature the status of the study of the comparable worth standard and" and near middle, after "schedules", inserted "and statutes", near beginning of second sentence substituted "may" for "shall", and deleted third sentence that read: "The department shall continue to make such reports until the standard is met"; and made minor changes in style.

1991 Amendment: Near beginning inserted reference to 5-11-210. Amendment effective March 20, 1991.

Part 3
Compensation Determination

Part Compiler's Comments

Study of Protective Services Professionals' Pay Schedules: Section 1, Ch. 363, L. 1997, provided: "(1) The department shall study, with the cooperation of the department of justice, the department of transportation, the department of corrections, and other state agencies with personnel who will be included on the schedule, a pay schedule for protective services professionals. The pay schedule must be implemented for the period beginning July 1, 1999, and ending June 30, 2001. Insofar as the pay schedule applies to employees of a collective bargaining unit, its implementation is a negotiable subject under 39-31-305.

(2) "Protective services professional" means:

(a) a highway patrol officer, as defined in 61-1-305, except the chief, as defined in 61-1-302;

(b) an agent, as described in 44-2-111;

(c) a person authorized by the department of transportation or the department of justice to conduct an inspection pursuant to 61-9-501;

(d) a person whose primary work function is to supervise or otherwise guard persons incarcerated in a component of the department of corrections described in 53-1-202(2); or

(e) a person in an occupation identified by the department that is similar to those in subsections (2)(a) through (2)(d)."

Report to Legislature: Section 2, Ch. 363, L. 1997, provided: "By November 1, 1998, the department of administration shall submit to the 56th legislature a report on the results of the study conducted pursuant to [section 1] [not codified, see compiler's comment above for section text]. The report may contain proposed legislation to implement the pay schedule developed pursuant to [section 1] [not codified, see compiler's comment above for section text]."

Effective Date: Section 3, Ch. 363, L. 1997, provided: "[This act] is effective July 1, 1997."

Committee on State Employee Compensation — Temporary: Section 14, Ch. 660, L. 1989, provided: "(1) (a) There is a committee on state employee compensation.

(b) The governor shall appoint seven members to the committee. Two of the members must be representatives of employee organizations and have knowledge of or experience in negotiating the pay schedules provided in 2-18-312 through 2-18-315.

(c) The president of the senate shall appoint one senator and the speaker of the house of representatives shall appoint one representative to the committee.

(2) A committee member shall serve until the committee terminates on July 1, 1991. A vacancy on the committee must be filled in the same manner as the original appointment.

(3) The governor shall appoint the chairman and vice chairman of the committee. The committee shall meet upon the call of the chairman or at the request of five members. Five members constitute a quorum to transact business.

(4) A member is entitled to compensation as provided in 2-15-122(5).

(5) The committee shall:

(a) examine policies governing state employee compensation in Montana;

(b) study compensation policies of other comparable governmental and private sector entities;

(c) review professional literature and research on compensation issues;

(d) analyze and assess various components of the Montana state employee compensation system;

(e) identify problems with the state employee compensation system and options for resolving these problems. State employees and managers may be surveyed to assist in identifying these problems and options.

(f) develop recommendations to maximize employee productivity and promote quality governmental services within available funding; and

(g) report its findings, recommendations, and any proposed legislation to the governor and the 52nd legislature.

(6) The state personnel division, department of administration, and the legislative council shall provide staff assistance to the committee." Effective May 11, 1989, and terminates July 1, 1991.

Part Case Notes

Implementation of Department Directors' Pay Plan Prevented by Governor — No Violation of Separation of Powers — No Impairment of Contract: Directors of two Executive Branch agencies notified employees that employees would be eligible for reinstatement of pay plan steps lost to multigrade promotions. The Governor prohibited the proposed plan. Plaintiffs sued, claiming that the Governor acted unconstitutionally. The Supreme Court held that the Department of Administration's broad powers and duties relating to the state pay plan must be read in conjunction with the Governor's statutory duties of supervision, approval, appointment, and direction over executive agency departments while also taking into consideration the Governor's constitutional status as chief executive officer of the state. The doctrine of separation of powers is not violated when the Governor exercises the very sorts of powers and duties authorized by the Legislature in the statutes. Because the directors' offer was gratuitous and there was no consideration for the offer, no contract was formed under which the employees gained any vested rights to the reinstatement of the lost steps. Past consideration (the employees' prior work) is not sufficient to support a promise. Because there was no contract, there were no contractual obligations that were impaired by the Governor's action. Mont. Pub. Employees Ass'n v. Office of Governor, 271 M 450, 898 P2d 675, 52 St. Rep. 523 (1995).

Part Collateral References

What entities or projects are "public" for purposes of state statutes requiring payment of prevailing wages on public works projects. 5 ALR 5th 470.

Who is executive, administrator, supervisor, or the like, under exemption for such employees from state minimum wage and overtime pay statutes. 85 ALR 4th 519.

2-18-301. Purpose and intent of part — rules.

Compiler's Comments

2003 Amendment: Chapter 552 in (3), (4), and (5) substituted "58th legislature" for "57th legislature". Amendment effective July 1, 2003.

2001 Amendment: Chapter 553 in (3), (4), and (5) substituted "57th legislature" for "56th legislature". Amendment effective July 1, 2001.

1999 Amendment: Chapter 558 throughout section substituted "56th legislature" for "55th legislature"; and inserted (8) authorizing board of regents to negotiate with representatives of classified staff of university system. Amendment effective July 1, 1999.

1997 Amendments: Chapter 42 in (2), (3), (4), and (5) deleted reference to 2-18-314; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 417 in (2), after "2-18-313", substituted "and" for "through"; and in (3), (4), and (5), after "2-18-312", substituted "2-18-313, and" for "through" and substituted "55th legislature" for "54th legislature". Amendment effective July 1, 1997.

1995 Amendment: Chapter 455 in (3), after "2-18-110", deleted "and 2-18-305(4)", inserted "pay adjustments and", and inserted "2-18-303 and in"; in (3), (4), and (5) substituted "54th legislature" for "53rd legislature"; and made minor changes in style. Amendment effective April 14, 1995.

1993 Amendments: Chapter 349 near end of (2), after "survey", substituted second sentence regarding submission of the salary survey for former language that read: "report to the legislature at the start of each legislative session".

Chapter 640 in (3), (4), and (5) substituted "53rd" for "52nd". Amendment effective July 1, 1993.

1991 Amendment: In (1), before "compensation", inserted "market-based"; in (2), after "that", deleted "for the biennium ending June 30, 1991" and inserted remainder of subsection concerning analysis of the labor market based on a salary survey; at beginning of (3) inserted exception clause; in (3), (4), and (5) substituted "52nd legislature" for "51st legislature"; and made minor changes in style. Amendment effective April 29, 1991.

1991 Statement of Intent: The statement of intent to Ch. 720, L. 1991, provided: "In order to recruit and retain competent and qualified public employees to perform required services for the state, it is the intent of the legislature to provide for a state employee compensation system based on the prevailing compensation practices found in relevant public sector and private sector labor markets.

(1) To achieve this goal, 2-18-301 requires that the department of administration provide a salary survey report to the legislature. The report may include, but is not limited to:

(a) data showing the average salaries paid to employees in Montana's labor market for comparable positions;

(b) recommendations for administering the pay increases provided in 2-18-303; and

(c) recommendations for adjusting the pay schedules provided in 2-18-312 in order to maintain an internally equitable and competitive salary structure for Montana state employees.

(2) Labor markets relevant to state employees must have positions comparable to those in Montana state government and must compete with state government for qualified employees."

1989 Amendment: Near beginning of (2) substituted "1991" for "1989"; and in (2)(a), (2)(b), and (2)(c) changed "50th legislature" to "51st legislature". Amendment effective May 11, 1989.

1987 Amendment: In three places in (2) changed "2-18-311" to "2-18-312", in three places, before "legislature", changed "49th" to "50th", and after "June 30" changed "1987" to "1989".

1986 Amendment: The amendment was contingent on renegotiation of collective bargaining agreements; since such contingency didn't occur, the amendment terminated.

1985 Amendment: In introductory clause of (2) substituted "1987" for "1985"; and in (2)(a), (2)(b), and (2)(c) substituted "49th legislature" for "48th legislature".

1983 Amendment: In (2), substituted "1985" for "1983"; in (2)(a) through (2)(c) before "2-18-311" deleted "[the adjusted schedules under]", and substituted "48th legislature" for "47th legislature".

1981 Amendment: Substituted "1983" for "1981" in (2); substituted "47th legislature" for "46th legislature" in (2)(a), (2)(b), and (2)(c).

2-18-303. Procedures for using pay schedules.

Compiler's Comments

2003 Amendment: Chapter 552 in (1)(c) substituted "2004" for "2002" and "2003" for "2001"; deleted former (1)(d) that read: "(d) Effective on the first day of the pay period that includes an

employee's anniversary date during the fiscal years ending June 30, 2002, and June 30, 2003, the employee's base salary must be increased by 4% or by a lesser amount so that the employee's base salary after the increase does not exceed the maximum salary of the pay grade as provided in subsection (1)(f). An employee's base salary increases resulting from subsection (1)(e) and this subsection may not exceed a maximum of 4% in each fiscal year. For employees hired on or before September 30, 1994, the anniversary date is October 1"; inserted (1)(d) relating to 25 cents an hour pay increase; in (3)(a)(i) substituted "2004" for "2002" and "2005" for "2003"; in (3)(a)(ii) in two places substituted "2003" for "2001"; deleted former (3)(a)(iii) that read: "(iii) On the first day of the first pay period that includes October 1 of each fiscal year, a teacher employed under the authority of the department of public health and human services or the department of corrections before October 1, 1994, shall advance one step on the appropriate pay schedule adopted in 2-18-313. A teacher hired after October 1, 1994, shall advance on the teacher's actual anniversary date"; inserted (3)(a)(iii) relating to certain teachers; in (3)(b) substituted "2004" for "2002" and "2005" for "2003"; in (4)(a)(i) at beginning inserted "If the legislature authorizes a pay increase for state employees" and at end deleted "covering the biennium ending June 30, 2003"; in (4)(a)(ii) and (4)(a)(iii) substituted "the date on which a legislatively authorized pay increase is implemented" for "July 1, 2001"; near end of (4)(a)(iii) after "that they were receiving" deleted "as of June 30, 2001"; and made minor changes in style. Amendment effective July 1, 2003.

2001 Amendment: Chapter 553 in (1)(c) substituted "2002" for "2000" and "2001" for "1999"; in (1)(d) in first sentence substituted "2002" for "2000" and "2003" for "2001" and in first and second sentences substituted "4%" for "3%"; in (3)(a)(i) substituted "years 2002 and 2003" for "years 2000 and 2001"; in (3)(a)(ii) in two places substituted "2001" for "1999"; in (3)(b) substituted "2002" and "2003" for "2000" and "2001"; in (4)(a)(i) substituted "2003" for "2001"; in (4)(a)(ii) and (4)(a)(iii) substituted "2001" for "1999"; in (6) substituted "classes of medical professionals" for "medical doctors" and at end substituted "qualified professionals" for "qualified physicians"; in (7)(a) in first sentence after "classification plan" deleted "through demonstration projects"; in (7)(b) in two places substituted reference to a plan for reference to a project; deleted former (7)(b)(i) that read: "(i) The department may develop demonstration projects for protective service and public safety classes, information technology classes, brand inspector classes in the department of livestock, managers in the department of commerce, counselors and resident care aides at the Montana chemical dependency center, health care facility surveyors at the department of public health and human services, classes in the department of revenue, and any other class or work unit appropriate for a demonstration project, as determined by the department"; deleted former (7)(b)(iii) that read: "(iii) No employee whose position is excepted from the provisions of this section under this subsection (7)(b) will receive a pay increase for the fiscal years ending 2000 and 2001 less than that prescribed under this section"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 558 in (1)(c) substituted "fiscal year 2000" for "fiscal year 1998" and at end substituted "June 30, 1999" for "June 30, 1997"; in (1)(d) at beginning substituted first two sentences providing for increasing employee's base salary during fiscal years ending June 30, 2000, and June 30, 2001, for former sentence that read: "Effective on the first day of the pay period that includes an employee's anniversary date during the fiscal years ending June 30, 1998, and June 30, 1999, an employee's market ratio must be compared to the target market ratio in the matrix that corresponds to the employee's grade level and completed years of uninterrupted state service"; deleted former (1)(d)(ii) that provided matrix for target market ratios (see 1999 Session Law for former text); deleted (1)(d)(iii) that read: "(iii) On the first day of the pay period that includes an employee's anniversary date during the fiscal years ending June 30, 1998, and June 30, 1999, the employee's base salary must be increased to the greater of:

(A) the market salary for the employee's grade multiplied by the target ratio that corresponds to the employee's grade level and completed years of uninterrupted state service not to exceed 4%;

(B) if under subsection (1)(d)(iii)(A), progression from one target market ratio to the next exceeds 3%, then the employee's base salary increased by the amount of that progression plus 1%; or

(C) the employee's base salary as it was on the last day of the pay period immediately preceding the pay period that includes the employee's anniversary date, plus 1%"; in (3)(a)(i) substituted "fiscal years 2000 and 2001" for "fiscal years 1998 and 1999"; in (3)(a)(ii) substituted "July 1, 1999" for "July 1, 1997" and substituted "June 30, 1999" for "June 30, 1997"; in (3)(b)(i) substituted "June 30, 2000, and June 30, 2001" for "June 30, 1998, and June 30, 1999"; in (4)(a)(i) substituted "June 30, 2001" for "June 30, 1999"; in (4)(a)(ii) substituted "July 1, 1999" for "July 1, 1997"; in (4)(a)(iii) substituted "July 1, 1999" for "July 1, 1997" and substituted "June 30, 1999"

for "June 30, 1997"; at end of (6) after "physicians" deleted "at the state institutions"; inserted (7) directing department to develop and implement alternative pay and classification plan through demonstration projects for certain classes, occupations, and work units; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendments — Composite Section: Chapter 42 in (1)(c)(i), (3)(a)(i), and (3)(b)(ii) deleted reference to fiscal year 1996; in (2), (3), (4)(b), and (5) deleted reference to 2-18-314; deleted former (1)(c), (1)(d)(iii), and former (3)(a)(ii) that addressed pay calculations for 1995 and fiscal year 1996; in (2), after "teachers", deleted "liquor store occupations"; deleted former (3)(b) that referred to pay schedules provided in 2-18-314 and compensation of employees covered by those schedules; adjusted subsection references; and made minor changes in style. Amendment effective March 12, 1997.

Because certain amendments in Ch. 42 were intended to delete material no longer in effect because it related to former years and that material was used in Ch. 417 as a basis for Ch. 417 amendments, the material deleted in Ch. 42 was retained in this section.

Chapter 417 in (1)(c) substituted "1998" for "1996", substituted "employee is entitled" for "employee hired before July 1, 1995, is entitled", substituted "1997" for "1995", and at end deleted "plus, on the employee's anniversary date that occurs on or after September 30, 1995, the increases provided in subsection (1)(d), if applicable"; in (2)(d) substituted "1998" for "1996" and "1999" for "1997" and after "matrix" deleted "in subsection (1)(d)(ii)"; in (1)(d)(ii) substituted "The matrix for the target market ratios is as follows" for "As provided in subsection (1)(d)(i), the following matrix must be used to compare an employee's market ratio to the target market ratio that corresponds to the employee's grade level and completed years of uninterrupted state service"; in (1)(d)(iii), at beginning, deleted "If", substituted "1998 and "June 30, 1999" for "1996", after "June 30, 1999" deleted "the employee's market ratio is less than the target market ratio that corresponds to the employee's grade level and completed years of uninterrupted state service", and near end substituted "greater of" for "lesser of"; in (1)(d)(iii)(A), at end, inserted "not to exceed 4%"; inserted (1)(d)(iii)(B) relating to progression through target market ratios; in (1)(d)(iii)(C), at end, substituted "the employee's anniversary date, plus 1%" for "October 1, 1995, plus 5%"; deleted (1)(d)(iv) that read: "(iv) If, on the first day of the pay period that includes an employee's anniversary date during the fiscal year ending June 30, 1997, the employee's market ratio is less than the target market ratio that corresponds to the employee's grade level and completed years of uninterrupted state service, the employee's base salary must be increased to the lesser of:

(A) the market salary for the employee's grade multiplied by the target ratio that corresponds to the employee's grade level and completed years of uninterrupted state service; or

(B) the employee's base salary as it was on the last day of the pay period immediately preceding the pay period that includes October 1, 1996, plus 6%"; deleted former (1)(f) that read: "(f) an employee's base salary may not exceed the maximum salary for the employee's grade. The salary of an employee may not be reduced because of this provision"; deleted (1)(h) that read: "(h) An employee's market ratio, as it was on the last day of the pay period immediately preceding the pay period that includes October 1, 1996, may not be reduced as a result of the adjustment of the pay ranges provided in 2-18-312(2)"; in (2), after "teachers", deleted "liquor store occupations" and after "2-18-313" substituted "and" for "through"; in introductory clause of (3), after "2-18-313", substituted "and" for "through"; in (3)(a)(i) substituted "1998 and 1999" for "1996 and 1997"; in (3)(a)(ii), in two places, substituted "1997" for "1995"; in (3)(a)(iii), after "human services", inserted "or the department of corrections"; deleted former (3)(a)(iv), (3)(a)(v), and (3)(b) that read: "(iv) On the first day of the first full pay period during the month that includes the teacher's anniversary date, a teacher employed under the authority of the department of corrections shall advance one step on the appropriate pay schedule adopted in 2-18-313.

(v) On the first day of the first pay period that includes October 1 of each fiscal year, a teacher employed by the Montana school for the deaf and blind shall advance one step on the teacher pay matrix used by the school.

(b) (i) The pay schedules provided in 2-18-314 indicate the maximum hourly compensation for fiscal years ending June 30, 1996, and June 30, 1997, for those employees in liquor store occupations who have collectively bargained separate classification and pay plans.

(ii) The compensation of each employee on the first day of the first pay period in fiscal year 1996 or 1997 is that amount corresponding to the grade occupied on the last day of the preceding fiscal year"; in (3)(b)(i) substituted "1998" for "1996" and "1999" for "1997"; in (3)(b)(ii) substituted "each fiscal year" for "fiscal year 1996 or 1997"; in (4)(a)(i) substituted "1999" for "1997"; in (4)(a)(ii) and (4)(a)(iii), in three places, substituted "1997" for "1995"; in (4)(b) substituted "2-18-312, 2-18-313, 2-18-315" for "2-18-312 through 2-18-315"; in (5) substituted

"2-18-312, 2-18-313, and 2-18-315" for "2-18-312 through 2-18-315"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendments — Composite Section: Chapter 455 in (1)(a), after "and market salary", deleted "for the fiscal years ending June 30, 1994, and June 30, 1995"; in (1)(c), at beginning, deleted "Except as provided in subsection (1)(e)", substituted "1996" for "1994", in two places substituted "1995" for "1993", and inserted final clause regarding increases on employee's anniversary date; substituted (1)(d) regarding employee's market ratio at various grades and market salary for former (1)(d) that read: "(d) Except as provided in subsection (1)(e), on the first day of the first complete pay period in January 1995, each employee hired before January 1, 1995, is entitled to the amount of the employee's base salary as it was on December 31, 1994, plus 1.5%"; inserted (1)(h) regarding an employee's market ratio; in (3)(a)(i), after "annual compensation for", deleted "the contracted school term" and substituted "1996" for "1994" and "1997" for "1995"; in (3)(a)(ii) substituted "on July 1, 1995" for "on the first day of the first pay period in July 1993" and substituted "the same as it was on June 30, 1995" for "determined by the teacher's level of academic achievement and years of experience"; substituted (3)(a)(iii) and (3)(a)(iv) concerning institutional teachers for former (3)(a)(iii) and (3)(a)(iv) that read: "(iii) On the first day of the first complete pay period of each fiscal year, each teacher shall advance one step on the appropriate pay schedule adopted in 2-18-313.

(iv) On the first day of the first complete pay period of each fiscal year, each teacher employed by the Montana school for the deaf and blind shall advance one step on the teacher pay matrix used by the school"; inserted (3)(a)(v) regarding teachers employed by the Montana School for the Deaf and Blind; in (3)(b)(i), (3)(b)(ii), (3)(c)(i), and (3)(c)(ii) substituted "1996" for "1994" and "1997" for "1995"; inserted (4) regarding collective bargaining units and agreements; adjusted subsection references; and made minor changes in style. Amendment effective April 14, 1995.

Chapter 546 in (1)(a), after "market salary", deleted "for the fiscal years ending June 30, 1994, and June 30, 1995"; deleted former (1)(c) that read: "(c) Except as provided in subsection (1)(e), on the first day of the first complete pay period in fiscal year 1994, each employee hired before July 1, 1993, is entitled to the amount of the employee's base salary as it was on June 30, 1993"; deleted former (1)(d) that read: "(d) Except as provided in subsection (1)(e), on the first day of the first complete pay period in January 1995, each employee hired before January 1, 1995, is entitled to the amount of the employee's base salary as it was on December 31, 1994, plus 1.5%"; at end of (3)(a)(i) substituted "department of corrections or the department of public health and human services" for "department of corrections and human services or the department of family services for fiscal years 1994 and 1995"; deleted former (3)(a)(ii) that read: "(ii) The compensation of each teacher on the first day of the first pay period in July 1993 is determined by the teacher's level of academic achievement and years of experience"; in (3)(b)(i), after "compensation", deleted "for fiscal years ending June 30, 1994, and June 30, 1995"; in (3)(b)(ii), after "employee", deleted "on the first day of the first pay period in fiscal year 1994 or 1995"; in (3)(c)(i), after "compensation", deleted "for fiscal years ending June 30, 1994, and June 30, 1995"; in (3)(c)(ii), after "pay period", deleted "in fiscal year 1994 or 1995"; and made minor changes in style. Amendment effective July 1, 1995.

Other than the changes to reflect the revised agency names, the changes made by Ch. 546 were designed to remove obsolete language from this section. Chapter 455 rendered the same language effective by adding language and revising the dates of applicability. The Code Commissioner has retained the stricken language where necessary for the grammatical construction of the new language added by Ch. 455 and has reflected the agency function changes in Ch. 546.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 640 in (1)(a) substituted "1994" for "1992" and "1995" for "1993"; in (1)(b) substituted "subsections (6) and (7)" for "subsections (7) and (8)"; in (1)(c) and (1)(d) substituted "subsection (1)(e)" for "subsection (1)(g)"; in (1)(c) substituted "1994" for "1992" and in two places substituted "1993" for "1991"; deleted former (1)(c)(i) and (1)(c)(ii) that provided for a 60-cent-per-hour raise in 1991 and an additional 1/8 of 1% of the base salary, as it is after the 60-cent raise, for each percentage point that the base salary, as it is after the 60-cent raise, is below the market salary for the grade; in (1)(d), at end, substituted "January 1995, each employee hired before January 1, 1995, is entitled to the amount of the employee's base salary as it was on December 31, 1994, plus 1.5%" for "fiscal year 1993, each employee hired before July 1, 1992, is entitled to the amount of the employee's base salary as it was on June 30, 1992"; deleted (1)(d)(i) through (1)(d)(iii) that provided for a 45-cent-per-hour raise in July 1993, plus 1/8 of 1% for each percentage point that the base salary, as it is after the raise, is below the market salary

for the grade, minus 20 cents an hour; deleted former (1)(e) and (1)(f) that provided for a 20-cent-per-hour raise in January 1993 and for a determination of the number of percentage points that a salary is below the market salary by dividing the salary by the market salary for the grade, multiplying by 100, and subtracting that total from 100; in (1)(f), at beginning of first sentence, deleted "Except as provided in subsections (5) through (8)", substituted "maximum" for "market", after "salary" deleted "by a percentage greater than the percentage that the market salary", and near end, before "grade", deleted "grade exceeds the entry salary for that"; inserted (1)(g) stating that each grade's maximum salary is the entry salary subtracted from the market salary, plus the difference; in (3)(a)(i) and (3)(a)(ii) substituted "1994", "1995", and "1993" for "1992", "1993", and "1991", respectively; in (3)(a)(iii), before "pay period", inserted "complete"; inserted (3)(a)(iv) stating that at the beginning of each year, teachers at the school for the deaf and blind advance one step on the school's pay matrix; in (3)(b)(i), (3)(b)(ii), (3)(c)(i), and (3)(c)(ii) substituted "1994" and "1995" for "1992" and "1993"; deleted former (4) that provided that a bargaining unit member could not receive raises until the unit ratified an agreement for the biennium ending June 30, 1993, and that if an agreement was not reached by July 1, 1991, retroactivity to that date could be negotiated and unit members received the salary they received on June 30, 1991; in (6) deleted provision that to maintain pay plan equity, if a majority of registered nurses classified under part 2 of this chapter are granted a pay plan exception through a collective bargaining agreement, then all other classified registered nurses must receive the same salary, except that no nurse's salary could be reduced; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendments — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Chapter 720 throughout section changed references to fiscal years to reflect the current biennium; in (1)(a) substituted "entry salary and market salary" for "annual compensation" and after "grade" deleted "and step"; substituted (1)(b) concerning hire at entry rate with certain exceptions for former text that read: "Each new employee shall advance from step 1 to step 2 of a grade after successfully completing 6 months of probationary service. The anniversary date of an employee must be established at the end of the probationary period in accordance with rules promulgated by the department"; substituted (1)(c), (1)(d), and (1)(e) concerning computation of pay in fiscal years 1992 and 1993 for former text that read: "(i) The compensation of each employee on the first day of the first pay period in fiscal year 1990 is that amount corresponding to the grade and step occupied on the last day of fiscal year 1989.

(ii) The compensation of each employee on the first day of the first pay period in fiscal year 1991 is that amount corresponding to the grade and step occupied on the last day of fiscal year 1990"; inserted (1)(f) concerning market salary adjustment; inserted (1)(g) providing a minimum base salary; inserted (1)(h) limiting base salary; in (3)(a)(ii), at end, substituted "years of experience" for "the step occupied on June 30, 1990"; substituted (3)(a)(iii) concerning teacher step advancement for former text that read: "(iii) On the first day of the first pay period in July 1989, each teacher shall advance three steps on the appropriate pay schedule for fiscal year 1990 from the step that he occupied on June 30, 1989"; in (7) inserted last sentence concerning pay exception for nurses; in (8), near beginning before "occupations", deleted "registered nurses and other"; and made minor changes in style. Amendment effective April 29, 1991.

1989 Amendment: In (1)(a) substituted "1990" and "1991" for "1988" and "1989"; near middle of (1)(c)(i) substituted "1990 is" for "1988 shall be" and at end substituted "1989" for "1987"; in (1)(c)(ii) substituted "1991 is" for "1989 shall be" and at end substituted "1990" for "1988"; near middle of (2), before "teachers", deleted "institutional"; at end of (3)(a)(i) substituted "1990" and "1991" for "1988" and "1989"; substituted (3)(a)(ii) regarding teacher pay for former subsection that read: "The compensation of each teacher on the first day of the first pay period in July 1987 shall be that amount which corresponds to his level of academic achievement and the step occupied on June 30, 1987"; in (3)(a)(iii) substituted "1990 is" for "1988 shall be", before "achievement" inserted "academic", and at end substituted "1990" for "1987"; in (3)(b)(i), (3)(b)(ii), (3)(c)(i), and (3)(c)(ii) substituted "1990" and "1991" for "1988" and "1989"; at end of (4)(a)(i) substituted "1991" for "1989"; in (4)(a)(ii) and (4)(a)(iii) substituted "1989" for "1987"; inserted (8) regarding adjustment after a review of competitiveness; corrected internal references; and made minor changes in phraseology and punctuation. Amendment effective May 11, 1989.

1987 Amendments: Chapter 609 in (3)(a)(i), after "department of institutions", inserted "or the department of family services".

Chapter 621 in (3)(a)(i) through (3)(a)(iii) set all yearly references forward 2 years.

Chapter 661 throughout section, except in (3)(a), changed "1985" to "1987", "1986" to "1988", and "1987" to "1989"; in (1), (2), and (6), after "provided in", deleted "2-18-311 and"; in (1)(a), (4), and (5) changed "2-18-311" to "2-18-312"; in (1)(a), after "June 30", changed "1986" to "1988, and June 30, 1989"; deleted former (1)(b) that read: "(b) The pay schedule provided in 2-18-312 indicates the annual compensation for the fiscal year ending June 30, 1987, for each grade and step for positions classified under the provisions of part 2 of this chapter"; in (1)(c)(ii) changed "1985" to "1988"; deleted former (1)(d)(iii) that read: "(iii) In compliance with rules adopted to implement this part, each employee is eligible on his anniversary date to advance one step in the pay matrix for fiscal year 1987. However, if the employee's anniversary date falls between (inclusive) July 1 and the first day of the first pay period of fiscal year 1987, he will advance one step on the first day of that pay period"; in (4)(b), after "provided in", changed "2-18-313" to "2-18-312"; and made minor changes in phraseology. Amendments to (3)(a) voided by sec. 4, Ch. 621, L. 1987, but see amendment note for Ch. 621.

1986 Amendment: The amendment was contingent on renegotiation of collective bargaining agreements; since such contingency didn't occur, the amendment terminated.

1985 Amendment: Throughout section (except (1)(d)(ii) and (iii)) substituted "1985" for "1983", "1986" for "1984", and "1987" for "1985"; in (1)(d)(ii) substituted "1985" for "1984"; in (1)(d)(iii), in first sentence substituted "1987" for "1984 and fiscal year 1985", and in second sentence substituted "1987" for "1984 or 1985, as the case may be".

1983 Amendment: Throughout section before each cite or series of cites (except at end of (7)), deleted "[the adjusted schedule under]" or "[the adjusted schedules under]"; throughout section (except first sentence of (1)(d)(i)) substituted "1984" for "1982" and "1985" for "1983"; in (1)(d)(i), (3)(a)(ii), (4)(a)(ii), and (4)(a)(iii) substituted "1983" for "1981"; in (1)(d)(iii) at end of first sentence substituted "for fiscal year 1984 and fiscal year 1985" for "each fiscal year".

1981 Amendment: Substituted "1982" for "1980" in (1), (3)(a)(i), (3)(b) and (3)(c); substituted "1983" for "1981" in (1), (3)(a)(i), (3)(b), (3)(c), and (4); substituted "1981" for "1979" in (1)(d), at the end of (3)(a)(ii) and (4); substituted "1981" for "1980" in (3)(a)(ii); substituted "first pay period in July, 1982" for "first pay period in July, 1981" in (3)(a)(iii); substituted "step" for "grade" in (3)(a)(ii) and (iii); made minor grammatical changes.

Attorney General's Opinions

First Pay Period in Fiscal Year: The phrase "first pay period in" a fiscal year means the first pay period any part of which lies within the fiscal year. Thus, the first pay period of fiscal year 1981 begins June 29, 1980, requiring the use of the pay matrix at 2-18-312 beginning that day. 38 A.G. Op. 70 (1980).

2-18-304. Longevity allowance.

Compiler's Comments

1999 Amendment: Chapter 558 inserted (1)(b) increasing longevity allowance at 15- and 20-year increments; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendments: Chapter 42 deleted (1)(a)(i) that applied to longevity allowances calculated in 1995; and in (1)(a) deleted reference to 2-18-314. Amendment effective March 12, 1997.

Chapter 339 inserted (3) providing that for the purposes of calculating longevity, employment as a short-term worker does not apply toward years of service. Amendment effective July 1, 1997.

Chapter 417 deleted (1)(a)(i) that read: "(i) Effective July 1, 1995, through the last day of the pay period immediately preceding the pay period that includes October 1, 1995, in addition to the compensation provided for in 2-18-303, 2-18-312, 2-18-313, 2-18-314, or 2-18-315, each employee who has completed 5 years of uninterrupted state service must receive 9/10 of 1% of the employee's base salary multiplied by the number of completed, contiguous 5-year periods of uninterrupted state service"; and in (1)(a), at beginning, deleted "Effective on the first day of the pay period that includes October 1, 1995" and after "2-18-313" deleted "2-18-314". Amendment effective July 1, 1997.

1995 Amendment: Chapter 455 in (1)(a)(i), at beginning, inserted first clause providing effective dates of compensation, inserted "2-18-303", and at end, after "must receive", deleted "the greater of"; deleted former (1)(a)(i) that read: "(i) $10 a month"; inserted (1)(a)(ii) regarding longevity pay; and made minor changes in style. Amendment effective April 14, 1995.

1991 Amendment: In (1)(a)(ii) substituted "9/10 of 1% of the employee's base salary" for "10% of the difference between the base compensation for his grade and step (where applicable) and

the base compensation for the next highest grade and corresponding step (where applicable)"; and made minor changes in style. Amendment effective April 29, 1991.

1987 Amendment: In (1), before "2-18-312", deleted "2-18-311".

1986 Amendment: The amendment was contingent on renegotiation of collective bargaining agreements; since such contingency didn't occur, the amendment terminated.

1985 Amendment: Inserted (2) providing method to determine years of service.

Applicability: Section 5, Ch. 593, L. 1985, provided: "This act applies retroactively, within the meaning of 1-2-109, to service performed after July 31, 1984."

1983 Amendment: In (1) before "2-18-311" deleted "[the adjusted schedules under]".

Case Notes

Prospective Legislative Change in Compensation: An employee's right to compensation vests or accrues only after the employee has performed the required services for that pay period. Thus, highway patrol officers had no vested rights to continue to receive 1% longevity increases in salary that were established by a statute repealed when the state pay plan was established and when their base pay under the pay plan included earned longevity, because such prospective alteration of salary prior to vesting is permissible. In re the Wage Appeal of Highway Patrol Officers v. Bd. of Personnel Appeals, 208 M 33, 676 P2d 194, 41 St. Rep. 154 (1984).

Statutes Fixing Terms and Conditions of State Employment — Presumed Not to Be Contractual: Highway patrolmen had no vested right to receive 1% longevity increases established by a statute repealed when the state pay plan was instituted. Unless the circumstances and language of the statute manifest a legislative intent to create private rights of a contractual nature, enforceable against the state, a statute fixing certain terms of public employment, such as salary or compensation, is presumed not to create contractual rights but merely to declare a policy to be pursued until the Legislature declares otherwise. In re the Wage Appeal of Highway Patrol Officers v. Bd. of Personnel Appeals, 208 M 33, 676 P2d 194, 41 St. Rep. 154 (1984).

Attorney General's Opinions

"Year of Service": A state employee must be in a pay status for 2,080 hours in order to be credited with a year of service for longevity accrual purposes. (Annotator's note: This was decided prior to 1985 amendment.) 40 A.G. Op. 61 (1984), overruled in 48 A.G. Op. 19 (2000), in which, pursuant to Phillips v. Lake County, 222 M 42, 721 P2d 326 (1986), the term "year of service" was construed to mean a calendar year.

2-18-306. Determination of weekly or hourly pay rate.

Case Notes

Inclusion of District Construction Allowance in Base Pay for Purposes of Calculating Overtime Pay: Plaintiff employees' union sought a declaratory judgment that the district construction allowance (DCA) paid to eligible state employees should be included in their base pay for purposes of calculating overtime compensation. The District Court found that the DCA should not be included in the base pay and granted summary judgment to defendant state agency. On appeal, the Supreme Court reversed, holding that the District Court erred in granting summary judgment. Defendant did not meet its burden of showing that the DCA fit plainly and unmistakenly within one of the exceptions to the federal Fair Labor Standards Act (FLSA), 29 U.S.C. 201 through 219. The FLSA exceptions are to be narrowly construed against the employer asserting them, and the employer bears the burden of showing that the employee fits within the terms of the exception. All remuneration that does not fall within one of the seven exclusionary clauses of the FLSA must be added into the total compensation received by the employee before the hourly pay rate is determined. In the present case, the expenses at issue were not incurred on the employer's behalf or for its benefit or convenience, but rather the money was reimbursement for normal, everyday expenses incurred by the employee for traveling to and from work and thus could not be excluded from the regular rate as reimbursement for travel expenses under 29 U.S.C. 207(e)(2). Further, the agency could not be relieved of liability under the Portal-to-Portal Act of 1947 (PPA), 29 U.S.C. 251, et seq., because under the PPA, that relief does not extend to an employer if the activity is compensable by either an express provision of a written or nonwritten contract in effect, at the time of the activity, between the employer and the employee, the employee's agent, or the collective bargaining representative, as was the case here. Mont. Pub. Employees Ass'n v. Dept. of Transportation, 1998 MT 17, 287 M 229, 954 P2d 21, 55 St. Rep. 60 (1998).

Award of Liquidated Damages Under Fair Labor Standards Act — Findings Regarding Damage Amount Proper: Absent a showing by the state that its act or omission giving rise to a

violation of the Fair Labor Standards Act of 1938 (FLSA) was in good faith and that the state had reasonable grounds for believing that the act or omission was not a violation of the FLSA, the award of liquidated damages under 29 U.S.C. 216(b) and 29 U.S.C. 260 by the District Court was not error or an abuse of discretion. Further, evidence by plaintiffs that they had worked hours for which they were not properly compensated, based on reasonable inferences, entitled them to damages based on a reasonable approximation. Tefft v. St., 271 M 82, 894 P2d 317, 52 St. Rep. 357 (1995).

Collateral References

Officers and Public Employees *key* 101.

67 C.J.S. Officers and Public Employees §§304 through 307.

2-18-312. Statewide pay schedule.

Compiler's Comments

2003 Amendment: Chapter 552 in introductory clause substituted "2004" for "2002"; and deleted pay schedules applicable prior to October 1, 2002 (see 2003 Session Law for deleted schedules). Amendment effective July 1, 2003.

2001 Amendment: Chapter 553 in (1) in introductory clause substituted "2002" for "2000" and substituted pay schedule for former pay schedule (see 2001 Session Law for former schedule); in (2) in introductory clause substituted "2001" for "1999" and substituted pay schedule for former pay schedule (see 2001 Session Law for former schedule); and in (3) in introductory clause substituted "2002" for "2000" and substituted pay schedule for former pay schedule (see 2001 Session Law for former schedule). Amendment effective July 1, 2001.

1999 Amendment: Chapter 558 in (1) in introductory clause substituted "fiscal year 2000" for "fiscal year 1998", deleted former fiscal year 1998 statewide classification pay schedule (see 1999 Session Law for former text), and provided for former fiscal year 1999 pay schedule to be effective first day of first full pay period in fiscal year 2000; inserted (2) enacting pay schedule effective first day of pay period that includes October 1, 1999; inserted (3) enacting pay schedule effective pay period that includes October 1, 2000; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendment: Chapter 417 in (1) substituted "beginning on the first day of the first full pay period in fiscal year 1998" for "from July 1, 1995, until the first day of the pay period that includes October 1, 1996" and substituted pay schedule for fiscal year 1998 for July 1995 pay schedule (see 1997 Session Law for text); and in (2) substituted "first full pay period in fiscal year 1999" for "pay period that includes October 1, 1996" and substituted pay schedule for fiscal year 1999 for October 1996 pay schedule (see 1997 Session Law for text). Amendment effective July 1, 1997.

1995 Amendment: Chapter 455 in (1) substituted "the period from July 1, 1995, until the first day of the pay period that includes October 1, 1996" for "fiscal year 1994"; in (2) substituted pay schedule effective October 1, 1996, for pay schedule for fiscal year 1995 (see 1995 Session Law for text); and made minor changes in style. Amendment effective April 14, 1995.

1993 Amendment: Chapter 640 replaced the 1992 and 1993 pay schedules with 1994 and 1995 pay schedules equal to the 1993 schedule. See 1993 Session Law for the 1992 schedule. Amendment effective July 1, 1993.

1991 Amendment: Substituted pay matrixes not including insurance for fiscal years 1992 and 1993 for matrixes including insurance for fiscal years 1990 and 1991. Amendment effective April 29, 1991.

1989 Amendment: Substituted pay schedules for fiscal years 1990 and 1991 for former pay schedule for fiscal years 1988 and 1989 (see 1987 MCA for text of former schedule). Amendment effective May 11, 1989.

1987 Amendment: Near beginning substituted "fiscal years 1988 and 1989" for "fiscal year 1987".

Repeal and Reenactment: Chapter 6, Sp. L. June 1986, was originally introduced to freeze state employee salaries at the fiscal year 1986 level for fiscal year 1987 and reduce appropriations for payment of salaries. It was considerably amended during passage and as enacted provided that the appropriations were to be cut, but unless 95% of the collective bargaining agreements with the state were renegotiated by July 18, 1986, to allow a freeze in salaries, salaries would not be frozen. The introduced bill provided that this section would be repealed and sections 2-18-301, 2-18-303 through 2-18-305 (2-18-305 now repealed), 2-18-311, 2-18-313 through 2-18-315, and 2-18-703 were to be amended to conform to the salary freeze. As the chapter was enacted, if collective bargaining agreements were not renegotiated the exact

substance of this section as it read in the 1985 MCA was to be enacted to replace the repealed section and conforming amendments were to terminate. The method of section reenactment was necessary because the contingent effective dates in sec. 16, Ch. 6, would have raised problems if the section was to be retained by reenacting it by repealing its repealer.

Collective bargaining agreements were not renegotiated by July 18, 1986; thus, the other amendments were terminated and this section was reenacted retroactively to July 1, 1986, and the appropriation for salaries was reduced.

For the convenience of Code users and to retain the history of the section, the Code Commissioner has retained the MCA section number for this section, although technically it was repealed and the new enactment would under normal circumstances have been assigned a new section number.

1985 Amendment: In introduction substituted "1987" for "1985"; in pay matrix substituted fiscal year 1987 figures (see 1985 Session Law) for 1985 figures (see sec. 2, Ch. 710, L. 1983, for pay schedule for fiscal year 1985).

1983 Amendment: Inserted pay schedule for fiscal year 1985 (see sec. 2, Ch. 710, L. 1983). Pay schedule for fiscal year 1983 was adopted by Executive Order 7-81. The schedule appears in the compiler's comments to the 1981 MCA.

Case Notes

State Firefighter Reclassification Plan Violative of Fair Labor Standards Act: In 1985, the U.S. Supreme Court in Garcia v. Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985), reversed previous case law that excluded state jobs from coverage under the federal Fair Labor Standards Act of 1938 (FLSA), making FLSA provisions binding on state and local governments. Under the FLSA, a firefighter must be paid at the overtime rate if the firefighter's tour of duty exceeds 212 hours in 28 days. The Montana Department of Military Affairs employed certain firefighters, the cost of whose jobs was paid by the federal government through a cooperative arrangement with the state. In response to Garcia, the Department proposed changes in the manner in which the firefighters were paid and, in 1986, an exclusion from the state pay matrix was granted under 2-18-103. Following the reclassification, the firefighters' wages were reduced. The firefighters sought compensation for unpaid "straight time" and for discrimination in violation of the FLSA. The state's economic necessity argument failed because under Blanton v. Murfreesboro, 856 F2d 731 (6th Cir. 1988), the state could not prove that the wages were reduced from fiscal concern that was not attributable to the extra cost of complying with the FLSA nor could the state show that it could not augment federal funds with state funds or implement a different plan without violating the FLSA. The state's contention that the firefighters were not reclassified in response to their assertion of coverage under the FLSA because violations were not asserted until 1988 also was invalid because under Drollinger v. Ariz., 962 F2d 956 (9th Cir. 1992), the FLSA also prohibits violations in anticipation of assertions of coverage. The state's argument that the firefighters ratified the wage cuts when they signed agreements reducing their hourly wage also was incorrect because under Barrentine v. Ark.-Best Freight Sys., 450 US 728, 67 L Ed 2d 641, 101 S Ct 1437 (1981), employees' rights under the FLSA cannot be abridged by contract or otherwise. Cumulatively, the uncontroverted evidence established a state violation of the FLSA, and summary judgment was proper. Tefft v. St., 271 M 82, 894 P2d 317, 52 St. Rep. 357 (1995).

Attorney General's Opinions

First Pay Period in Fiscal Year: The state central payroll division may apply the pay matrix for fiscal 1980 in issuing paychecks covering the pay period from June 30, 1979, to July 13, 1979, inclusive, because the phrase "first pay period in" a fiscal year in 2-18-303 means the first pay period any part of which lies within the fiscal year. 38 A.G. Op. 70 (1980).

2-18-313. Teachers' pay schedules.

Compiler's Comments

2003 Amendment: Chapter 552 in (1) in introductory clause substituted "for the period beginning the first day of the first full pay period in fiscal year 2004" for "for the period that includes October 1, 2001, until the first day of the pay period that includes October 1, 2002" and deleted the pay schedule (see 2003 Session Law for deleted schedule); deleted introductory clause of former (2) that read: "Effective on the first day of the pay period that includes October 1, 2002, the pay schedule for teachers is as follows"; and inserted (2) providing the pay schedule for succeeding periods that include January 1, 2005. Amendment effective July 1, 2003.

2001 Amendment: Chapter 553 in (1) in introductory clause substituted "2001" and "2002" for "1999" and "2000" and substituted pay schedule for former pay schedule (see 2001 Session Law

for former schedule); and in (2) in introductory clause substituted "2002" for "2000" and substituted pay schedule for former pay schedule (see 2001 Session Law for former schedule). Amendment effective July 1, 2001.

1999 Amendment: Chapter 558 in (1) in introductory clause substituted "for the period that includes October 1, 1999, until the first day of the pay period that includes October 1, 2000" for "for the period that includes October 1, 1997, until the first day of the pay period that includes October 1,1998", deleted former pay schedule for pay period including October 1, 1997 to first day of pay period that includes October 1, 1998 (see 1999 Session Law for former text), and inserted pay schedule effective for period that includes October 1, 1999, to first day of pay period that includes October 1, 2000; deleted former (2) that established pay schedule for teachers for pay period beginning first day of pay period that includes October 1, 1998 (see 1999 Session Law for former text); inserted (2) establishing pay schedule effective on first day of pay period that includes October 1, 2000; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendment: Chapter 417 in (1) substituted "1997" for "1995" and "1998" for "1996" and substituted 1997 pay schedule for 1995 pay schedule (see 1997 Session Law for text); and in (2) substituted "1998" for "1996" and substituted 1998 pay schedule for 1996 pay schedule (see 1997 Session Law for text). Amendment effective July 1, 1997.

1995 Amendment: Chapter 455 in (1) substituted annual pay schedule beginning October 1, 1995, for pay schedule for fiscal year 1994 and first 6 months of fiscal year 1995 (see 1995 Session Law for text); and in (2) substituted pay schedule beginning October 1, 1996, for pay schedule for last 6 months of fiscal year 1995 (see 1995 Session Law for text). Amendment effective April 14, 1995.

1993 Amendment: Chapter 640 inserted new pay schedules for 1994 and 1995 and provided that the schedules, which formerly included insurance, do not include insurance. See 1993 Session Law for the 1992 and 1993 schedules. Amendment effective July 1, 1993.

1991 Amendment: Substituted pay matrixes for fiscal years 1992 and 1993 for matrixes for fiscal years 1990 and 1991. Amendment effective April 29, 1991.

1989 Amendment: Substituted 1990 12-month and 9-month pay schedules and 1991 12-month and 9-month pay schedules for former section that read: "The department of institutions shall adjust the 1987 pay schedules for institutional teachers so that the cost of implementing the adjusted schedules is equal to the appropriation provided for in section 3, Chapter 621, Laws of 1987. The adjusted schedules must be applied as provided in 2-18-303." Amendment effective May 11, 1989.

1987 Amendment: Substituted language providing method for determining pay rates (see Ch. 621, L. 1987, for text) for former pay schedules (see sec. 5, Ch. 740, L. 1985, for pay schedules for fiscal years 1986 and 1987).

1986 Amendment: The amendment was contingent on renegotiation of collective bargaining agreements; since such contingency didn't occur, the amendment terminated.

1985 Amendment: In (1)(a) and (1)(b) substituted "1986" for "1984" and in pay matrix substituted 1986 fiscal year figures (see Ch. 740, L. 1985) for 1984 figures; in (2)(a) and (2)(b) substituted "1987" for "1985" and in pay matrix substituted 1987 fiscal year figures (see Ch. 740, L. 1985) for 1985 figures (see sec. 3, Ch. 710, L. 1983, for pay schedule for fiscal years 1984 and 1985).

1983 Amendment: Inserted pay schedules for fiscal years 1984 and 1985 (see sec. 3, Ch. 710, L. 1983). Pay schedules for fiscal years 1982 and 1983 were adopted by Executive Order 7-81. Pay schedules appeared in the compiler's comments to the 1981 MCA.

2-18-315. Blue-collar pay schedules.

Compiler's Comments

2003 Amendment: Chapter 552 in (1) in introductory clause substituted "the period beginning the first day of the first full pay period in fiscal year 2004" for "the period from July 1, 2001, until the first day of the pay period that includes October 2001" and deleted the pay schedule (see 2003 Session Law for deleted schedule); deleted former (2) that was the pay schedule beginning October 2002 (see 2003 Session Law for deleted schedule); deleted introductory clause of former (3) that read: "Effective on the first day of the pay period that includes October 1, 2002, the pay schedule for blue-collar workers is as follows"; and inserted (2) providing the pay schedule for succeeding periods that include January 1, 2005. Amendment effective July 1, 2003.

2001 Amendment: Chapter 553 in (1) in introductory clause in two places substituted "2001" for "1999" and substituted pay schedule for former pay schedule (see 2001 Session Law for former schedule); in (2) in introductory clause substituted "2001" and "2002" for "1999" and

"2000" and substituted pay schedule for former pay schedule (see 2001 Session Law for former schedule); and in (3) in introductory clause substituted "2002" for "2000" and substituted pay schedule for former pay schedule (see 2001 Session Law for former schedule). Amendment effective July 1, 2001.

1999 Amendment: Chapter 558 in (1) substituted "July 1, 1999" for "July 1, 1997", substituted "October 1999" for "October 1997", deleted former pay schedule (see 1999 Session Law for former text), and inserted pay schedule effective July 1, 1999, to first day of pay period that includes October 1999; in (2) substituted "October 1, 1999" for "October 1, 1997", substituted "October 2000" for "October 1998", deleted former pay schedule (see 1999 Session Law for former text), and inserted pay schedule effective for pay period that includes October 1, 1999, to first day of pay period that includes October 2000; and in (3) substituted "October 1, 2000" for "October 1, 1998", deleted former pay schedule (see 1999 Session Law for former text), and inserted pay schedule effective for pay period that includes October 1, 2000. Amendment effective July 1, 1999.

1997 Amendment: Chapter 417 in (1) substituted "July 1, 1997, until the first day of the pay period that includes October 1997" for "July 1, 1995, through September 29, 1995" and substituted 1997 pay schedule for 1995 pay schedule (see 1997 Session Law for text); in (2) substituted "on the first day of the pay period that includes October 1, 1997" for "September 30, 1995", substituted "1998" for "1996", and substituted 1997 pay schedule for 1995 pay schedule (see 1997 Session Law for text); and in (3) substituted "1998" for "1996" and substituted 1998 pay schedule for 1996 pay schedule (see 1997 Session Law for text). Amendment effective July 1, 1997.

1995 Amendment: Chapter 455 in (1) substituted July 1, 1995, through September 29, 1995, pay schedule for fiscal year 1994 and first 6 months of fiscal year 1995 pay schedule (see 1995 Session Law for text); in (2) substituted pay schedule for September 30, 1995, through October 1996 for pay schedule for last 6 months of fiscal year 1995 (see 1995 Session Law for text); inserted (3) regarding October 1, 1996, pay schedule; and made minor changes in style. Amendment effective April 14, 1995.

1993 Amendment: Chapter 640 inserted new pay schedules for 1994 and 1995 and provided that the schedules, which formerly included insurance, do not include insurance. See 1993 Session Law for the 1992 and 1993 schedules. Amendment effective July 1, 1993.

1991 Amendment: Substituted pay matrixes for fiscal years 1992 and 1993 for matrixes for fiscal years 1990 and 1991. Amendment effective April 29, 1991.

1989 Amendment: Substituted pay schedules for fiscal years 1990 and 1991 for former pay schedule for fiscal years 1988 and 1989 (see 1987 MCA for text of former pay schedule). Amendment effective May 11, 1989.

1987 Amendment: Near beginning of section substituted "fiscal years 1988 and 1989" for "fiscal year 1986", deleted 1986 pay matrix that read:

"Annual Hours — 2080 Pay Matrix — Blue-Collar Grade	Note: With Insurance Matrix Type — Hourly $/Hour W/Ins.
B1	7.836
B2	8.236
B3	8.636
B4	9.036
B5	9.436
B6	9.836
B7	10.236
B8	10.636
B9	11.036
B10	11.436
B11	11.836
B12	12.236
B00	12.636",

and deleted introductory clause that read: "(2) The pay schedule for blue-collar workers for fiscal year 1987 is as follows".

1986 Amendment: The amendment was contingent on renegotiation of collective bargaining agreements; since such contingency didn't occur, the amendment terminated.

1985 Amendment: In (1) substituted "1986" for "1984" and in pay matrix substituted 1986 fiscal year figures (see Ch. 740, L. 1985) for 1984 figures; in (2) substituted "1987" for "1985" and in pay matrix substituted fiscal year 1987 figures (see Ch. 740, L. 1985) for 1985 figures (see sec. 5, Ch. 710, L. 1983, for pay schedules for fiscal years 1984 and 1985).

1983 Amendment: Inserted pay schedules for fiscal years 1984 and 1985 (see sec. 5, Ch. 710, L. 1983). Pay schedules for fiscal years 1982 and 1983 were adopted by Executive Order 7-81. Pay schedules appeared in the compiler's comments to the 1981 MCA.

Part 4
Payroll Systems

2-18-401. Central payroll system — department to provide for inclusion of agencies.

Compiler's Comments

1995 Amendments: Chapter 84 inserted third sentence that read: "The department shall adopt rules to implement the state central payroll system." Amendment effective July 1, 1995.

Chapter 308 at end of first sentence, after "system", deleted "and the vocational-technical centers"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 84, L. 1995, provided: "A statement of intent is required for this bill because 2-18-102 requires the department of administration to adopt administrative rules containing personnel policies and 2-18-401 authorizes the department to adopt rules regarding the operation of the state central payroll system.

The legislature intends that rules containing personnel policies should address employee records, performance appraisals, grievances, discipline, reductions in force, recruitment, selection, and training.

The legislature intends that rules concerning payroll deductions should address the payroll deduction process and should set criteria for the kinds of payments that can be made through payroll deductions. Examples of types of payroll deductions that should be addressed by the rules are payment of insurance premiums, bank and credit union payments, charitable contributions, and wage garnishments."

1993 Amendment: Chapter 188 in two places substituted reference to Department of Administration for reference to State Auditor; and made minor changes in style. Amendment effective July 1, 1993.

1989 Amendment: At end of first sentence inserted "including units of the Montana university system and the vocational-technical centers". Amendment effective April 20, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 592, L. 1989, provided: "This bill requires the state auditor to provide for the inclusion of the units of the university system and the vocational-technical centers [now colleges of technology] into the state central payroll system.

The legislature recognizes the need to include the five vocational-technical centers [now colleges of technology] under the central payroll system by July 1, 1989, when the vocational-technical center [now college of technology] employees become employees of the board of regents.

The legislature further recognizes the complexity and enormity of the task of including all units of the Montana university system under the central payroll system. Therefore, the legislature intends that the information services division of the department of administration, in consultation with the state auditor and under the direction of the office of budget and program planning, conduct a study to be performed and finalized by November 1, 1989. The purpose of the study is to determine the necessary modifications and costs required for the university system to be included under a uniform state central payroll, personnel, and position control system. It is expected that the state auditor and the information services division of the department of administration work closely with the board of regents and each unit of the Montana university system to ensure that a systematic implementation of each unit on the uniform state central payroll, personnel, and position control system as approved by the office of budget and program planning be completed no later than January 1, 1991."

Appropriation: Section 3, Ch. 592, L. 1989, provided an appropriation to the Department of Administration and to the State Auditor to conduct the study and implement the state central payroll, personnel, and position control system for the University System and the vocational-technical centers (now colleges of technology). See 1989 Session Law for text of the appropriation.

2-18-402. Payroll agency fund — department to determine disbursements and transfers.

Compiler's Comments

1993 Amendment: Chapter 188 in (2) substituted references to Department of Administration for references to State Auditor; and made minor changes in style. Amendment effective July 1, 1993.

1983 Amendment: In (1), substituted "A fund in the agency fund type" for "An account in the revolving fund" and substituted "payroll agency fund, which fund" for "payroll revolving account, which account"; and in (2), changed "revolving account" to "agency fund" in two places.

2-18-403. Service charges.

Compiler's Comments

1995 Amendment: Chapter 84 in second sentence substituted "an internal services fund" for "a state special revenue fund". Amendment effective July 1, 1995.

1993 Amendment: Chapter 188 at beginning substituted "department of administration" for "state auditor"; and made minor changes in style. Amendment effective July 1, 1993.

1983 Amendment: Substituted reference to state special revenue fund for reference to revolving fund.

2-18-404. Payroll roster — changes certified by appointing powers.

Compiler's Comments

1993 Amendment: Chapter 188 in (1), (2), and (3) substituted references to Department of Administration for references to State Auditor; and made minor changes in style. Amendment effective July 1, 1993.

1989 Amendment: In (1), near middle of second sentence after "shall include", deleted "both merit system and".

2-18-405. Payroll based on actual, end-of-period figures — pay date — change of payroll periods.

Compiler's Comments

1993 Amendment: Chapter 188 at beginning deleted "By January 1, 1979"; in (3) substituted "department of administration" for "state auditor"; and made minor changes in style. Amendment effective July 1, 1993.

1989 Amendment: Near end of (2) inserted reference to electronic funds transfers; and made minor change in punctuation. Amendment effective March 15, 1989.

2-18-411. Lost warrants — duplicate.

Compiler's Comments

1995 Amendment: Chapter 325 in three places in (1) changed references from State Auditor to references to State Treasurer; and made minor changes in style. Amendment effective July 1, 1995.

2-18-412. Designation of person to receive decedent's warrants — reissuance.

Compiler's Comments

1995 Amendment: Chapter 325 in two places in last sentence changed references from State Auditor to references to State Treasurer; and made minor changes in style. Amendment effective July 1, 1995.

Administrative Rules

ARM 2.21.3105 Decedent's warrant.

Part 5
Travel, Meals, and Lodging

2-18-501. Meals, lodging, and transportation of persons in state service.

Compiler's Comments

1997 Amendment: Chapter 439 at beginning of introductory clause substituted "All elected state officials" for "Every elected official"; in (1), at beginning, inserted exception clause, after "state of Montana" substituted "lodging must be authorized at" for "the following provisions apply:

(a) The governor shall be authorized actual and necessary expenses not to exceed $55 per day.

(b) All other elected state officials, appointed members of boards, commissions, or councils, department directors, and all other state employees shall be authorized", and increased allowance for lodging from $30 per day to $35, for morning meal from $3.50 to $5, for midday meal from $4 to $6, and for evening meal from $8 to $12; at beginning of (2) substituted introductory clause and (2)(a) and (2)(b) allowing reimbursement for lodging and meals for out-of-state travel at actual cost, up to federal maximum, for "For travel out of the state of Montana, the following provisions apply:

(a) The governor shall be authorized the actual cost of lodging in addition to a meal allowance not to exceed $30 per day"; in (3), at beginning, substituted "The department shall designate the locations and circumstances under which the governor" for "All" and substituted "may be authorized the actual cost of lodging when the actual cost exceeds the maximum established in subsection (1) or (2)(a)" for "shall be authorized the actual cost of lodging, not exceeding $50 per day, except as provided in subsection (3), plus $5 for the morning meal, $6.50 for the midday meal, and $12 for the evening meal. All claims for the lodging expense reimbursement allowed under this subsection must be documented by an appropriate receipt"; deleted former (3) that read: "(3) All other elected state officials, appointed members of boards, commissions, or councils, department directors, and all other state employees shall be authorized the actual cost of lodging when traveling in the normal course of their duties to certain designated areas. The department of administration shall designate those areas where the actual cost of lodging shall be reimbursed"; in (4)(b) substituted "claims for lodging reimbursement" for "claims for meals and lodging reimbursement"; in (5), near beginning of first sentence, substituted "a state official or employee" for "a state employee" and at end substituted "(1)(a) or (2)(a)" for "(1)(b) or (2)(b)"; in (8) substituted "establish policies" for "prescribe rules"; and made minor changes in style. Amendment effective July 1, 1997.

1991 Amendment: In (1)(b) increased in-state daily allowances from $24 to $30 for lodging, from $3 to $3.50 for breakfast, and from $3.50 to $4 for lunch; and in (2)(b) increased out-of-state breakfast allowance from $4 to $5.

1989 Amendments: Chapter 83 in (3) substituted "commissions" for "commissioners"; and made minor changes in phraseology.

Chapter 207 inserted (4) relating to travel to a foreign country; and in (5) increased nonreceiptable lodging expense to $12 from $7. Amendment effective March 21, 1989.

1987 Amendment: In (1)(b), after "$24 per day", inserted "and taxes on the allowable cost of lodging".

1983 Amendment: In (1)(b), increased the in-state evening meal allowance from $7 to $8.

1981 Amendments: Chapter 582 increased $40 per day to $55 per day in (1)(a); increased the maximum reimbursement for lodging from $21 to $24 in (1)(b); increased the allowance for the morning meal from $2 to $3 in (1)(b); increased the allowance for the evening meal from $6.50 to $7 in (1)(b); substituted "cost of lodging in addition to a meal allowance" for "and necessary travel expenses" in (2)(a); increased the out-of-state lodging allowance from $40 to $50 in (2)(b); increased the morning meal allowance from $3 to $4 in (2)(b); increased the midday meal allowance from $5 to $6.50 in (2)(b); increased the evening meal allowance from $8.50 to $12 in (2)(b); inserted "other" after "All" at the beginning of (3); and deleted "in the United States" after "The department of administration shall designate those areas" in the last sentence of (3).

Chapter 338 amended subsections (2)(a) and (3) exactly the same as done in Ch. 582.

Chapter 575 redesignated subsection (2)(c) as (3); in (1)(b), changed the internal reference from "subsection (2)(c)" to "subsection (3)"; in (2)(b), inserted "except as provided in subsection (3)".

Case Notes

Travel Pay — Effect on Workers' Compensation: Since claimant was not entitled to travel pay under this section, she was not entitled to workers' compensation for an injury sustained en route to work. Hagerman v. Galen St. Hosp., 174 M 249, 570 P2d 893 (1977).

Entitlement of Judges to Actual and Necessary Expenses: Statutory travel expenses as applied to District Judges and Supreme Court Justices are unconstitutional as Judges are entitled to their actual and necessary expenses for travel, subsistence, and lodging to meet constitutional mandate that their salaries shall not be diminished during their term of office. In re Expense of Judges, 168 M 170, 541 P2d 345 (1975).

Attorney General's Opinions

Exception to County Travel Policy — Certain County Officers Entitled to Actual Travel Expenses: In attending the annual state convention for the office held, a County Attorney, Sheriff, Assessor, or Justice of the Peace is entitled to reimbursement for actual travel expenses. These expenses may exceed the levels established in a county travel policy. 42 A.G. Op. 124 (1988).

Authority of County Commissioners to Adopt Meal and Lodging Expense Regulations: Section 2-18-501 does not, by its own terms, govern meal and lodging expense payments to county officers or employees. Except as may otherwise be specified statutorily, a Board of County Commissioners with general governmental powers may adopt rules and regulations providing for payment or reimbursement of reasonable meal and lodging expenses incurred by county officers or employees in the performance of official duties. 40 A.G. Op. 77 (1984).

Travel Expenses of County Tax Appeal Board: Members of the County Tax Appeal Boards are only entitled to travel and per diem as provided by the general state travel and per diem statutes. 35 A.G. Op. 16 (1973).

2-18-502. Computation of meal allowance.

Compiler's Comments

1997 Amendment: Chapter 439 in (1), near beginning, substituted "subsections (2) and (4)" for "subsection (3)", after "2-18-501" substituted "only if the employee is in a travel status" for "an employee must have been in a travel status", and at end substituted "during the following hours" for "If eligible, an employee receives"; in (1)(a), (1)(b), and (1)(c), after "allowance", deleted "if in a travel status"; in (2) inserted "An eligible employee may receive"; in (5) substituted "policies" for "rules"; and made minor changes in style. Amendment effective July 1, 1997.

1983 Amendment: At beginning of (1), inserted the exception clause; inserted (3) relating to midday meals for certain meetings.

2-18-503. Mileage — allowance.

Compiler's Comments

2002 Amendment: Chapter 4 in (1) substituted references to motor vehicles for references to automobiles; in (2)(a) substituted language concerning reimbursement when using a privately owned motor vehicle for "When the individual is authorized to operate a privately owned vehicle even though a government-owned or leased vehicle is available, a rate of 3 cents less per mile than the mileage rate allowed by the United States internal revenue service for the current year must be paid"; in (2)(b) substituted references to motor vehicle for references to vehicle and inserted "and a notice of unavailability of a government-owned or leased motor vehicle or a specific exemption is attached to the travel claim, then"; inserted (3) relating to reimbursement for persons other than state employees; in (4) substituted "motor vehicle" for "automobile"; and made minor changes in style. Amendment effective August 13, 2002.

1999 Amendment: Chapter 558 in two places after "allowed by the United States internal revenue service" substituted "for the current year" for "for the preceding year". Amendment effective May 6, 1999.

Retroactive Applicability: Section 15, Ch. 558, L. 1999, provided: "[Section 8] [amending 2-18-503] applies retroactively, within the meaning of 1-2-109, to mileage expenses incurred on or after April 1, 1999."

1997 Amendment: Chapter 439 in (6), in first sentence, substituted "policies" for "rules" and inserted second sentence exempting policies from Montana Administrative Procedure Act; and made minor changes in style. Amendment effective July 1, 1997.

Statement of Intent: The statement of intent attached to SB 370 (Ch. 622, L. 1979) provided: "A statement of intent is included with this Bill because the Committee wished to clarify the reasons for and conditions under which increased compensation is granted to owners of private aircraft when used for state business.

1. The intent of this increase is to permit adequate compensation for the use of private aircraft when used for state business.

2. It is also the intent of this Bill that the Department of Administration provide rules to insure the necessary computation and documentation of the savings effected by, or the necessity for, the use of private aircraft rather than the use of state motor vehicles for state business. This cost-efficiency documentation pertains to Section 1, subsection (6) of Senate Bill No. 370."

Case Notes

Entitlement of Judges to Actual and Necessary Expenses: Statutory travel expenses as applied to District Judges and Supreme Court Justices are unconstitutional as Judges are entitled to their actual and necessary expenses for travel, subsistence, and lodging to meet constitutional mandate that their salaries shall not be diminished during their term of office. In re Expense of Judges, 168 M 170, 541 P2d 345 (1975).

Mileage Payable — "Earnings" Within Exemption Statute: Mileage payable to County Assessor for official travel constitutes "earnings" within 25-13-614 exempting earnings necessary for debtor's family, the term being broader than "wages" and "salary". Williams v. Sorenson, 106 M 122, 75 P2d 784 (1938).

Attorney General's Opinions

Mileage Reimbursement for Constables: Parties involved in civil litigation in Justice's Court who desire to have legal process served by a constable should prepay the cost of service based upon the estimated round-trip mileage involved and the mileage reimbursement rate established in this section. A constable should be reimbursed for travel only upon the amount of miles actually traveled at the legally established rate. Any difference between the amount paid by the parties to litigation for service of process by a constable and the amount that the constable is reimbursed accrues to the benefit of the local governing body providing the service. 42 A.G. Op. 15 (1987).

Use of Private Vehicles on State Business — Rate of Reimbursement: A state agency may permit its employees to use personal vehicles while on state business regardless of the availability of state motor pool vehicles. A state employee who uses a personal vehicle on state business must be reimbursed as provided in the applicable subsection of 2-18-503, even though the rate may exceed the rate allowed for state motor pool vehicles. 37 A.G. Op. 172 (1978).

Mileage Rates for Juvenile Probation Officers: A county is not entitled to a refund from the state for mileage payments to juvenile probation officers in excess of 15 cents per mile. 37 A.G. Op. 55 (1977).

Expenses of Juvenile Probation Officers: The Montana Youth Court Act governs the payment of expenses and mileage for juvenile probation officers. 36 A.G. Op. 50 (1976).

Collateral References

Counties *key* 73; States *key* 62, et seq.

20 C.J.S. Counties §§118, 137; 81A C.J.S. States §104.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements. 5 ALR 2d 1182.

2-18-504. Mileage computed by shortest traveled route.

Collateral References

Jury *key* 77(1); Sheriffs and Constables *key* 61; Witnesses *key* 29.

50 C.J.S. Juries §207; 80 C.J.S. Sheriffs and Constables §251; 97 C.J.S. Witnesses §§37, 38, 43.

Part 6
Leave Time

Part Administrative Rules

Title 2, chapter 21, ARM Leave policies.

Title 2, chapter 21, subchapter 3, ARM Disaster and emergency leave.

Part Attorney General's Opinions

Collective Bargaining Agreement — Days of Leave in Addition to Legal Holidays: The Board of County Commissioners may enter into an agreement with county employees that grants a day of paid leave in addition to the enumerated legal holidays. The collective bargaining provision in question merely provides an additional paid day off to attend the county fair for those employees covered by the contract. The provision does not make "fair day" a "legal holiday" nor does it suggest that an employee may accumulate "fair days" as vacation. The provision contravenes no statutory determination of employee benefits. The provision falls within the area that is a proper subject for collective bargaining. 38 A.G. Op. 116 (1980).

Employee Benefits: Title 2, ch. 18, part 6, establishes maximum and minimum benefits which may not be varied through collective bargaining or other negotiation. 38 A.G. Op. 20 (1979).

2-18-601. Definitions.

Compiler's Comments

2001 Amendment: Chapter 314 in definition of agency inserted (b) excepting the state compensation insurance fund; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendment: Chapter 339 inserted definition of short-term worker; deleted definition of sick pay plan (see 1997 Session Law for former text); in definition of permanent employee substituted "means a permanent employee as defined in 2-18-101" for "means an employee who is assigned to a position designated as permanent on the appropriate list of authorized positions referenced in 2-18-206 and approved as such in the biennium budget"; in definition of seasonal employee substituted "means a seasonal employee as defined in 2-18-101" for "means an employee assigned to a position designated as seasonal on the appropriate agency list of authorized positions referenced in 2-18-206 and for which the agency has a permanent need but which is interrupted by the seasonal nature of the assignment"; in definition of temporary employee substituted "means a temporary employee as defined in 2-18-101" for "means an employee assigned to a position designated as temporary on the appropriate agency list of authorized positions referenced in 2-18-206, created for a definite period of time not to exceed 9 months"; and made minor changes in style. Amendment effective July 1, 1997.

1991 Amendments: Chapter 260 inserted definition of holiday.

Chapter 756 at end of definition of sick leave inserted "or for a permanent state employee who is eligible for parental leave under the provisions of 2-18-606".

Preamble: The preamble to Ch. 756, L. 1991, provided: "WHEREAS, maternity leave regulations now provide that maternity leave is based solely on a state employee's disability due to pregnancy but do not require proof of medical disability for the first 6 weeks after birth; and

WHEREAS, this rule is arbitrary in that it excludes employees from parental leave when employees seek to establish families through means other than childbirth; and

WHEREAS, this rule is against public policy in that it fails to recognize the equal contributions to societal well-being of both families created through adoption and families created through childbirth."

1981 Amendment: Added definition of sick-pay plan.

Case Notes

Deaf and Blind School Employee Contracts Not Personal Services Contracts — Employees Entitled to Annual Leave and Holiday Pay Accrued: Employees of the Montana School for the Deaf and Blind signed standard form year-to-year employment contracts that granted them "all holidays and annual leave to which [the employee] is entitled under state law" and "all employee benefits to which [the employee] is entitled under the laws of the State of Montana". The employees were required to work evenings and to be on call much of the time. Nevertheless, the employees were required to complete time cards showing employment for only 8-hour days and were paid for only that time. The employees submitted a claim to the Board of Public Education for annual leave and holiday pay accrued but not paid and sued the Board when it refused to pay them. The Board defended, claiming that the employees' contracts were personal services contracts and that therefore the employees were exempt from the definition of an "employee" under this section. The Supreme Court held that the District Court properly granted summary judgment for the employees because the employees were not hired on an ad hoc basis because of the highly technical nature of their employment—rather, the employees are year-round employees given the benefit of the state group health plan and given grade and pay increases on state payroll accounting forms. The Supreme Court concluded that to hold otherwise would mean that all state employees are hired under personal services contracts and no state employee is entitled to annual leave and holiday pay, a construction that the Supreme Court determined would be unreasonable. Corwin v. Bd. of Pub. Educ., 272 M 14, 898 P2d 1227, 52 St. Rep. 589 (1995).

Temporary Employment — No Recall Rights: A labor agreement provided that an employee would not have recall rights under a seniority clause unless he was employed for 6 continuous months. A union employee was hired to temporarily replace an injured permanent employee and worked for a period 2 days short of 6 months. The injured employee returned but worked only 3 days. Twenty days later, the union employee was rehired for a period 1 day short of 6 months. The employer then hired a permanent employee to replace the union employee, who contended the contract was violated by the employer's failure to recall him for the permanent position. Recall rights were not earned by the union employee under the contract because the position fell short of 6 months on both occasions. The 20-day break in employment represented a substantial

break in service; therefore, the employment was not continuous or renewable. Local 1334 v. Great Falls, 233 M 432, 760 P2d 99, 45 St. Rep. 1611 (1988).

Mountain View School Teachers as State Employees: Individuals employed to teach at Mountain View School are not employed by a school district and so do not meet the statutory definition of "teacher" in 20-1-101. Therefore, the instructors are considered state employees entitled to the leave benefits provided for other state employees. Mtn. View Educ. Ass'n v. Mtn. View School, 227 M 288, 738 P2d 1288, 44 St. Rep. 1089 (1987).

"Schoolteacher" — Higher Education Faculty Not Included: The plain and ordinary meaning of "schoolteacher" does not encompass higher education faculty, including community college faculty members, especially since community college faculty members are ultimately answerable to the Board of Regents. Community college faculty members are state employees for purposes of entitlement to payment for accumulated sick leave. Rippey v. Bd. of Trustees, 210 M 396, 682 P2d 1363, 41 St. Rep. 1117 (1984), followed, with regard to the fact that "teacher" does not include a community college instructor for tenure purposes, in Talley v. Flathead Valley Community College, 259 M 479, 857 P2d 701, 50 St. Rep. 889 (1993).

School Superintendent: For the purpose of interpreting his contract, school superintendent was classified as a schoolteacher under this part. Bitney v. School District, 167 M 129, 535 P2d 1273 (1975).

Attorney General's Opinions

Chief Water Judge Not Subject to State Leave Policies — Executive Branch Not to Supervise Judicial Branch: Although the Chief Water Judge is appointed and not elected, the Chief Water Judge is a judicial officer and is not subject to the vacation leave policies of the Department of Administration. This interpretation of the statutes is also required by the application of the separation of powers clause of the Montana Constitution. To hold otherwise would subject a judicial officer to control by the Executive Branch of state government and not to the control of the Montana Supreme Court or the Judicial Standards Commission. 48 A.G. Op. 2 (1999).

Regional Airport Authority Employee Entitled to Credit for Sick and Vacation Leave Earned With Other Public Entity: A regional airport authority is a public entity and, upon satisfaction of relevant statutory criteria, is required to give credit for sick and vacation leave earned by its airport police officers during employment with other public entities. 44 A.G. Op. 27 (1992).

Elected Officials: All state, county, and city officers having the legal status of elected officials are excluded from the definition of employee in 2-18-601. 38 A.G. Op. 12 (1979).

County Employee Elected to Public Office: A county employee who is elected or appointed to a public office of the state, county, or city thereby terminates his employment and is entitled to receive vacation and sick leave benefits accumulated during his employment, unless he falls within the mandatory leave provision of 2-18-620. 38 A.G. Op. 12 (1979).

Hospital District Employees — Vacation and Sick Leave: Employees of county hospital districts are employees of a subdivision of the county and are therefore entitled to receive the vacation and sick leave benefits provided public employees. 37 A.G. Op. 102 (1977).

County Superintendent of Schools: An elected County Superintendent of Schools is not an "employee" for the purposes of this part. 37 A.G. Op. 4 (1977).

Definition of "Employees": This section does not repeal by implication the section excluding elected officials and schoolteachers from the definition of "employees". 37 A.G. Op. 4 (1977).

2-18-603. Holidays — observance when falling on employee's day off.

Compiler's Comments

1997 Amendment: Chapter 339 inserted (1)(c) providing that a short-term worker may not receive holiday pay; and made minor changes in style. Amendment effective July 1, 1997.

1981 Amendment: Substituted "a day off with pay either on the day preceding the holiday or on another day following the holiday in the same pay period or as scheduled by the employee and his supervisor" for "a day off either on the day preceding or the day following the holiday" in (1); inserted the phrase "provided the employee is in a pay status on his last regularly scheduled working day immediately before the holiday or on his first regularly scheduled working day immediately after the holiday" at the end of the first sentence in (1); substituted "pay" for "paid holiday time off based only on the number of hours scheduled" in (1); added the phrase "on a prorated basis according to rules adopted by the department of administration or appropriate administrative officer under 2-18-604" at the end of (1).

Administrative Rules

Title 2, chapter 21, subchapter 6, ARM Holidays.

Attorney General's Opinions

Holiday Pay Applicable to County Road Employees Who Work Ten-Hour Days: County road and bridge department employees regularly working 10-hour days 4 days a week are entitled to 8 hours' pay under this section for all nonworked holidays. 43 A.G. Op. 14 (1989).

Holidays and Vacations: Section 2-18-603, which generally entitles each state, city, and county employee to a day off on the day preceding or following a holiday which falls on the employee's regular day off, is applicable to full-time salaried employees of a county hospital district. Vacation and holiday leave time for public employees are cumulative. If a holiday or its complement under 2-18-603 falls during a public employee's annual vacation, that day should not be counted against leave time. If counted against leave time, the employee must be given a paid day off at a later time to make up for the lost holiday. A public employee may be required to work on a holiday or its complement under 2-18-603. However, a public employee who works a holiday or its complement must be either compensated for the lost holiday or given an opportunity to take a paid day off at a later time. The holiday provisions of 2-18-603 apply to full-time, salaried public employees. They do not apply to part-time, temporary, or seasonal employees who are paid on an hourly or per diem basis for work actually performed. 38 A.G. Op. 16 (1979).

Nonteaching School Employees — Public Employees: Nonteaching school district employees are public employees and thus entitled to the legal holidays enumerated in 1-1-216 just as are all other public employees. They are not entitled to the school holidays enumerated in 20-1-305. 37 A.G. Op. 96 (1977), overruling in part 36 A.G. Op. 105 (1976). (Annotator's Comment: This opinion not to take effect until the 1978-79 school year.)

Employment Contract Providing for Extra Pay for Working Holidays: An employment contract providing that public employees are entitled to extra pay for working on a paid holiday applies fully to employees called to work on the day they were to have off in place of a holiday under this section. 37 A.G. Op. 44 (1977).

Coverage of Act: All public employees, including nonteaching school district employees, who are covered by the vacation, sick leave, and holiday provisions are entitled to paid days off on legal holidays. 36 A.G. Op. 105 (1976), overruled in part by 37 A.G. Op. 96 (1977).

2-18-604. Administration of rules.

Compiler's Comments

Codification: Section 11, Ch. 568, L. 1979, provided: "It is intended that section 10 be codified as an integral part of Title 2, chapter 18, part 6, and the provisions of Title 2, chapter 18, part 6, apply to section 10."

Attorney General's Opinions

Department Rules Upheld — Leave Time — Agency Interpretation Entitled to Substantial Weight: The Department of Administration's comprehensive set of rules, adopted under this section, explicitly recognizes that vacation and sick leave credits are accrued on an hourly basis. In construing statutes, the interpretation of the administrative body is entitled to substantial weight. Here, agency's interpretation was applied to public employees at the local level. 39 A.G. Op. 15 (1981).

2-18-606. Parental leave for state employees.

Compiler's Comments

1997 Amendments: Chapter 2 inserted (3) allowing application of the Family and Medical Leave Act of 1993; and made minor changes in style. Amendment effective January 27, 1997.

Chapter 480 at end of (2) substituted "33-22-130" for "40-8-103".

Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 8, chapter 8 renumbered in Title 52, chapter 8, part 1] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

Preamble: The preamble to Ch. 756, L. 1991, provided: "WHEREAS, maternity leave regulations now provide that maternity leave is based solely on a state employee's disability due to pregnancy but do not require proof of medical disability for the first 6 weeks after birth; and

WHEREAS, this rule is arbitrary in that it excludes employees from parental leave when employees seek to establish families through means other than childbirth; and

WHEREAS, this rule is against public policy in that it fails to recognize the equal contributions to societal well-being of both families created through adoption and families created through childbirth."

Administrative Rules

ARM 2.21.1004 Parental leave requests.

2-18-611. Annual vacation leave.

Compiler's Comments

1997 Amendment: Chapter 339 in (5) near beginning after "employees", deleted "do not" and after "credits" substituted "but may not use the credits until after working for 6 qualifying months" for "except that a temporary employee who is subsequently hired into a permanent position within the same jurisdiction without a break in service and temporary employees who are employed continuously longer than 6 months may count as earned leave credits for the immediate term of temporary employment"; inserted (6) providing that a short-term worker may not earn vacation leave credits; and made minor changes in style. Amendment effective July 1, 1997.

1987 Amendment: Inserted (6) relating to leave accrual for employees with temporary reductions in hours of work.

1987 Statement of Intent: The statement of intent attached to Ch. 328, L. 1987, provided: "A statement of intent is required for this bill because it authorizes the public employees' retirement board to adopt rules providing that a retirement system member whose hours have been temporarily reduced as a result of a budget deficit receives the same retirement benefits as if the reduction had not occurred. The legislature intends that public employees suffer no loss of retirement benefits because reduced work hours are instituted to avoid employee layoffs. The legislature directs the board to develop equitable procedures for protecting retirement benefits for members of the public employees', Montana highway patrolmen's, sheriffs', Montana state game wardens' [now game wardens' and peace officers'], municipal police officers', and Montana unified firefighters' retirement systems."

1987 Applicability: Section 6, Ch. 328, L. 1987, provided: "This act applies retroactively, within the meaning of 1-2-109, to employees as defined in 2-18-601 whose hours were reduced from 40 hours a week to less than 40 hours a week as a result of a budget deficit on or after January 1, 1986, and who were employees on the effective date of this act." Effective April 2, 1987.

1985 Amendment: In (1) deleted former second sentence that read: "For calculating vacation leave credits, 2080 hours (52 weeks x 40 hours) shall equal 1 year."

1985 Applicability: Section 5, Ch. 593, L. 1985, provided: "This act applies retroactively, within the meaning of 1-2-109, to service performed after July 31, 1984."

1983 Amendment: At end of (4), deleted "exceeding 15 working days".

Administrative Rules

Title 2, chapter 21, subchapter 2, ARM Annual leave policy.

Case Notes

Statutory Qualifying Period for Unpaid Vacation Not Controlled by Policy or Collective Bargaining Agreement: Under 2-18-617, an employee is eligible to recover unused vacation leave only if the employee has worked for the 6-month qualifying period set out in this section. The statutory qualifying period is separate from and not controlled by any probationary period that a local governing body establishes by policy or negotiation of a collective bargaining agreement. Poeppel v. Flathead County, 1999 MT 130, 294 M 487, 982 P2d 1007, 56 St. Rep. 525 (1999).

Employees: Term "employees" was used in section 59-1001, R.C.M. 1947 (now 2-18-611, 2-18-612, and 2-18-614), in its generic sense to include all employees of the state or its agencies, including nonteaching school district employees. Teamsters Local 45 v. Cascade County School District, 162 M 277, 511 P2d 339 (1973), distinguished, for circumstances involving community college instructors, in Talley v. Flathead Valley Community College, 259 M 479, 857 P2d 701, 50 St. Rep. 889 (1993).

School District Employees: Full-time nonteaching employees of county school district were entitled to vacation benefits under section 59-1001, R.C.M. 1947 (now 2-18-611, 2-18-612, and 2-18-614), adjusted retroactively to date of their employment subject to the 2-year Statute of Limitations placed upon liability created by statute and reduced by vacation benefits received under contract negotiations or administrative regulations. Teamsters Local 45 v. Cascade County School District, 162 M 277, 511 P2d 339 (1973).

Attorney General's Opinions

Supplementation of Workers' Compensation Benefits With Annual Leave Not Allowed: Section 39-71-701 provides that a worker is eligible for temporary total disability benefits after suffering a total loss of wages. The term "wages" is defined in 39-71-123 to include remuneration at the regular hourly rate for vacations and sickness periods. If annual leave benefits are paid, then the employee is not suffering a total loss of wages and is not eligible for workers' compensation benefits. Therefore, a state agency may not supplement workers' compensation wage loss benefits with annual leave upon the request of an employee. 44 A.G. Op. 33 (1992).

Compensation of Police Officer Injured on Duty — No Accrual of Leave: Under 7-32-4132, a police officer of a first- or second-class municipality who is injured in the performance of duty is entitled to the difference between any workers' compensation benefits received and the officer's regular salary. However, 7-32-4132 does not provide for accrual of either vacation or sick leave benefits during the period of disability. 42 A.G. Op. 114 (1988).

Vacation and Sick Leave Benefits: Nonteaching employees of school districts and postsecondary vocational-technical centers (now colleges of technology) are entitled to vacation and sick leave benefits. 38 A.G. Op. 20 (1979).

Holidays and Vacations: Section 2-18-603, which generally entitles each state, city, and county employee to a day off on the day preceding or following a holiday which falls on the employee's regular day off, is applicable to full-time salaried employees of a county hospital district. Vacation and holiday leave time for public employees are cumulative. If a holiday or its complement under 2-18-603 falls during a public employee's annual vacation, that day should not be counted against leave time. If counted against leave time, the employee must be given a paid day off at a later time to make up for the lost holiday. A public employee may be required to work on a holiday or its complement under 2-18-603. However, a public employee who works a holiday or its complement must be either compensated for the lost holiday or given an opportunity to take a paid day off at a later time. The holiday provisions of 2-18-603 apply to full-time, salaried public employees. They do not apply to part-time, temporary, or seasonal employees who are paid on an hourly or per diem basis for work actually performed. 38 A.G. Op. 16 (1979).

County Employee Elected to Public Office: A county employee who is elected or appointed to a public office of the state, county, or city thereby terminates his employment and is entitled to receive vacation and sick leave benefits accumulated during his employment, unless he falls within the mandatory leave provision of 2-18-620. 38 A.G. Op. 12 (1979).

Hospital District Employees — Vacation and Sick Leave: Employees of county hospital districts are employees of a subdivision of the county and are therefore entitled to receive the vacation and sick leave benefits provided public employees. 37 A.G. Op. 102 (1977).

County Superintendent of Schools: An elected County Superintendent of Schools is not an "employee" for the purposes of this part. 37 A.G. Op. 4 (1977).

Vacation Leave Computed From Date of Employment: State, city, and county full-time employees are entitled to annual vacation leave with pay pursuant to this section, provided they have been "continuously employed for a period of 6 calendar months" computed from date of employment rather than July 1, 1975, the effective date of this part. 36 A.G. Op. 14 (1975).

2-18-612. Rate earned.

Compiler's Comments

1985 Amendment: Inserted (2) providing method to determine years of employment.

Applicability: Section 5, Ch. 593, L. 1985, provided: "This act applies retroactively, within the meaning of 1-2-109, to service performed after July 31, 1984."

Administrative Rules

ARM 2.21.222 Calculating annual leave credits.

Case Notes

Employees: Term "employees" was used in section 59-1001, R.C.M. 1947 (now 2-18-611, 2-18-612, and 2-18-614), in its generic sense to include all employees of the state or its agencies, including nonteaching school district employees. Teamsters Local 45 v. Cascade County School District, 162 M 277, 511 P2d 339 (1973), distinguished, for circumstances involving community college instructors, in Talley v. Flathead Valley Community College, 259 M 479, 857 P2d 701, 50 St. Rep. 889 (1993).

School District Employees: Full-time nonteaching employees of county school district were entitled to vacation benefits under section 59-1001, R.C.M. 1947 (now 2-18-611, 2-18-612, and 2-18-614), adjusted retroactively to date of their employment subject to the 2-year Statute of

Limitations placed upon liability created by statute and reduced by vacation benefits received under contract negotiations or administrative regulations. Teamsters Local 45 v. Cascade County School District, 162 M 277, 511 P2d 339 (1973).

Attorney General's Opinions

Change to Ten-Hour Work Day — Leave Time Calculated on Hourly Basis: Accrued employee leave time is calculated on an hourly basis for the purpose of determining the amount of leave time credited to employees who change from an 8-hour work day to a 10-hour work day. 39 A.G. Op. 15 (1981).

Holidays and Vacations: Section 2-18-603, which generally entitles each state, city, and county employee to a day off on the day preceding or following a holiday which falls on the employee's regular day off, is applicable to full-time salaried employees of a county hospital district. Vacation and holiday leave time for public employees are cumulative. If a holiday or its complement under 2-18-603 falls during a public employee's annual vacation, that day should not be counted against leave time. If counted against leave time, the employee must be given a paid day off at a later time to make up for the lost holiday. A public employee may be required to work on a holiday or its complement under 2-18-603. However, a public employee who works a holiday or its complement must be either compensated for the lost holiday or given an opportunity to take a paid day off at a later time. The holiday provisions of 2-18-603 apply to full-time, salaried public employees. They do not apply to part-time, temporary, or seasonal employees who are paid on an hourly or per diem basis for work actually performed. 38 A.G. Op. 16 (1979).

2-18-614. Military leave considered service.

Administrative Rules

Title 2, chapter 21, subchapter 4 ARM Military leave.

Case Notes

Employees: Term "employees" was used in section 59-1001, R.C.M. 1947 (now 2-18-611, 2-18-612, and 2-18-614), in its generic sense to include all employees of the state or its agencies, including nonteaching school district employees. Teamsters Local 45 v. Cascade County School District, 162 M 277, 511 P2d 339 (1973), distinguished, for circumstances involving community college instructors, in Talley v. Flathead Valley Community College, 259 M 479, 857 P2d 701, 50 St. Rep. 889 (1993).

School District Employees: Full-time nonteaching employees of county school district were entitled to vacation benefits under section 59-1001, R.C.M. 1947 (now 2-18-611, 2-18-612, and 2-18-614), adjusted retroactively to date of their employment subject to the 2-year Statute of Limitations placed upon liability created by statute and reduced by vacation benefits received under contract negotiations or administrative regulations. Teamsters Local 45 v. Cascade County School District, 162 M 277, 511 P2d 339 (1973).

2-18-617. Accumulation of leave — cash for unused — transfer.

Compiler's Comments

1997 Amendment: Chapter 143 inserted (4) allowing school districts to provide for cash compensation in lieu of accumulation of vacation leave. Amendment effective July 1, 1997.

1993 Amendment: Chapter 115 at beginning of (1)(a) inserted exception clause; inserted (1)(b) requiring a public agency head to actively manage vacation leave for agency employees; and made minor changes in style. Amendment effective March 18, 1993.

Administrative Rules

ARM 2.21.232 through 2.21.241 Termination and transfer.

Case Notes

Statutory Qualifying Period for Unpaid Vacation Not Controlled by Policy or Collective Bargaining Agreement: Under this section, an employee is eligible to recover unused vacation leave only if the employee has worked for the 6-month qualifying period set out in 2-18-611. The statutory qualifying period is separate from and not controlled by any probationary period that a local governing body establishes by policy or negotiation of a collective bargaining agreement. Poeppel v. Flathead County, 1999 MT 130, 294 M 487, 982 P2d 1007, 56 St. Rep. 525 (1999).

Denial of Accrued Benefits Not Unconstitutional: State employees, dismissed because of criminal and sexual misconduct investigations, appealed a summary judgment, alleging that the refusal by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) to pay accrued vacation benefits violated the double jeopardy and

equal protection clauses of the federal constitution. The Supreme Court held that the employees' failure to meet the statutory prerequisite to receive the accrued vacation benefits does not equate to violating a law and facing double jeopardy. Similarly, the terminated employees failed to establish any grounds to support an equal protection discrimination violation. Stuart v. Dept. of Social and Rehabilitation Services, 256 M 231, 846 P2d 965, 50 St. Rep. 48 (1993).

Failure to Exhaust Administrative Remedies Not Bar to Constitutional Challenge: The appellants did not request a hearing when the state agency they worked for terminated them for cause and indicated that it would not pay them for accrued leave. The lower court ruled that the appellants could not challenge the constitutionality of the state law concerning accrued leave because they had not exhausted their administrative remedies. The Supreme Court reversed on the basis that an individual does not have to submit to the provisions of a law he claims is unconstitutional before he can seek a declaratory ruling on the issue of constitutionality. Stuart v. Dept. of Social and Rehabilitation Services, 247 M 433, 807 P2d 710, 48 St. Rep. 238 (1991).

Rights Waived by Failing to Pursue Administrative Remedy: The appellants filed a suit in District Court, alleging that they had been denied due process when the state failed to pay them for accrued leave after they were terminated for cause. The Supreme Court held that the appellants had never requested a departmental hearing and their failure to pursue their administrative remedies amounted to an implied waiver of their rights. Stuart v. Dept. of Social and Rehabilitation Services, 247 M 433, 807 P2d 710, 48 St. Rep. 238 (1991).

School Superintendent: When the contract of the superintendent was silent as to accumulation of annual leave, the court applied the 30-day policy of government employees of this section, although the superintendent was not covered by this section. Bitney v. School District, 167 M 129, 535 P2d 1273 (1975).

Attorney General's Opinions

Annual Cash-Out of Vacation Benefits Impermissible: If excess annual leave is accumulated, it must be used according to the conditions established in this section or it is forfeited. The statutory language clearly establishes a legislative intent that public employees do not have the option of cashing out accumulated but unused vacation leave. The state's general policy encouraging collective bargaining between public employees and their employers is not sufficient to overcome the clear legislative intent. Therefore, Montana law does not permit a public employer to offer a cash-out benefit to employees whereby the unused accumulated vacation leave credits of a public employee who is not terminating employment are bought back by the employer. 46 A.G. Op. 25 (1996).

Beginning of Fiscal Year — Computation for Compensation: Sick or annual leave for employees terminated as laid off on June 30, 1979, should be computed by reference to the pay matrix in effect on that date. 38 A.G. Op. 70 (1980).

County Employee Elected to Public Office: A county employee who is elected or appointed to a public office of the state, county, or city thereby terminates his employment and is entitled to receive vacation and sick leave benefits accumulated during his employment, unless he falls within the mandatory leave provision of 2-18-620. 38 A.G. Op. 12 (1979).

County Superintendent of Schools: An elected County Superintendent of Schools is not an "employee" for the purposes of this part. 37 A.G. Op. 4 (1977).

2-18-618. Sick leave.

Compiler's Comments

2001 Amendment: Chapter 272 in (6) at beginning inserted exception clause; in (7) near beginning after "pursuant to this section" inserted "or who, pursuant to 2-18-1311, converts unused sick leave to employer contributions to a health care expense trust account" and at end after "been compensated" inserted "or for which the employee has received an employer contribution to the health care expense trust account"; in (9) in first sentence near beginning after "An employee" inserted "of a state agency" and at end after "accumulated sick leave" inserted "irrespective of the employee's membership or nonmembership in the employee welfare benefit plan established pursuant to 2-18-1304"; and made minor changes in style. Amendment effective on occurrence of contingency.

Saving Clause: Section 17, Ch. 272, L. 2001, was a saving clause.

1997 Amendment: Chapter 339 inserted (5) providing that a short-term worker may not earn sick leave credits; and made minor changes in style. Amendment effective July 1, 1997.

1991 Amendments: Chapter 25 in second sentence of (8) substituted "state employee group benefits advisory council, provided for in 2-15-1016" for "sick leave advisory council provided for in 2-15-216".

Chapter 758 made minor changes in style. Amendment effective July 1, 1991.

Applicability: Section 5, Ch. 758, L. 1991, provided: "[This act] applies to a reduction in force occurring on or after July 1, 1991."

1989 Amendment: Inserted (9) relating to establishment of a local government sick leave fund; and made minor changes in phraseology.

Repeal of Sunset Provision: Section 3, Ch. 707, L. 1985, which terminated 2-18-618(8) July 1, 1989, was repealed by sec. 1, Ch. 65, L. 1989. Repealer effective June 30, 1989.

1987 Amendment: Inserted (9) relating to sick leave accrual for employees with temporary reductions in hours of work.

1987 Statement of Intent: The statement of intent attached to Ch. 328, L. 1987, provided: "A statement of intent is required for this bill because it authorizes the public employees' retirement board to adopt rules providing that a retirement system member whose hours have been temporarily reduced as a result of a budget deficit receives the same retirement benefits as if the reduction had not occurred. The legislature intends that public employees suffer no loss of retirement benefits because reduced work hours are instituted to avoid employee layoffs. The legislature directs the board to develop equitable procedures for protecting retirement benefits for members of the public employees', Montana highway patrolmen's, sheriffs', Montana state game wardens' [now game wardens' and peace officers'], municipal police officers', and Montana unified firefighters' retirement systems."

1987 Applicability: Section 6, Ch. 328, L. 1987, provided: "This act applies retroactively, within the meaning of 1-2-109, to employees as defined in 2-18-601 whose hours were reduced from 40 hours a week to less than 40 hours a week as a result of a budget deficit on or after January 1, 1986, and who were employees on the effective date of this act." Effective April 2, 1987.

1985 Amendment: Inserted (8) relating to contribution of accumulated sick leave to sick leave fund.

1985 Statement of Intent: The statement of intent attached to Ch. 707, L. 1985, read: "This bill requires a statement of intent because section 1 [which inserted subsection (8) of this section] gives the department of administration rulemaking authority to administer the sick leave fund created by the bill.

The department is required to consult with the sick leave advisory council created by the bill in promulgating all rules. It is intended that these rules relate to the following matters:

(1) procedures for contributing sick leave and applying for loans of sick leave;

(2) a plan under which individuals must pay back the loaned sick leave;

(3) the contribution of sick leave to a specific eligible individual rather than to the fund in general;

(4) definition of the types of illness or other circumstances for which loans or grants may be made;

(5) maximum amount of sick leave which may be loaned or granted;

(6) the inapplicability of contributing sick leave accrued prior to 1971 to the sick leave fund;

(7) procedures under which an agency or unit of the university system may administer a sick leave fund for agency or unit employees; and

(8) other matters necessary for the efficient operation of the sick leave fund.

It is intended that when promulgating these rules, the department of administration review similar programs, including the programs in use in school district no. 1 in Helena and school district no. 1 in Butte, and use those programs as guidelines for the adoption of the rules required by this bill.

It is further intended that these rules in no way limit the ability of a recognized bargaining agent to negotiate other sick leave provisions for its members."

1983 Amendment: At end of (2), deleted "exceeding 15 working days".

Administrative Rules

Title 2, chapter 21, subchapter 1 ARM Sick leave policy.

Case Notes

Involuntarily Terminated Public Employee Entitled to One-Fourth Accumulated Sick Leave: This section makes no distinction between voluntary or involuntary termination. A firefighter who was wrongfully terminated was entitled to only one-fourth his accrued sick leave benefits. Section 2-18-621 does not apply to accumulated sick leave benefits. Welsh v. Great Falls, 212 M 403, 690 P2d 406, 41 St. Rep. 1826 (1984).

"Schoolteacher"— Higher Education Faculty Not Included: The plain and ordinary meaning of "schoolteacher" does not encompass higher education faculty, including community college

faculty members, especially since community college faculty members are ultimately answerable to the Board of Regents. Community college faculty members are state employees for purposes of entitlement to payment for accumulated sick leave. Rippey v. Bd. of Trustees, 210 M 396, 682 P2d 1363, 41 St. Rep. 1117 (1984), followed, with regard to the fact that "teacher" does not include a community college instructor for tenure purposes, in Talley v. Flathead Valley Community College, 259 M 479, 857 P2d 701, 50 St. Rep. 889 (1993).

Attorney General's Opinions

Supplementation of Workers' Compensation Benefits With Sick Leave Not Allowed: When a particular employment condition for public employees has been legislatively set, it may not be modified through collective bargaining without statutory authorization. The consequence of making payment of accrued sick leave benefits to an employee is that, effective July 1, 1987, the employee's eligibility for workers' compensation benefits is forfeited under 39-71-736. Therefore, a state agency is precluded from complying with a collective bargaining agreement that provides for supplementation of workers' compensation wage loss benefits with sick leave when entitlement to that compensation arose on or after July 1, 1987. 44 A.G. Op. 33 (1992), distinguishing 42 A.G. Op. 69 (1988).

Compensation of Police Officer Injured on Duty — No Accrual of Leave: Under 7-32-4132, a police officer of a first- or second-class municipality who is injured in the performance of duty is entitled to the difference between any workers' compensation benefits received and the officer's regular salary. However, 7-32-4132 does not provide for accrual of either vacation or sick leave benefits during the period of disability. 42 A.G. Op. 114 (1988).

Change to Ten-Hour Work Day — Leave Time Calculated on Hourly Basis: Accrued employee leave time is calculated on an hourly basis for the purpose of determining the amount of leave time credited to employees who change from an 8-hour work day to a 10-hour work day. 39 A.G. Op. 15 (1981).

Beginning of Fiscal Year — Computation for Compensation: Sick or annual leave for employees terminated as laid off on June 30, 1979, should be computed by reference to the pay matrix in effect on that date. 38 A.G. Op. 70 (1980).

Vacation and Sick Leave Benefits: Nonteaching employees of school districts and postsecondary vocational-technical centers (now colleges of technology) are entitled to vacation and sick leave benefits. 38 A.G. Op. 20 (1979).

County Employee Elected to Public Office: A county employee who is elected or appointed to a public office of the state, county, or city thereby terminates his employment and is entitled to receive vacation and sick leave benefits accumulated during his employment, unless he falls within the mandatory leave provision of 2-18-620. 38 A.G. Op. 12 (1979).

Hospital District Employees — Vacation and Sick Leave: Employees of county hospital districts are employees of a subdivision of the county and are therefore entitled to receive the vacation and sick leave benefits provided public employees. 37 A.G. Op. 102 (1977).

County Superintendent of Schools: An elected County Superintendent of Schools is not an "employee" for the purposes of this part. 37 A.G. Op. 4 (1977).

School District Employees: Full-time nonteaching employees of a school district are entitled to sick leave benefits under this section; however, schoolteachers are not as section 2-18-601 excludes them. 35 A.G. Op. 69 (1974).

2-18-619. Jury duty — service as witness.

Administrative Rules

Title 2, chapter 21, subchapter 5, ARM Jury duty and witness leave.

2-18-620. Mandatory leave of absence for employees holding public office — return requirements.

Compiler's Comments

1991 Amendment: In (1) inserted second sentence requiring certain employers to restore employees elected to a city, county, or state office to the same position with the same seniority, status, compensation, hours, locality, and benefits as existed prior to election.

Administrative Rules

ARM 2.21.707 Leave to serve in a public office.

Attorney General's Opinions

Elected Officials: All state, county, and city officers having the legal status of elected officials are excluded from the definition of employee in 2-18-601. 38 A.G. Op. 12 (1979).

County Employee Elected to Public Office: A county employee who is elected or appointed to a public office of the state, county, or city thereby terminates his employment and is entitled to receive vacation and sick leave benefits accumulated during his employment, unless he falls within the mandatory leave provision of 2-18-620. 38 A.G. Op. 12 (1979).

2-18-621. Unlawful termination.

Compiler's Comments

1985 Amendment: In second sentence, after "Title 27, chapter 5", inserted "as if an agreement described in 27-5-114 is in effect"; and near end after "bargaining agreement" inserted "to the contrary".

Case Notes

Involuntarily Terminated Public Employee Entitled to One-Fourth Accumulated Sick Leave: Section 2-18-618 makes no distinction between voluntary or involuntary termination. A firefighter who was wrongfully terminated was entitled to only one-fourth his accrued sick leave benefits. This section does not apply to accumulated sick leave benefits. Welsh v. Great Falls, 212 M 403, 690 P2d 406, 41 St. Rep. 1826 (1984).

2-18-622. Reduction in force — severance pay and retraining allowance required.

Compiler's Comments

1993 Amendment: Chapter 640 in (1) substituted "shall provide severance pay as provided in subsection (2)" for "may provide severance pay"; inserted (2) providing for severance pay; inserted (3) providing that one choosing severance pay is not eligible for certain other benefits; and made minor changes in style. Amendment effective May 17, 1993, and terminates June 30, 1995.

Applicability: Section 5, Ch. 758, L. 1991, provided: "[This act] applies to a reduction in force occurring on or after July 1, 1991."

Effective Date: Section 6, Ch. 758, L. 1991, provided that this section is effective July 1, 1991.

2-18-626. Department of justice employees — payment of compensation for time spent answering subpoena.

Collateral References

81 Am. Jur. 2d Witnesses §§7 through 10, 15, 68, 70 through 72.

2-18-627. Paid leave for disaster relief volunteer service.

Compiler's Comments

Effective Date: Section 3, Ch. 225, L. 1999, provided that this section is effective on passage and approval. Approved April 1, 1999.

2-18-641. Exemption — employees of certain county hospitals or rest homes and hospital districts.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

Part 7
Group Insurance Generally

Part Compiler's Comments

Funding: Section 2, Ch. 359, L. 1975, read: "In compliance with section 43-517[, R.C.M. 1947 (since amended, now 1-2-112)], the administration of this act is declared a public purpose of a county, city, or town which may be in addition to any other levy and may be paid out of the general fund of the governing body and financed by a levy on the taxable value of property within the county, city, or town."

Part Case Notes

School Health Insurance Contribution: School district contribution of $35 per month to teachers' medical insurance costs, made pursuant to opinion of the Attorney General but prior to enactment of the exception provision of section 11-1024, R.C.M 1947 (now Title 2, ch. 18, part 7), was not unlawful. Duffy v. Butte Teachers' Union 332, 168 M 246, 541 P2d 1199 (1975).

2-18-701. Definitions.

Compiler's Comments

2001 Amendment: Chapter 314 inserted (11) relating to the state compensation insurance fund. Amendment effective July 1, 2001.

1989 Amendment: In (2), (3), and (9), inserted "regularly"; in (3), after "seasonal", inserted "full-time" and after "a year" inserted reference to employee who works for a continuous period of more than 6 months; inserted (4) expanding employee definition to include certain seasonal part-time employees; in (9), after "temporary", inserted "full-time"; in (9)(b), after "6 months"; inserted "a year although not regularly scheduled to do so"; inserted (10) expanding employee definition to include certain temporary part-time employees; and made minor changes in phraseology. Amendment effective March 20, 1989.

1981 Amendment: Added "permanent" before "employees" in (5) and (6); added subsection (8) relating to temporary employees.

Attorney General's Opinions

Volunteer Firefighters — Eligibility for Insurance: Volunteer firefighters working fewer than 20 hours a week do not fit within the definition of "employee" found in this section. Therefore, they are excluded from the group insurance plan of a third-class city. Because they are not eligible to belong to the group, they are not permitted to participate by paying their own premiums unless they fall within the class of eligible retirees or dependents defined by 2-18-704. 41 A.G. Op. 18 (1985).

County Attorneys — Participation in State Group Health Insurance Program: County Attorneys are elected county officials. The Legislature intended to exclude them from the state group health insurance program. They are not eligible to participate in the program. 40 A.G. Op. 52 (1984).

Local Government — Group Health Insurance: A local government unit is required, upon approval of two-thirds of its officers and employees, to contribute to the group health insurance plan of its officers although it is not required to contribute a specific amount. 37 A.G. Op. 138 (1978).

Contribution by Public Employer to Be to Group Plan: A city may not contribute to individual employees' insurance plans but must contribute to a city group insurance plan. 37 A.G. Op. 54 (1977).

2-18-702. Group insurance for public employees and officers.

Compiler's Comments

2001 Amendment: Chapter 559 in (1)(a) at beginning inserted exception clause; inserted (1)(c) relating to exempting employees of certain county hospitals, county rest homes, and hospital districts from insurance contracts or plans; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 186 inserted (1)(b) authorizing governing body of county, city, or town to consider employees of private, nonprofit economic development organizations as employees for purpose of health insurance contracts or plans and authorizing governing bodies to require payment of actual cost of required coverage; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 325 in (3) substituted "state treasurer" for "auditor"; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 13 in (1) inserted second sentence to clarify that providing greater or additional contributions for insurance benefits for employees with dependents does not constitute discrimination based on marital status; and made minor changes in style. Amendment effective February 1, 1993.

1991 Amendment: Near beginning of (5) inserted reference to implementation of a self-insured group health plan by a school district board of trustees. Amendment effective July 1, 1991.

1989 Amendment: Inserted (5) requiring an actuarially sound basis for any alternative plan implemented by the Board of Regents. Amendment effective May 11, 1989.

1981 Amendment: Added "and elected officials" after "State employees" at the beginning of (2); substituted "2-18-701" for "2-18-809" in (2).

Attorney General's Opinions

Modification of Group Plan Covering Employees Covered Under Collective Bargaining — Exception When Another Bargaining Unit Represented by Different Labor Organization: A governing body may agree to modify a group insurance plan covering employees represented for

collective bargaining purposes unless the changes would affect employees in another collective bargaining unit represented by a different labor organization, in which case concurrence of both representatives is required before modifications can be made. 43 A.G. Op. 79 (1990).

Two-Thirds Vote Unnecessary to Change Carriers or Policy Provisions or to Renew Policy: The only purpose of the two-thirds vote required under this section is to simultaneously authorize and require entry into a group health or other specified plan. Once initial authorization is given, no further votes are mandated. Therefore, a governing body need not obtain a two-thirds vote of all officers and employees to change group insurance carriers or policy provisions or to renew an existing policy. Following the original vote, decisions regarding these matters are subject to the discretion of the governing body, except as otherwise constrained by law. 43 A.G. Op. 79 (1990).

Prohibition on Separate Health Benefit Plan: A county with general government powers may not establish a separate health benefit plan for certain employees in a collective bargaining unit when a county employee-wide group insurance plan adopted under this section already exists. (See 2001 amendment.) 42 A.G. Op. 37 (1987).

Insurance for Volunteer Firefighters — Third-Class Cities: Pursuant to 7-33-4130, only cities of the first and second class are required to provide group insurance to their firefighters if they provide such insurance for other employees. Cities of the third class are not mentioned in the statute and therefore are not required to provide group health and life insurance for volunteer firefighters. 41 A.G. Op. 18 (1985).

County Attorneys — Participation in State Group Health Insurance Program: County Attorneys are elected county officials. The Legislature intended to exclude them from the state group health insurance program. They are not eligible to participate in the program. 40 A.G. Op. 52 (1984).

District Court Employees as County Employees: District Court employees are paid by the county in which the court is located, receive the same county benefits as all other county employees, and are therefore county employees. 39 A.G. Op. 38 (1981).

Soil Conservation District Employees as County Employees: Although soil conservation districts are distinct governmental entities covering more than one county and the statutes governing the districts do not expressly designate district personnel as county employees to be included on the county payroll, if a county does include district personnel on its payroll, giving them the same benefits received by other county employees, to that extent district personnel must be considered county employees. 39 A.G. Op. 38 (1981).

Local Government — Group Health Insurance: A local government unit is required, upon approval of two-thirds of its officers and employees, to contribute to the group health insurance plan of its officers although it is not required to contribute a specific amount. 37 A.G. Op. 138 (1978).

Contribution by Public Employer to Be to Group Plan: A city may not contribute to individual employees' insurance plans but must contribute to a city group insurance plan. 37 A.G. Op. 54 (1977).

2-18-703. Contributions.

Compiler's Comments

2003 Amendments — Composite Section — Coordination: Chapter 529 in (3) near end of second sentence after "in effect on" substituted "the first day of the last fiscal year" for "July 1, 1999". Amendment effective April 26, 2003.

Section 4, Ch. 529, L. 2003, provided: "If House Bill No. 13 is passed and approved, then the amendments contained in 2-18-703(2) in [section 2 of this act] are void." House Bill No. 13 was passed and approved as Ch. 552, L. 2003, so the amendments to 2-18-703(2) in sec. 2, Ch. 529, L. 2003, are void.

Chapter 552 in (2) in first sentence near beginning after "members of the legislature" deleted "the employer contribution for group benefits is $295 a month for the period from July 2001 through December 2001, $325 a month for the period from January 2002 through December 2002, and $366 a month for January 2003 and for each succeeding month", substituted "$410" for "$325", substituted "July 2003 through June 2004" for "July 2001 through June 2002", substituted "$460" for "$366", and substituted "July 2004 through June 2005" for "July 2002 through June 2003"; and made minor changes in style. Amendment effective July 1, 2003.

2001 Amendments — Composite Section — Coordination: Chapter 314 in (1) near beginning inserted reference to the state compensation insurance fund; and made minor changes in style. Amendment effective July 1, 2001.

The amendments to subsection (2) of this section made by sec. 4, Ch. 314, L. 2001, were rendered void by sec. 9, Ch. 553, L. 2001, a coordination section.

Chapter 511 in (3) inserted second sentence exempting increases in local government's property tax levy for the employer's premium contributions for group health insurance benefits from the mill levy calculation limitation. Amendment effective July 1, 2001.

The amendments to subsection (2) of this section made by sec. 2, Ch. 511, L. 2001, were rendered void by sec. 9, Ch. 553, L. 2001, a coordination instruction.

Chapter 553 in (2) in first sentence substituted "$295 a month for the period from July 2001 through December 2001, $325 a month for the period from January 2002 through December 2002, and $366 a month for January 2003" for "$270 a month for the period from July 1999 through December 1999, $285 a month for the period from January 2000 through December 2000, and $295 a month for January 2001" and in second sentence substituted "$325 a month for the period from July 2001 through June 2002 and $366 a month for the period from July 2002 through June 2003" for "$285 a month for the period from July 1999 through June 2000 and $295 a month for the period from July 2000 through June 2001"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 558 in (2) in first sentence substituted "is $270 a month for the period from July 1999 through December 1999, $285 a month for the period from January 2000 through December 2000, and $295 a month for January 2001 and for each succeeding month" for "is $245 per month for the fiscal year ending June 30, 1998, and $270 a month for the fiscal year ending June 30, 1999, and for each succeeding fiscal year" and inserted second sentence establishing employer contribution for employees of Montana university system. Amendment effective July 1, 1999.

1997 Amendment: Chapter 417 in (2), in first sentence, increased contributions to $245 from $220 and to $270 from $225 and substituted "1998" for "1996" and "1999" for "1997"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 455 in (2), near beginning of first sentence after "2-18-701", deleted "other than members of collective bargaining units" and substituted "$220" for "$210", "1996" for "1994", "$225" for "$230", and "1997" for "1995" and at end of fourth sentence, after "contribution", deleted "as wages"; and made minor changes in style. Amendment effective April 14, 1995.

1993 Amendments: Chapter 13 inserted (6) to clarify that providing greater or additional contributions for insurance benefits for employees with dependents does not constitute discrimination based on marital status; and made minor changes in style. Amendment effective February 1, 1993.

Chapter 640 in (2) substituted "$210" for "$170", "1994" for "1992", "$230" for "$190", and "1995" for "1993". Amendment effective July 1, 1993.

1991 Amendments: Chapter 171 inserted (5) relating to unused employer contributions; and made minor change in style.

Chapter 720 in (2) increased contribution for benefits from $130 to $170 in first year of biennium and from $150 to $190 in second year of biennium. Amendment effective April 29, 1991.

Chapter 758 in (2) inserted second sentence that reads: "When a state employee is terminated to achieve a reduction in force, the continuation of contributions for group benefits beyond the termination date is subject to negotiation under 39-31-305"; and made minor change in style. Amendment effective July 1, 1991.

Applicability: Section 5, Ch. 758, L. 1991, provided: "[This act] applies to a reduction in force occurring on or after July 1, 1991."

1989 Amendments: Chapter 171 in (2), in second sentence after "part-time", inserted "seasonal part-time, and temporary part-time". Amendment effective March 20, 1989.

Chapter 660 near beginning of (2) increased employer contribution for group benefits from $115 per month to $130 per month for fiscal year ending June 30, 1990, and to $150 per month for fiscal year ending June 30, 1991, and each fiscal year thereafter; and made minor changes in phraseology. Amendment effective May 11, 1989.

1987 Amendments: Chapter 370 near middle of (4), after "department", inserted "of administration".

Chapter 661 in (2) increased employer benefit contribution from $105 to $115 and substituted "fiscal years ending June 30, 1988, and June 30, 1989" for "fiscal year ending June 30, 1986".

1986 Amendment: The amendment was contingent on renegotiation of collective bargaining agreements; since such contingency didn't occur, the amendment terminated.

1985 Amendment: In (2) near beginning substituted "$105" for "$90", "1986" for "1984", and "$115" for "$100".

1983 Amendments: Chapter 207 inserted last sentence of (2) relating to "Part B" of Medicare.

Chapter 710, in (2), increased the employer contributions to $90 from $70 and to $100 from $80 per month; and changed year from 1982 to 1984.

1981 Amendment: Increased employer insurance contribution to $70 and $80 for the first and second year of the biennium from $50 and $60, respectively.

Funding: Section 2, Ch. 359, L. 1975, provided: "In compliance with section 43-517 [R.C.M. 1947, now 1-2-112, MCA], the administration of this act is declared a public purpose of a county, city, or town which may be in addition to any other levy and may be paid out of the general fund of the governing body and financed by a levy on the taxable value of property within the county, city, or town."

Attorney General's Opinions

Insurance for Volunteer Firefighters — Third-Class Cities: Pursuant to 7-33-4130, only cities of the first and second class are required to provide group insurance to their firefighters if they provide such insurance for other employees. Cities of the third class are not mentioned in the statute and therefore are not required to provide group health and life insurance for volunteer firefighters. 41 A.G. Op. 18 (1985).

Local Government — Group Health Insurance: A local government unit is required, upon approval of two-thirds of its officers and employees, to contribute to the group health insurance plan of its officers although it is not required to contribute a specific amount. 37 A.G. Op. 138 (1978).

Contribution by Public Employer to Be to Group Plan: A city may not contribute to individual employees' insurance plans but must contribute to a city group insurance plan. 37 A.G. Op. 54 (1977).

Group Insurance Payments Not Limited: This section does not limit a school district to a maximum payment of $10 per month per employee for group insurance. 35 A.G. Op. 11 (1973).

2-18-704. Mandatory provisions.

Compiler's Comments

Contingent Effective Date: Section 79(4), Ch. 471, L. 1999, provided that the amendments to this section are "effective contingent upon certification, as provided in [section 65] [not codified], that the defined contribution retirement plan is ready to become operational or on July 1, 2002, whichever is earlier". Section 65 provided in subsection (2) that "The board shall certify to the governor and the secretary of state the date on which the defined contribution retirement plan established pursuant to [sections 42 through 63] [Title 19, chapter 3, part 21] is ready to become operational and shall provide a copy of the certification to the code commissioner." The contingency occurred pursuant to a letter dated May 23, 2002, which certified that the defined contribution retirement plan "is ready to become and will become operational as of July 1, 2002".

2001 Amendment: Chapter 450 inserted (8) concerning coverage of outpatient self-management training and education for diabetes. Amendment effective January 1, 2002.

Effective Date — Applicability: Section 7, Ch. 450, L. 2001, provided: "[This act] is effective January 1, 2002, and applies to all policies, contracts, plans, or certificates issued or renewed on or after that date."

1999 Amendments — Composite Section: Chapter 434 inserted (7) concerning coverage for inborn error of metabolism. Amendment effective January 1, 2000.

Chapter 471 in (1)(a) near beginning inserted "of a defined benefit plan" and inserted "or, in the case of the defined contribution plan provided in Title 19, chapter 3, part 21, a member with at least 5 years of service and who is at least age 50 while in covered employment"; and made minor changes in style. Amendment effective on occurrence of contingency or July 1, 2002, whichever is earlier.

Effective Date — Applicability: Section 6, Ch. 434, L. 1999, provided that this section is effective January 1, 2000, and applies to all policies, contracts, plans, or certificates issued or renewed on or after that date.

Saving Clause: Section 77, Ch. 471, L. 1999, was a saving clause.

Severability: Section 78, Ch. 471, L. 1999, was a severability clause.

1997 Amendments: Chapter 42 in (3)(b) and (3)(c) substituted reference to subsection (3)(a) for reference to subsection (3). Amendment effective March 12, 1997.

Chapter 282 inserted (4) requiring an insurance contract or plan to provide for continued participation by a retired judge as inactive vested member and providing circumstances under which judge may not remain a member or rejoin; in (5) inserted reference to subsection (4); and made minor changes in style.

Retroactive Applicability: Section 2, Ch. 282, L. 1997, provided: "[This act] [2-18-704] applies retroactively, within the meaning of 1-2-109, to a judge who was a member of the state's group health insurance plan in effect on December 1, 1996, who is otherwise eligible under the provisions of 2-18-704 and who files written notice to the department of administration within 30 days of [the effective date of this act]." Effective October 1, 1997.

1995 Amendment: Chapter 274 in (2), near beginning of introductory clause after "issued", deleted "after June 30, 1983"; in (3)(a), near beginning after "plan", deleted "issued after August 31, 1991"; in (5), near beginning of introductory clause after "part", deleted "after June 30, 1993"; in (5)(a), near middle after "plan", inserted "and to meet all terms and conditions, including the same professional requirements that are met"; in (5)(b), near middle, substituted "registered with" for "licensed by"; and made minor changes in style. Amendment effective March 28, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 274, L. 1995, provided: "A statement of intent is required for this bill because the bill gives the board of pharmacy authority to adopt administrative rules for the registration of out-of-state mail service pharmacies.

It is the intent of the legislature to correct a deficiency in Title 37, chapter 7, part 7 (Chapter 664, Laws of 1991), that arose from a defective attempt to grant rulemaking authority to the board of pharmacy to carry out the provisions regarding out-of-state mail service pharmacies. [Section 4] [37-7-712] is specifically intended to grant rulemaking authority to the board of pharmacy to carry out the purpose and to enforce the provisions of Title 37, chapter 7, part 7. Sections 37-7-701 and 37-7-703 are intended to provide for regulation of out-of-state pharmacies and pharmacists through recognition of the licenses issued by their states of domicile through registration, rather than licensure, by the state of Montana."

Severability: Section 6, Ch. 274, L. 1995, was a severability clause.

1993 Amendment: Chapter 300 in (1), after "issued", deleted "after June 30, 1977"; inserted (5) regarding conditions for insurance contracts providing for dispensing of prescription drugs by out-of-state mail service pharmacies; and made minor changes in style. Amendment effective July 1, 1993.

Severability: Section 6, Ch. 300, L. 1993, was a severability clause.

1991 Amendment: Inserted (3) requiring contract or plan issued after August 31, 1991, to permit legislator to remain member of group plan until eligible for federal Medicare if legislative service is terminated and he is vested member of retirement system and Department of Administration receives notification in writing within 90 days of end of legislative term and describing situations when legislator may not remain member of group plan; in (4) inserted reference to subsection (3); and made minor changes in style. Amendment effective May 1, 1991.

Retroactive Applicability: Section 3, Ch. 738, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to a legislator who was a member of the state's group health insurance plan in effect on December 1, 1990, who is otherwise eligible under the provisions of 2-18-704 and who files written notice to the department of administration within 30 days of [the effective date of this act] [effective May 1, 1991]."

1983 Amendment: Inserted (2) relating to provisions required for contract or plan issued after June 30, 1983.

Funding: Section 2, Ch. 359, L. 1975, provided: "In compliance with section 43-517 [R.C.M. 1947, now 1-2-112, MCA], the administration of this act is declared a public purpose of a county, city, or town which may be in addition to any other levy and may be paid out of the general fund of the governing body and financed by a levy on the taxable value of property within the county, city, or town."

Attorney General's Opinions

Insurance for Volunteer Firefighters: Volunteer firefighters working fewer than 20 hours a week do not fit within the definition of "employee" found in 2-18-701. Therefore, they are excluded from the group insurance plan of a third-class city. Because they are not eligible to belong to the group, they are not permitted to participate by paying their own premiums unless they fall within the class of eligible retirees or dependents defined by this section. 41 A.G. Op. 18 (1985).

2-18-711. Cooperative purchasing of employee benefit services and insurance products — procedures.

Compiler's Comments

2001 Amendment: Chapter 314 in (1) near beginning inserted reference to the state compensation insurance fund and near end inserted two references to the state fund. Amendment effective July 1, 2001.

Effective Date: Section 3, Ch. 147, L. 1997, provided: "[This act] is effective on passage and approval." Approved March 25, 1997.

Part 8
State Group Insurance

2-18-809. Definitions.

Compiler's Comments

1999 Amendment: Chapter 88 inserted definition of flexible spending account; in definition of group benefits at end of first sentence inserted "including flexible spending account benefits"; and made minor changes in style. Amendment effective July 1, 1999.

1981 Amendment: Substituted "authorized in 33-1-209 and 33-1-221 through 33-1-229" for "defined in 33-1-209".

Attorney General's Opinions

County Attorneys — Participation in State Group Health Insurance Program: County Attorneys are elected county officials. The Legislature intended to exclude them from the state group health insurance program. They are not eligible to participate in the program. 40 A.G. Op. 52 (1984).

2-18-811. General duties of the department.

Compiler's Comments

1993 Amendment: Chapter 349 at beginning of (6) deleted "as provided in 5-11-210" and after "section" substituted "to the office of budget and program planning as a part of the information required by 17-7-111" for "to the legislature".

1991 Amendment: Substituted (6) requiring submission of report and inserting reference to 5-11-210 for former last sentence of (5) that read: "The department shall make copies of the report available to the legislature"; and made minor changes in style. Amendment effective March 20, 1991.

2-18-812. Alternatives to conventional insurance for providing state employee group benefits authorized — requirements.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 88 in (3) near middle inserted "account within the state self-insurance reserve fund"; inserted (5) providing for the deposit of employees' flexible spending account contributions by the department and designating how the account income and deposits must be used; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 334 in (7) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 532 in (3), near middle after "deposits", substituted "must" for "are statutorily appropriated, as provided in 17-7-502, to the department to"; in (5) deleted second sentence that read: "The department may not implement any full self-insurance alternative prior to July 1, 1981"; and made minor changes in style. Amendment effective July 1, 1997.

1989 Amendment: In (4) inserted provision that expenditures for plan administration must be from temporary appropriations as described in 17-7-501(1) or (2); and made minor change in phraseology. Amendment effective July 1, 1989.

1985 Amendment: In (3) inserted "and such deposits are statutorily appropriated, as provided in 17-7-502, to the department to be expended for claims under the plan".

Internal Reference: Title 33 contains insurance law.

2-18-816. Biennial audit of group benefit plans required.

Compiler's Comments

1989 Amendment: At beginning of first sentence, before "state employee", deleted "department shall have the" and near end, before "audited", inserted "must be" and after "audited" deleted "annually by either" and inserted "every 2 years. The audit must cover the 2-year period since the last audit and be conducted by or at the direction of"; and at end of second sentence, after "auditor", deleted "or an independent certified public accountant". Amendment effective March 14, 1989.

2-18-820. Continuation of health insurance for legislators.

Compiler's Comments

Effective Date: Section 14(1), Ch. 558, L. 1999, provided that this section is effective July 1, 1999.

Part 9
Subrogation — Notice

2-18-901. Subrogation rights.

Compiler's Comments

Applicability: Section 6, Ch. 365, L. 1987, provided: "This act applies to policies or contracts delivered, issued for delivery, or renewed in this state after October 1, 1987."

Codification: This section is codified at both 2-18-901 and 33-22-1601.

Collateral References

44 Am. Jur. 2d Insurance §1794, et seq.

2-18-902. Notice — shared costs of third-party action — limitation.

Compiler's Comments

Applicability: Section 6, Ch. 365, L. 1987, provided: "This act applies to policies or contracts delivered, issued for delivery, or renewed in this state after October 1, 1987."

Codification: This section is codified at both 2-18-902 and 33-22-1602.

Case Notes

Statute of Limitations Applicable to Subrogee in Insurance Claim: St. Paul Fire & Marine Insurance Company (St. Paul), as subrogee, sought to recover from Glassing a payment made to its insured Lynn for underinsured motorist coverage, interest, and costs. Montana has no statutory authority extending the statute of limitations for subrogation claims in such cases. Because an insurer's claim is derived from that of the insured, St. Paul's claim was subject to the same defenses, including the statute of limitations, as though the action were sued upon by the insured and St. Paul had no claim for its damages independent of Lynn's claim. An insurer's right to subrogation attaches upon paying an insured's loss; thus, the 3-year statute of limitations in 27-2-204 applied to St. Paul's claim in the same manner that the original action brought by Lynn and, when raised after the 3-year limit, was time-barred. St. Paul Fire & Marine Ins. Co. v. Glassing, 269 M 76, 887 P2d 218, 51 St. Rep. 1437 (1994), followed in Nimmick v. St. Farm Mut. Auto. Ins. Co., 270 M 315, 891 P2d 1154, 52 St. Rep. 208 (1995). See also Skauge v. Mtn. St. Tel. & Tel., 172 M 521, 565 P2d 628 (1977), and Beedie v. Shelly, 187 M 556, 610 P2d 713 (1980).

Collateral References

44 Am. Jur. 2d Insurance §§1796, 1810, et seq.

Part 10
Grievance Procedures

Part Case Notes

BPA's Findings Not Supported by Record — Order Unenforceable: Larson and Sanders applied for a sectionman position with the Department of Highways (now Department of Transportation). Sanders, the brother-in-law of the Department personnel director, was selected over Larson who had more seniority. Larson filed a grievance, and the Board of Personnel Appeals conducted a hearing. The Board concluded that the Department had not acted in good faith and had violated the union contract by not applying the mandated criteria in awarding the advancement and ordered that Larson be given the position with backpay. The Board petitioned the District Court for enforcement of the Board's order. The District Court, however, found that the record as a whole did not support the findings and that the order was invalid and unenforceable. On appeal, the Supreme Court affirmed the decision of the District Court. Bd. of Personnel Appeals v. Dept. of Highways, 189 M 185, 615 P2d 844 (1980).

2-18-1001. Transportation department personnel grievances — hearing.

Compiler's Comments

1991 Amendments: Chapter 14 inserted (3) establishing 180-day period for filing a personnel grievance and barring grievances filed late.

Chapter 512 substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

2-18-1002. Grievance procedure — hearing — order.

Compiler's Comments

1995 Amendment: Chapter 90 at end of (2) inserted "The hearing may be conducted by telephone or by videoconference"; and made minor changes in style. Amendment effective March 9, 1995.

Applicability: Section 12, Ch. 90, L. 1995, provided: "[Sections 2, 3, 6, 7, and 9] [2-18-1002, 2-18-1012, 39-3-216, 39-3-217, and 39-31-105] apply to hearings or appeals requested on or after [the effective date of this act]." Effective March 9, 1995.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

2-18-1003. Enforcement of board order — petition in district court.

Case Notes

BPA's Findings Not Supported by Record — Order Unenforceable: Larson and Sanders applied for a sectionman position with the Department of Highways (now Department of Transportation). Sanders, the brother-in-law of the Department personnel director, was selected over Larson who had more seniority. Larson filed a grievance, and the Board of Personnel Appeals conducted a hearing. The Board concluded that the Department had not acted in good faith and had violated the union contract by not applying the mandated criteria in awarding the advancement and ordered that Larson be given the position with backpay. The Board petitioned the District Court for enforcement of the Board's order. The District Court, however, found that the record as a whole did not support the findings and that the order was invalid and unenforceable. On appeal, the Supreme Court affirmed the decision of the District Court. Bd. of Personnel Appeals v. Dept. of Highways, 189 M 185, 615 P2d 844 (1980).

2-18-1011. Classification or compensation grievance — retaliation — hearing on complaint.

Compiler's Comments

1981 Amendment: Substituted "personnel" for "personal" in (1).

Case Notes

Board of Personnel Appeals Not Bound by Findings and Conclusions of Hearings Examiner — District Court Bound by Board Conclusions if Correct: The interpretation of an administrative rule and an agency's policy is a question of law, and in its final order, an agency may reject or modify a hearings officer's conclusion of law and interpretation of administrative rules in the proposal for decision. As the final administrative authority in the state employee classification process, the Board of Personnel Appeals must review and interpret applicable rules promulgated by the Department of Administration. Thus, the Board is not bound by a hearings officer's conclusions and interpretations. However, the District Court is bound by the Board's conclusions of law and interpretation of administrative rules, if correct. In the present case, the Board reasonably interpreted applicable employee classification rules and correctly concluded that child support enforcement investigators were improperly classified in violation of 2-18-202, and the District Court erred in reversing the Board's final order. St. Personnel Div. v. Child Support Investigators, 2002 MT 46, 308 M 365, 43 P3d 305 (2002). See also Weber v. Pub. Employees' Retirement Bd., 270 M 239, 890 P2d 1296 (1995), and In re Grievance of Brady, 1999 MT 153, 295 M 75, 983 P2d 292 (1999).

Department to Develop Guidelines for Classification — Board Limited to Determining Proper Classification: Certain highway patrol officers successfully appealed to the Personnel Division of the Department of Administration to have their grade raised pursuant to 2-18-203. In response, other officers filed a grievance pursuant to this section, seeking reclassification of their positions and grades. Appeal was permissible under 2-18-203 as it existed at the time. The Division reclassified their positions using a "five factor" formula. The affected officers appealed their resulting grade reassignment to the Board of Personnel Appeals, which issued an order to the Division requiring reclassification of certain positions. The Board subsequently rejected the Division's classification recommendations and upheld the so-called "practice" of maintaining a grade difference between supervisors and persons they supervise. In the subsequent appeal from the classification process used by the Division, the Supreme Court held: (1) the Division's failure to follow a "practice" or "rule of thumb" is not an abuse of discretion because it followed the

factors set forth in its rules and offered legitimate reasons for deviating from the "practice"; (2) the Board is limited to determining whether a position is properly classified; (3) the function of developing guidelines for classification is assigned to the Department; and (4) the state has a legitimate interest in preserving the state pay classification system, and the amended statute rationally relates toward effectuating that objective. St. Personnel Div. v. Bd. of Personnel Appeals, 235 M 208, 766 P2d 1300, 45 St. Rep. 2324 (1988).

Action to Enforce Distinguished From Action for Judicial Review of Contested Case — No Timely Exceptions or Appeal Filed: In an action based upon an order of the Board of Personnel Appeals regarding reclassification, Walch disputed parts of the order but failed to make a timely appeal or exception to the order and instead filed a petition to enforce in District Court. In upholding the District Court's dismissal, the Supreme Court distinguished an action to enforce under 2-18-1013 from an action for judicial review of a contested case under 2-4-702, noting that the latter action must be brought within 30 days after service of a final agency decision and allows the petitioner to contest the decision. However, in an action to enforce, the petitioner may not contest the decision; therefore, Walch could prevail only if the employer was not paying him according to the order. Upon a finding that Walch was being paid accordingly, the District Court's dismissal of the petition to enforce was affirmed. Walch v. Univ. of Mont., 221 M 52, 716 P2d 640, 43 St. Rep. 629 (1986).

District Court Bound by Factual Findings of Board of Personnel Appeals — Wrongful Discharge — Reinstatement — No Backpay: An employee of the state was discharged from employment because he used a state-owned vehicle for private purposes. He appealed the decision of the Department of Fish, Wildlife, and Parks, and the Board of Personnel Appeals ruled that though his discharge was properly justified, the Department had never adopted a policy regarding such use of vehicles and had not punished similar usage; thus, the discharge was wrongful and he was entitled to reinstatement. He was offered a substantially equivalent position but appealed the Board's denial of backpay and benefits and, upon losing the District Court appeal, pursued the issues before the Supreme Court. The court upheld the District Court on all issues, observing that both courts were bound by factual findings of the Board and stipulations by the parties. The District Court was not obligated to hold a hearing on the facts. Hutchin v. St., 213 M 15, 688 P2d 1257, 41 St. Rep. 1916 (1984).

Job Classification — No Participation by Employing Agency: The statutes and rules governing job classification procedures do not contemplate participation by the employing agency other than the opportunity for input into the Personnel Division's decision. If and when the dispute reaches step four of the formal appeals procedure, the employee represents his interests and the Personnel Division, through its Classification Bureau, represents the interests of the state. Therefore, the Board of Personnel Appeals had no clear legal duty and no authority to hear the objections of the employing agency. State ex rel. St. Tax Appeal Bd. v. Bd. of Personnel Appeals, 181 M 366, 593 P2d 747 (1979).

2-18-1012. Grievance procedure.

Compiler's Comments

1995 Amendment: Chapter 90 at end inserted "The hearing may be conducted by telephone or by videoconference"; and made minor changes in style. Amendment effective March 9, 1995.

Applicability: Section 12, Ch. 90, L. 1995, provided: "[Sections 2, 3, 6, 7, and 9] [2-18-1002, 2-18-1012, 39-3-216, 39-3-217, and 39-31-105] apply to hearings or appeals requested on or after [the effective date of this act]." Effective March 9, 1995.

Case Notes

Board of Personnel Appeals Not Bound by Findings and Conclusions of Hearings Examiner — District Court Bound by Board Conclusions if Correct: The interpretation of an administrative rule and an agency's policy is a question of law, and in its final order, an agency may reject or modify a hearings officer's conclusion of law and interpretation of administrative rules in the proposal for decision. As the final administrative authority in the state employee classification process, the Board of Personnel Appeals must review and interpret applicable rules promulgated by the Department of Administration. Thus, the Board is not bound by a hearings officer's conclusions and interpretations. However, the District Court is bound by the Board's conclusions of law and interpretation of administrative rules, if correct. In the present case, the Board reasonably interpreted applicable employee classification rules and correctly concluded that child support enforcement investigators were improperly classified in violation of 2-18-202, and the District Court erred in reversing the Board's final order. St. Personnel Div. v. Child Support Investigators, 2002 MT 46, 308 M 365, 43 P3d 305 (2002). See also Weber v. Pub. Employees'

Retirement Bd., 270 M 239, 890 P2d 1296 (1995), and In re Grievance of Brady, 1999 MT 153, 295 M 75, 983 P2d 292 (1999).

Board Power in Classification Appeal — Resolution of Grievance: Under 2-18-203 and the holding in St. Personnel Div. v. Bd. of Personnel Appeals, 235 M 208, 766 P2d 1300 (1988) (also known as the Mead decision), in a classification appeal, the Board of Personnel Appeals is limited to determining whether a position is properly classified. If the Board determines that the position is improperly classified and the employee is therefore aggrieved, the Board can resolve the grievance under this section by ordering the State Personnel Division to reclassify the employee's position and, as appropriate, order other remedies, such as retroactive pay. In the present case, the Board exceeded its authority by granting retroactive pay even though there was no finding of improper classification or that the employees were aggrieved. St. Personnel Div. v. Bd. of Personnel Appeals, 255 M 507, 844 P2d 68, 49 St. Rep. 1087 (1992), distinguishing Hutchin v. St., 213 M 15, 688 P2d 1257 (1984).

Action to Enforce Distinguished From Action for Judicial Review of Contested Case — No Timely Exceptions or Appeal Filed: In an action based upon an order of the Board of Personnel Appeals regarding reclassification, Walch disputed parts of the order but failed to make a timely appeal or exception to the order and instead filed a petition to enforce in District Court. In upholding the District Court's dismissal, the Supreme Court distinguished an action to enforce under 2-18-1013 from an action for judicial review of a contested case under 2-4-702, noting that the latter action must be brought within 30 days after service of a final agency decision and allows the petitioner to contest the decision. However, in an action to enforce, the petitioner may not contest the decision; therefore, Walch could prevail only if the employer was not paying him according to the order. Upon a finding that Walch was being paid accordingly, the District Court's dismissal of the petition to enforce was affirmed. Walch v. Univ. of Mont., 221 M 52, 716 P2d 640, 43 St. Rep. 629 (1986).

2-18-1013. Enforcement of board order — petition to district court.

Case Notes

Action to Enforce Distinguished From Action for Judicial Review of Contested Case — No Timely Exceptions or Appeal Filed: In an action based upon an order of the Board of Personnel Appeals regarding reclassification, Walch disputed parts of the order but failed to make a timely appeal or exception to the order and instead filed a petition to enforce in District Court. In upholding the District Court's dismissal, the Supreme Court distinguished an action to enforce under 2-18-1013 from an action for judicial review of a contested case under 2-4-702, noting that the latter action must be brought within 30 days after service of a final agency decision and allows the petitioner to contest the decision. However, in an action to enforce, the petitioner may not contest the decision; therefore, Walch could prevail only if the employer was not paying him according to the order. Upon a finding that Walch was being paid accordingly, the District Court's dismissal of the petition to enforce was affirmed. Walch v. Univ. of Mont., 221 M 52, 716 P2d 640, 43 St. Rep. 629 (1986).

District Court Bound by Factual Findings of Board of Personnel Appeals — Wrongful Discharge — Reinstatement — No Backpay: An employee of the state was discharged from employment because he used a state-owned vehicle for private purposes. He appealed the decision of the Department of Fish, Wildlife, and Parks, and the Board of Personnel Appeals ruled that though his discharge was properly justified, the Department had never adopted a policy regarding such use of vehicles and had not punished similar usage; thus, the discharge was wrongful and he was entitled to reinstatement. He was offered a substantially equivalent position but appealed the Board's denial of backpay and benefits and, upon losing the District Court appeal, pursued the issues before the Supreme Court. The court upheld the District Court on all issues, observing that both courts were bound by factual findings of the Board and stipulations by the parties. The District Court was not obligated to hold a hearing on the facts. Hutchin v. St., 213 M 15, 688 P2d 1257, 41 St. Rep. 1916 (1984).

Part 11
Employee Incentive Program

Part Compiler's Comments

Termination Date: Section 7, Ch. 552, L. 1981, provided: "All provisions of this act shall terminate on July 1, 1983." Section 1, Ch. 61, L. 1983, extended the termination date to July 1, 1985, by amending section 7, Ch. 552, L. 1981, to read: "All provisions of this act shall terminate

on July 1, 1985." Section 2, Ch. 103, L. 1985, repealed the termination, making the program permanent.

Part Administrative Rules

Title 2, chapter 21, subchapter 67, ARM State employee incentive awards program.

2-18-1101. Definitions.

Compiler's Comments

2001 Amendment: Chapter 99 in definition of agency head in second sentence after "in charge of" inserted "a public retirement board or". Amendment effective March 21, 2001.

Termination Date Removed: Section 17, Ch. 417, L. 1997, and sec. 40, Ch. 532, L. 1997, removed the termination date for the amendments enacted by sec. 13, Ch. 23, Special Laws of November 1993.

1993 Special Session Amendment: Chapter 23 in definition of agency head inserted second sentence including president or other person in charge of a unit of the Montana University System; and inserted definition of group or team of employees. Amendment effective December 23, 1993, and terminates July 1, 1997.

Applicability: Section 11, Ch. 23, Sp. L. November 1993, provided that this section applies to achievements and outcomes occurring after December 23, 1993.

Termination: Section 13, Ch. 23, Sp. L. November 1993, provided that the amendments to this section terminate July 1, 1997.

2-18-1102. Creation of program.

Compiler's Comments

1997 Amendment: Chapter 417 near beginning, after "develop", deleted "and administer" and near middle substituted "innovations" for "achievements and outcomes". Amendment effective July 1, 1997.

Termination Date Removed: Section 17, Ch. 417, L. 1997, and sec. 40, Ch. 532, L. 1997, removed the termination date for the amendments enacted by sec. 13, Ch. 23, Special Laws of November 1993.

1993 Special Session Amendment: Chapter 23 near middle, after "monetarily reward", substituted "individual state employees and groups or teams of employees for documented achievements and outcomes" for "state employees in a timely manner for suggestions or inventions" and near end, after "costs", inserted "or improving the effectiveness". Amendment effective December 23, 1993, and terminates July 1, 1997.

Applicability: Section 11, Ch. 23, Sp. L. November 1993, provided that this section applies to achievements and outcomes occurring after December 23, 1993.

Termination: Section 13, Ch. 23, Sp. L. November 1993, provided that the amendments to this section terminate July 1, 1997.

2-18-1103. Powers and duties of department.

Compiler's Comments

1997 Amendment: Chapter 417 deleted former (2) and (3) that read: "provide an opportunity for all employees to participate in the program;

(3) assist agencies in making incentive awards under this part"; inserted (2) relating to guidelines and promotional materials; in (3) substituted "awards granted under 2-18-1106" for "incentive awards" and at end deleted "and shall provide a general review of and recommendations for improving the operation of this part"; and made minor changes in style. Amendment effective July 1, 1997.

Termination Date Removed: Section 17, Ch. 417, L. 1997, and sec. 40, Ch. 532, L. 1997, removed the termination date for the amendments enacted by sec. 13, Ch. 23, Special Laws of November 1993.

1993 Special Session Amendment: Chapter 23 in (1) substituted "implement this part" for "equitably administer the employee incentive award program"; at end of (3) substituted "this part" for "the program"; deleted former (4) and (5) that read: "(4) grant or deny incentive awards in consultation with the incentive awards advisory council and determine the amount of each incentive award based on first year monetary savings;

(5) hear appeals from employees on the operation of the program"; near beginning of (4), after "submit", substituted "in the manner provided in 5-11-210" for "as a part of the information required by 17-7-111", after "savings to the state" substituted "and improvements in the effectiveness of state government" for "resulting from each employee's suggestion or invention", and at end substituted "operation of this part" for "program"; deleted (7) that read: "send a copy

of all suggestions or inventions submitted under this program to the office of the legislative fiscal analyst"; and made minor changes in style. Amendment effective December 23, 1993, and terminates July 1, 1997.

Applicability: Section 11, Ch. 23, Sp. L. November 1993, provided that this section applies to achievements and outcomes occurring after December 23, 1993.

Termination: Section 13, Ch. 23, Sp. L. November 1993, provided that the amendments to this section terminate July 1, 1997.

1993 Amendment: Chapter 349 near beginning of (6), after "submit", substituted "as a part of the information required by 17-7-111" for "as provided in 5-11-210, a biennial report to the legislature containing".

1991 Amendment: At beginning of (6), after "prepare", inserted "and submit, as provided in 5-11-210". Amendment effective March 20, 1991.

1986 Amendment: Inserted (7) providing that a copy of suggestions or inventions be sent to the Legislative Fiscal Analyst.

Statement of Intent: The statement of intent for HB 161 (Ch. 552, L. 1981) read: "The general purpose of H.B. 161 is to provide incentives to state employees to make suggestions or to create inventions that reduce the costs of government operations or improve government operations without increasing costs. The discretion of the Department of Administration in granting awards is limited to 10% of the cost savings realized in the first year, or $500, whichever is less. Larger awards may be proposed but the Legislature must approve the awards and appropriate the money.

The purpose for giving the Department of Administration rulemaking authority is that it can best administer the program consistently throughout state government and determine the amount of money appropriate for an incentive award.

It is contemplated that the rules should address the following:

(1) the composition of the Advisory Council created by the bill;

(2) the procedures and bylaws that the Advisory Council will follow when conducting its business;

(3) providing model suggestion systems for agencies to use when administering the incentive program;

(4) standards to assure administration of the program on a statewide basis;

(5) forms that may be necessary to administer the provisions in the bill;

(6) procedures for detailed investigations and evaluations of suggestions;

(7) procedures for filing suggestions with the Department;

(8) procedures for the review of employee concerns regarding the fair administration of the program;

(9) time limits for the review of suggestions and inventions;

(10) procedures for the presentation of suggestions or inventions to the Legislature when the legitimate value of the ideas exceeds the $500 limit in the bill;

(11) procedures covering the timely payment of cash awards that are approved by the Department;

(12) procedures to maintain the integrity of the program through the review of awards to assure that they are granted equitably, on the basis of merit, and that the reasons for granting an award are made public. All provisions of this act shall expire and terminate on July 1, 1983."

Termination Date — Permanent: Section 7, Ch. 552, L. 1981, provided: "All provisions of this act shall terminate on July 1, 1983." Section 1, Ch. 61, L. 1983, extended the termination date to July 1, 1985, by amending section 7, Ch. 552, L. 1981, to read: "All provisions of this act shall terminate on July 1, 1985." Section 2, Ch. 103, L. 1985, repealed the termination, making the program permanent.

2-18-1105. Eligibility for award.

Compiler's Comments

1997 Amendment: Chapter 417 in (1), in exception clause at end, inserted "for innovations that"; in (1)(a), at beginning, deleted "for efforts that" and after "contribute to" deleted "documented"; deleted (2)(a) that read: "(a) An employee or nonemployee is not eligible for an individual incentive award unless the employee's or nonemployee's documented achievement or outcome was accomplished without significant contributions from others"; inserted (2) relating to approval for implementation or testing; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1997.

Termination Date Removed: Section 17, Ch. 417, L. 1997, and sec. 40, Ch. 532, L. 1997, removed the termination date for the amendments enacted by sec. 13, Ch. 23, Special Laws of November 1993.

1993 Special Session Amendment: Chapter 23 in (1), after "employee", inserted "a group or team of employees, or a nonemployee" and after "award" deleted "if his suggestion or invention results in"; at beginning of (1)(a) inserted "for efforts that significantly contribute to documented achievements or outcomes"; at beginning of (1)(b) inserted "for improving the effectiveness of state government or"; substituted (2)(a) concerning ineligibility for an individual incentive award unless accomplished without significant contributions from others for former (2)(a) that read: "An employee may not be eligible for an incentive award if his suggestion or invention directly relates to his assigned duties and responsibilities unless the proposal is so superior or meritorious as to warrant special recognition as determined by the department"; deleted former (2)(b) that read: "(b) Suggestions or inventions relating to the following matters may not be considered for awards:

(i) personnel grievances;

(ii) classification and pay of positions;

(iii) matters recommended for study or review; and

(iv) proposals resulting from assigned or contracted audits, studies, surveys, reviews, or research"; inserted (2)(b) concerning ineligibility of a director or a legislator; and inserted (3) providing that suggestions relating to an agency are eligible for an award even if the employee or some members of a group of employees do not work for that agency. Amendment effective December 23, 1993, and terminates July 1, 1997.

Applicability: Section 11, Ch. 23, Sp. L. November 1993, provided that this section applies to achievements and outcomes occurring after December 23, 1993.

Termination: Section 13, Ch. 23, Sp. L. November 1993, provided that the amendments to this section terminate July 1, 1997.

2-18-1106. Agency head to grant award — amount and source of award.

Compiler's Comments

1997 Amendment: Chapter 417 deleted former (2) that read: "The incentive award for an achievement or outcome that does not result in cost savings that can be specifically determined a year after the achievement or outcome is implemented and the cost savings are actually incurred is the agency head's estimated dollar value of the achievement or outcome, up to a maximum of $500 per employee or nonemployee or, in the discretion of the agency head, not more than 40 hours of paid leave time for an employee. Larger awards may be proposed and submitted to the legislature for consideration"; inserted (2) relating to discretionary awards; in (3), at end of first sentence, substituted "realized or that can be accurately projected for a period of 12 months following implementation, a larger award may be granted by the agency head" for "incurred"; in (3)(a) substituted "realized or accurately projected" for "incurred during the 12 months following implementation of the suggestion"; in (3)(b) and (3)(c) substituted "realized or accurately projected" for "incurred during that 12-month period"; deleted former (5) that read: "(5) The number of awards granted by an agency in a state government fiscal year may not exceed the number equal to 20% of the average number of full-time equivalent employees in that agency during that fiscal year. The office of budget and program planning may grant an agency with less than 50 full-time equivalent employees an exemption from this limitation, but the exemption may not allow more awards than the number equal to 50% of the average number of full-time equivalent employees in the agency during the fiscal year"; and made minor changes in style. Amendment effective July 1, 1997.

Termination Date Removed: Section 17, Ch. 417, L. 1997, and sec. 40, Ch. 532, L.1997, removed the termination date for the amendments enacted by sec. 13, Ch. 23, Special Laws of November 1993.

1993 Special Session Amendment: Chapter 23 substituted (1) concerning an incentive award to an employee, a group or team of employees, or a nonemployee who has made a significant contribution to achievements or outcomes in the agency or employees who are not members of the agency that benefits from the achievement or outcome for former text that read: "After an agency implements an employee's suggestion or invention and the monetary savings to the state is estimated, an agency head, upon written application to and approval from the department and the incentive awards advisory council, may grant an incentive award to an employee whose proposal meets the requirements enumerated in 2-18-1105"; substituted first sentence of (2) concerning nondetermined incentive award as the agency head's estimated dollar value of the achievement or outcome, up to a maximum of $500 per employee or nonemployee or, in the

discretion of the agency head, not more than 40 hours of paid leave time for an employee for "The incentive award shall be 10% of the savings resulting from implementing the employee's proposal for 1 year up to a maximum of $3,000"; inserted (3) establishing that the amount of an award to be determined by agency head not exceed 10% of first $100,000, 5% of second $100,000, and 2% of third $100,000 of actual savings incurred during first 12-month period of achievement or outcome; inserted (4)(a) requiring agency head to determine amount each person is to receive if award is divided; inserted first sentence of (4)(b) requiring a lump-sum payment of award no later than 90 days after end of 12-month period following implementation, inserted second sentence allowing agency head to pay award at any time savings can be determined, in third sentence, after "pay the" substituted "award" for "employee" and at end deleted "in a single, lump-sum award", and at end of fourth sentence inserted "or leave time"; inserted (5) limiting number of awards within an agency during state fiscal year to not more than 20% of the average number of full-time equivalent employees and allowing office of budget and program planning to grant agency with less than 50 full-time equivalent employees an exemption from the 20% limitation but not to exceed 50% of the average number of full-time equivalent employees in the agency during a fiscal year; inserted (6) concerning list of the number of incentive awards granted; and made minor changes in style. Amendment effective December 23, 1993, and terminates July 1, 1997.

Applicability: Section 11, Ch. 23, Sp. L. November 1993, provided that this section applies to achievements and outcomes occurring after December 23, 1993.

Termination: Section 13, Ch. 23, Sp. L. November 1993, provided that the amendments to this section terminate July 1, 1997.

1987 Amendment: In (2), near beginning, substituted "award shall be 10%" for "award may not be more than 10%" and increased maximum award from $1,500 to $3,000.

1986 Amendment — Applicability: The June 1986 amendment that terminated November 1, 1986, read: "(2) The incentive award shall be 10% of the savings resulting from implementing the employee's proposal for 1 year up to a maximum of $10,000. Larger awards may be proposed and submitted to the legislature for consideration.

(3) The agency head shall pay the employee from the savings in the agency's budget in a single, lump-sum award. If the money saved as a result of the employee's proposal is restricted or unavailable for payment of this kind of award, then the award must be paid by the department from money appropriated for that purpose. This award is in addition to the recipient's regular compensation."

The amendment applied to employee suggestions or inventions submitted to the Department prior to November 1, 1986. To allow time for evaluation of those suggestions or inventions, sec. 4, Ch. 23, Sp. L. June 1986, provided that awards could be granted pursuant to the amendment until June 30, 1987.

Effective Date — Applicability: The 1986 amendment was effective July 10, 1986, and terminates on November 1, 1986. Section 4, Ch. 23, Sp. L. June 1986, provided that the amendment to this section applies to employee suggestions or inventions submitted to the department prior to November 1, 1986. To allow time for evaluation of those suggestions or inventions, awards may be granted pursuant to the amendment until June 30, 1987.

1985 Amendment: In (2) increased maximum incentive award from $500 to $1,500.

2-18-1107. Salary increase based on elimination of position.

Compiler's Comments

Termination Date Removed: Section 17, Ch. 417, L. 1997, and sec. 40, Ch. 532, L. 1997, removed the termination date for this section as enacted by sec. 13, Ch. 23, Special Laws of November 1993.

Effective Date: Section 12, Ch. 23, Sp. L. November 1993, provided that this section is effective December 23, 1993.

Termination: Section 13, Ch. 23, Sp. L. November 1993, provided that this section terminates July 1, 1997.

Part 12
State Employee Protection Act

Part Compiler's Comments

Repeal of Termination Date: Section 8, Ch. 524, L. 1995, repealed sec. 11, Ch. 477, L. 1993, making this part permanent.

Severability: Section 7, Ch. 477, L. 1993, was a severability clause.

Limitation on Benefits: Section 9 (a coordination section), Ch. 477, L. 1993, provided: "If House Bill No. 517 [Ch. 567, L. 1993] is passed and approved establishing a retirement incentive window, then employees accepting the retirement incentive benefits provided in House Bill No. 517 are not eligible for the benefits provided by [this act]." House Bill No. 517 did pass and was approved.

Effective Date: Section 10, Ch. 477, L. 1993, provided: "[This act] [2-18-1201 through 2-18-1206] is effective on passage and approval." Approved April 22, 1993.

Termination: Section 11, Ch. 477, L. 1993, provided: "[This act] [2-18-1201 through 2-18-1206] terminates July 1, 1995."

2-18-1202. Definitions.

Compiler's Comments

1997 Amendment: Chapter 42 in definition of employee, after "6 continuous months", deleted "and who have waived benefits under the provisions of 2-18-319 and 2-18-320". Amendment effective March 12, 1997.

1995 Amendment — Code Commissioner Correction: Chapter 524 expanded definition of employee to include all Legislative Branch officers and employees, not just persons employed for 8 continuous weeks during the 53rd Legislature, and to include teachers in the Department of Corrections and Human Services or the Department of Family Services who are employed for at least 6 continuous months and who have waived benefits under 2-18-319 (now terminated) and 2-18-320. Amendment effective April 21, 1995.

Pursuant to sec. 4, Ch. 546, L. 1995, the Code Commissioner substituted "department of corrections" for "department of corrections and human services". Pursuant to sec. 2, Ch. 546, L. 1995, the Code Commissioner substituted "department of public health and human services" for "department of family services".

2-18-1203. General protection.

Compiler's Comments

2003 Amendment — Code Commissioner Correction: Chapter 502 deleted former (1)(a) that read: "(a) notice of announcements for jobs for which the employee may qualify that arise within the terminating agency or within state government. Notices must be provided by the state for a period of 1 year from the date of separation"; in (1)(a) after "through the" deleted "Job Training Partnership Act" and after "programs" inserted "under the Workforce Investment Act of 1998, 29 U.S.C. 2801, et seq."; in (1)(b) in first sentence near beginning after "all agencies" substituted "may" for "except an agency attempting to hire for a position exempt under 2-18-103 or 2-18-104, shall", deleted former second sentence that read: "The employee must be listed in the job register according to the occupational categories in which the employee is qualified for employment", and inserted second sentence providing that an agency is not required to attempt to hire employees from the special job register prior to seeking applications from the general public; deleted former (2) that read: "(2) (a) An agency attempting to hire from the job register shall consider the employee's qualifications and length of state service. If two or more employees listed in the job register are equally qualified for a vacant position, the agency shall select the employee with the longest continuous state service.

(b) If there is not an employee listed on the job register who meets the job qualifications for the vacant position, the agency may hire a qualified external applicant or establish a training assignment, according to state policy"; and made minor changes in style. Amendment effective July 1, 2003.

Pursuant to sec. 138, Ch. 114, L. 2003, the code commissioner substituted "1998" for "1988" in the citation to the Workforce Investment Act.

1997 Amendment: Chapter 361 in (1)(c) inserted third sentence regarding eligibility for participation in the job register; and inserted (3) regarding payment of costs for retraining and development services. Amendment effective July 1, 1997.

1995 Amendment: Chapter 524 near end of introductory clause of (1) inserted "or other actions by the legislature". Amendment effective April 21, 1995.

1993 Special Session Amendment: Chapter 24 near beginning of (1)(c), after "agencies", inserted "except an agency attempting to hire for a position exempt under 2-18-103 or 2-18-104". Amendment effective December 23, 1993.

Preamble: The preamble attached to Ch. 24, Sp. L. November 1993, provided: "WHEREAS, under Mead v. McKittrick, 223 Mont. 428, 727 P.2d 517 (1986), it appears that the judicial branch of state government is immune from the provisions of the State Employee Protection Act; and

WHEREAS, the reasoning of the court in Mead v. McKittrick, that "public policy is best served when newly-elected officials are free to select their own key staff members", should apply equally to the several positions, exempt from state classification statutes, of certain elected officials as it does to newly elected judges; and

WHEREAS, the state personnel classification system does not apply to a number of other exempt positions, thereby complicating the ability to determine whether or not a person meets the minimum qualifications for a position."

2-18-1204. Salary and benefits protection — employee transfer.

Compiler's Comments

1995 Amendment: Chapter 524 near end of introductory clause of (1) inserted "or other actions by the legislature"; in (1)(a), after "level", inserted "or higher"; and at end of (2) inserted "including those funds subject to transfer under the provisions of section 6, Chapter 524, Laws of 1995". Amendment effective April 21, 1995.

2-18-1205. Continuation of health insurance and employer contributions.

Compiler's Comments

1995 Amendment: Chapter 524 in (1), near middle of first sentence, inserted "or other actions by the legislature" and deleted second sentence that read: "This section does not apply to employees of the senate or house of representatives." Amendment effective April 21, 1995.

Part 13
Voluntary Employees' Beneficiary Association Act

Part Compiler's Comments

Department to Seek Commissioner's Determination: Section 13, Ch. 272, L. 2001, provided: "The department of administration shall, as soon as practicable, request in writing a determination from the commissioner of internal revenue as to whether the employee welfare benefit plan created under [sections 1 through 10] [Title 2, chapter 18, part 13] is a qualified plan pursuant to section 501(c)(9) of the Internal Revenue Code. If the commissioner determines that the plan is qualified for a tax exemption, the department shall immediately certify that fact to the secretary of state and shall notify the code commissioner of the certification."

Loan From Board of Investments for Startup Costs: Section 14, Ch. 272, L. 2001, provided: "To pay the startup costs of the plan established under the Voluntary Employees' Beneficiary Association Act, the department of administration is authorized to receive a loan from the intercap revolving loan program adopted by the board of investments pursuant to 17-5-1605."

Implementation by Conversion of Unused Sick Leave: Section 15, Ch. 272, L. 2001, provided: "In implementing and administering the provisions of [sections 1 through 10] [Title 2, chapter 18, part 13]:

(1) the department shall provide for the conversion of unused sick leave accrued in excess of the minimum established in [section 8] [2-18-1311]; or

(2) if conversion of sick leave in accordance with subsection (1) conflicts with applicable federal law, then the department shall provide for contributions to the health care expense accounts in lieu of sick leave accrual in excess of the minimum established in [section 8] [2-18-1311]."

Saving Clause: Section 17, Ch. 272, L. 2001, was a saving clause.

2-18-1301. Short title.

Compiler's Comments

Effective Date: Section 19(1), Ch. 272, L. 2001, provided: "(1) Except as provided in subsection (2), [this act] is effective on passage and approval." Approved April 20, 2001.

2-18-1302. Purpose and intent.

Compiler's Comments

Effective Date: Section 19(1), Ch. 272, L. 2001, provided: "(1) Except as provided in subsection (2), [this act] is effective on passage and approval." Approved April 20, 2001.

2-18-1303. Definitions.

Compiler's Comments

Effective Date: Section 19(1), Ch. 272, L. 2001, provided: "(1) Except as provided in subsection (2), [this act] is effective on passage and approval." Approved April 20, 2001.

2-18-1304. Statewide employee welfare benefit plan established — health care expense trust accounts — investment of funds — account access — administrative expenses.

Compiler's Comments

Effective Date: Section 19(1), Ch. 272, L. 2001, provided: "(1) Except as provided in subsection (2), [this act] is effective on passage and approval." Approved April 20, 2001.

2-18-1305. Rulemaking authority.

Compiler's Comments

Effective Date: Section 19(1), Ch. 272, L. 2001, provided: "(1) Except as provided in subsection (2), [this act] is effective on passage and approval." Approved April 20, 2001.

2-18-1309. Administration of plan — content of plan document.

Compiler's Comments

Effective Date: Section 19(1), Ch. 272, L. 2001, provided: "(1) Except as provided in subsection (2), [this act] is effective on passage and approval." Approved April 20, 2001.

CHAPTER 20
ELECTRONIC TRANSACTIONS WITH STATE AGENCIES AND LOCAL GOVERNMENTS

Part 1
General Provisions

Part Compiler's Comments

Saving Clause: Section 12, Ch. 365, L. 1999, was a saving clause.

Effective Dates: Section 13, Ch. 365, L. 1999, provided that 2-20-101 through 2-20-109 and 2-20-111 are effective July 1, 1999, and that 2-20-110 is effective on passage and approval. Approved April 20, 1999.

2-20-110. Secretary of state to adopt rules for registration of certification authorities and repositories.

Compiler's Comments

Effective Date: Section 13(1), Ch. 365, L. 1999, provided that this section is effective on passage and approval. Approved April 20, 1999.

TITLE 3
JUDICIARY, COURTS

CHAPTER 1
COURTS AND JUDICIAL OFFICERS GENERALLY

Chapter Law Review Articles

Tribal Courts and the Federal Judiciary: Opportunities and Challenges for Constitutional Democracy, Pommersheim, 58 Mont. L. Rev. 313 (1997).

A Ninth Circuit Split Study Commission: Now What?, O'Scannlain, 57 Mont. L. Rev. 313 (1996).

Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come, Hellman, 57 Mont. L. Rev. 261 (1996).

Dividing the Ninth Circuit Court of Appeals: A Proposition Long Overdue, Burns, 57 Mont. L. Rev. 245 (1996).

Judicial Discretion and the Homosexual Parent: How Montana Courts Are and Should Be Considering a Parent's Sexual Orientation in Contested Custody Cases, Runnette, 57 Mont. L. Rev. 177 (1996).

The Ninth Circuit Should Not Be Split, Hug, 57 Mont. L. Rev. 291 (1996).

The Judicial Article: What Went Wrong, Bowman, 51 Mont. L. Rev. 492 (1990).

Civil Procedure (a Montana Supreme Court Survey), Williams, 45 Mont. L. Rev. 335 (Summer 1984).

Will Colorado's Effort to Improve the Administration of Justice Help Montana?, Erickson, 33 Mont. L. Rev. 52 (Winter 1972).

Montana's Judicial System — A Blueprint for Modernization, Mason & Crowley, 29 Mont. L. Rev. 1 (Fall 1967).

Chapter Collateral References

Law and Justice: Theories of Adjudication, State Bar of Montana C.L.E. publication, Sept. 1985.

Court Unification in Montana, a Report to the 49th Legislature, Montana Legislative Council, Dec. 1984.

Part 1
Courts — Definitions and General Powers

Part Law Review Articles

The Effect of Lack of Jurisdiction, Slaight, 16 Mont. L. Rev. 54 (Spring 1955).

Part Collateral References

Precedential effect of unpublished opinions. 105 ALR 5th 499.

3-1-101. The several courts of this state.

Case Notes

City Not Liable for City Judge's Civil Rights Violations — City Judge Acts Under State Authority: Claims of the indigent defendants, who were not effectively informed by a City Judge of their right to appointed counsel, were properly dismissed. Under Montana law, a City Judge's acts and decision in advising defendants of the right were performed under the state's authority rather than the city's authority, thereby precluding imposition of civil rights liability on the city. Further, the indigent defendants did not have standing to seek declaratory and injunctive relief. There are other remedies for indigent defendants in future situations—they can file a complaint with the state body charged with overseeing judicial conduct, they can appeal their convictions to a higher court, and they can sue a judge individually because a judge does not enjoy judicial immunity for unconstitutional behavior when the facts are sufficient to grant declaratory or injunctive relief. Eggar v. Livingston, 40 F3d 312 (9th Cir. 1994).

Attorney General's Opinions

City Judge Not to Hold Office as Community College Trustee: The provisions of Art. VII, sec. 10, Mont. Const., apply to all judges, including City Judges. Because the position of trustee of a

community college district is considered an elective public office, a City Judge is constitutionally prohibited from holding office as an elected trustee of a community college district. 44 A.G. Op. 21 (1991).

Collateral References

Courts *key* 143.

21 C.J.S. Courts §§238, 240 through 243, 249, 273.

3-1-102. Courts of record.

Case Notes

Lack of Hearing Record on Support Modification — Vacation of District Court Decree Required: Pamela filed a motion to amend the decree dissolving her marriage, in order to increase child support payments, and a motion to hold her ex-husband, Earl, in contempt for failure to pay child support. The District Court held a hearing, which Earl did not attend. Based upon the hearing, of which no record was made, the District Court modified the decree by increasing Earl's child support payments. Earl was also ordered to pay Pamela's attorney fees and costs. In response, Earl filed a Rule 60, M.R.Civ.P. (Title 25, ch. 20), motion for relief from the judgment, but that motion was denied when the District Court failed to rule. Citing Malley v. Malley, 190 M 141, 619 P2d 531 (1980), the Supreme Court held that without a record, the Supreme Court could not determine the change in circumstances justifying the amended decree and Earl was thereby denied effective appellate review. The District Court's order was vacated, and the case was remanded for a hearing on the merits of Pamela's motion. In re Marriage of Long, 268 M 187, 885 P2d 533, 51 St. Rep. 1252 (1994).

Tribal Court Not State Court: Because of involvement of federal agents in a search on an Indian reservation, the search was a federal search governed by Rule 41(a), Federal Rules of Criminal Procedure, and hence a search warrant must be issued by a federal court or state court of record. A tribal court is neither a federal court nor a state court as enumerated in 3-1-102; thus the warrants were invalid and subsequent evidence seized pursuant to the warrants is inadmissible. U.S. v. Messerly, 530 F. Supp. 751, 39 St. Rep. 183 (D.C. Mont. 1982).

Record Required — Appeal Denied: The Supreme Court noted in Guardianship of Gullette, 173 M 132, 566 P2d 396 (1977), that the District Court is, by statute, a court of record, and this implies that a record will be kept of the proceedings. Recently, in Schneider v. Ostwald, 190 M 29, 617 P2d 1293, 37 St. Rep. 1728 (1980), a trial court contempt order was set aside because the contempt of court proceedings were not recorded. The same result obtains in the instant case. The record is silent as to why a court reporter was not present. But reasons aside, the failure to record the property distribution hearings has effectively denied the husband appellate review of the trial court's judgment. Malley v. Malley, 190 M 141, 619 P2d 531, 37 St. Rep. 1827 (1980), followed in In re Marriage of Long, 268 M 187, 885 P2d 533, 51 St. Rep. 1252 (1994).

Contested Guardianship Custody: A contested custody proceeding involving the guardianship of minors is a hearing requiring a verbatim record. Failure to hold such a hearing necessitates reversal. In re Gullette, 173 M 132, 566 P2d 396 (1977), followed in In re Marriage of Long, 268 M 187, 885 P2d 533, 51 St. Rep. 1252 (1994).

Collateral References

Courts *key* 31 through 36, 143.

21 C.J.S. Courts §§96, 97, 99 through 106, 238, 240 through 243, 249, 273.

3-1-111. Powers respecting conduct of business.

Case Notes

Municipal Ordinance Placing Clerk of Municipal Court Under Supervision of Finance Department Void: The city of Bozeman passed municipal ordinance 2.06.030 placing the Municipal Court Clerk under the supervision of the city department of finance, contending that it falls to the governing body to decide where its employees should be placed for supervision purposes. However, this section gives authority to the court to control the conduct of its ministerial officers. The District Court concluded that the clerk was in a ministerial position and voided the ordinance. The Supreme Court agreed. The Municipal Court Clerk may exercise independent judgment only within those areas of responsibility allowed by the Municipal Court Judge, so the position is ministerial. If the Municipal Court was divested of control of its ministerial officers, it would be powerless to regulate its calendar, prioritize the clerk's time to meet the needs of the court, or compel the clerk to obey its orders, thus impairing its power to conduct court business. The ordinance conflicted with the statute and was therefore void. Carlson v. Bozeman, 2001 MT 46, 304 M 277, 20 P3d 792 (2001).

Attorney Failure to Consult Client on Possible Conflict of Interest — Opposing Attorney Failure to Further Pursue Motion to Disqualify: In February 1992, Klemens was served with an amended complaint bringing Klemens into a case. In September 1993, Klemens' motion to disqualify the law firm representing plaintiffs, on grounds of conflict of interest, because the firm had represented Klemens in another matter was denied. Judgment in the case was issued in January 1999, and Klemens appealed denial of the motion to disqualify. Klemens never renewed its conflict of interest objection and did not request from the trial court the relief that Klemens requested on appeal—a new trial. Klemens could have requested an injunction under irreparable harm theory, sought a writ of supervisory control, sought certification of the order denying its motion to disqualify, or reported the alleged conflict of interest to the Commission on Practice. Instead, Klemens did nothing for 6 years. A party may not request relief on appeal that was not requested of the trial court. Denial of the motion to disqualify is affirmed. However, conduct of counsel for both sides must be referred by the Supreme Court to the Commission on Practice, which can pursue appropriate proceedings and any appropriate discipline. Plaintiffs' counsel did not consult with Klemens and obtain Klemens' consent to represent plaintiffs, as required by a professional conduct rule. Klemens' counsel failed to follow up on its disqualification motion. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

Jurisdiction Over and Authority to Sanction Conduct of Attorney — Motion to Disqualify: It is beyond argument that the Supreme Court has original and exclusive jurisdiction in all matters involving the conduct of attorneys practicing law in Montana. Accordingly, the court and the agency to which the court has delegated disciplinary authority have the exclusive authority to discipline or sanction unprofessional conduct of an attorney, and a lower court cannot give a party relief for misconduct of an attorney or a firm. Violation of a professional conduct rule should not give rise to a cause of action or create a presumption that a legal duty has been breached. The professional conduct rules do not establish substantive legal duties. However, a lower court may consider an attorney's violation of a rule if the violation results in prejudice or adversely affects the rights of another party, as when an attorney is disqualified because of a conflict of interest, because the lower court has inherent authority to control trial administration in the interest of fairness and justice. The essence of a motion to disqualify is that the continued representation of one party by the attorney will prejudice or adversely impact the rights of another party, not that the attorney violated a professional conduct rule, and evidence of violation of a professional conduct rule merely adds additional weight that may tip the scales in favor of disqualification. The rule violation is not prima facie grounds for disqualification or for any other relief. Prejudice must be proved. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

Refusal to Bifurcate Wrongful Discharge Claim From Employer's Counterclaim Proper: Jarvenpaa argued that his employer's counterclaim against him for recovery of retirement benefits should have been bifurcated from his wrongful discharge claim because the counterclaim unnecessarily invited evidence of his election to retire and the retirement benefits that he received, which prejudicially persuaded the jury to find that the discharge was fair instead of wrongful. However, evidence of the retirement election was helpful to the jury to make a well-informed decision, including whether the employer acted with malice, and was relevant to the wrongful discharge action. Therefore, the District Court did not err in refusing to bifurcate the issues for separate trial. Jarvenpaa v. Glacier Elec. Co-op, Inc., 1998 MT 306, 292 M 118, 970 P2d 84, 55 St. Rep. 1261 (1998).

Court's Refusal to Bifurcate Defendant's Trial Not Error: Ross argued that the lower court should have allowed the question of whether his letters to the victim were "true threats" to be tried separately from the question of whether the threats were communicated in such a way as to create a reasonable fear in the victim that the threats would be carried out. The Supreme Court held that trial administration issues will not be set aside absent a showing of abuse of discretion, which was not present in Ross's trial. St. v. Ross, 269 M 347, 889 P2d 161, 52 St. Rep. 22 (1995). See also Mont. Rail Link v. Byard, 260 M 331, 860 P2d 121 (1993).

District Court Remand of Appeal From City Court Precluded: A District Court has a number of powers respecting the conduct of its business, none of which include the remand of an appeal from City Court. While 3-1-113 authorizes a District Court to use the means necessary for the exercise of jurisdiction conferred by the constitution or by statute, it does not grant blanket authority to respond to a defendant's failure to appear when the range of responses is circumscribed by statute. Rickett v. Billings, 262 M 339, 864 P2d 793, 50 St. Rep. 1586 (1993), affirming Hardin v. Myers, 194 M 248, 633 P2d 677 (1981), and distinguished in In re Driver's License of Anderson, 284 M 109, 943 P2d 978, 54 St. Rep. 797 (1997).

Sanctions and Contempt Imposed on Attorney by City Court Invalid: A City Court imposed sanctions on an attorney for failing to appear to defend a client in a DUI case. The attorney argued that he had been required to attend a hearing in District Court and had diligently tried to inform the City Court of the conflict. The City Court refused to revoke the sanctions, adding instead a contempt charge. The Supreme Court ruled that the sanctions were improper in that the City Court acted arbitrarily in imposing them. The Supreme Court went on to reverse the contempt, finding on the basis that the sanctions did not constitute a lawful order and therefore the attorney could not be found in contempt for failing to pay the sanctions. Doran v. City Court of Whitefish, 239 M 94, 779 P2d 68, 46 St. Rep. 1539 (1989).

District Court's Power to Order Payment of Expenditures Beyond Budget: District Court's fiscal year budget was overrun, and this stopped or threatened to stop the efficient and orderly administration of justice and court business, creating an emergency. As a court of competent jurisdiction, the District Court may issue orders for the payment of out-of-budget expenditures that are reasonable and necessary. Compliance with the orders by the members of the Board of County Commissioners or by any other officer in the exercise of his official duties is within the exception to personal liability of the officers provided in 7-6-2323 (now repealed). The officers may pass on the propriety of the claims but may not deny them on the basis that they are outside the budget if the court has duly ordered them paid. State ex rel. District Court v. Whitaker, 210 M 363, 681 P2d 1097, 41 St. Rep. 1104 (1984).

No Finding of Willful Disobedience of Court Order — Contempt Not Found: The trial court adjusted the property settlement and the support and maintenance payment to allow the respondent to pay debts incurred in his name by the petitioner during a spending spree after separation but before the divorce. The case was remanded because the petitioner was penalized twice the amount of the spending spree. On remand, the court equalized the property distribution and adjusted the support and maintenance payments. There was no mention of the spending spree debts in the second decree. The petitioner is now being sued for the spending spree debts and brought this action seeking a contempt citation for respondent's failure to pay the debts. The Supreme Court affirmed the District Court's holding that the respondent was not in contempt. In re Marriage of Grenfell, 200 M 490, 652 P2d 1170, 39 St. Rep. 1891 (1982).

Evidence — Witness Called by Judge: There was no merit to contention that due process was denied at suspended sentence revocation hearing when the judge called a witness to the stand to resolve a conflict in pertinent testimony, for a court may on its own motion call witnesses, and the asserted error was waived because it had not been objected to below. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982).

Inherent Powers:

The District Court has inherent power to correct errors of Clerk, Judge, or counsel to conform to the actual decision, either immediately or years later. Morse v. Morse, 116 M 504, 154 P2d 982 (1945).

The District Court has power to order its judgments amended by nunc pro tunc order to correct an error which has crept into the judgment by reason of misprision on the part of the Judge, Clerk, or counsel and is apparent on the face of the record. State ex rel. Kruletz v. District Court, 110 M 36, 98 P2d 883 (1940).

Common-Law Powers: This section adds nothing to the powers already possessed by courts of general jurisdiction, for it is merely declaratory of the common law. May v. N. Pac. Ry., 32 M 522, 81 P 328 (1905).

Amendment of Process: The District Court has full power to amend a Writ of Attachment by virtue of this section. Wilson v. Barbour, 21 M 176, 53 P 315 (1898).

Attorney General's Opinions

Duty of Boards of County Commissioners to Accept and Pay Claims for Actual and Necessary Clerical Expenses of Justice's Court: Under 3-10-103, a duty is created on the part of Boards of County Commissioners to accept and pay claims for actual and necessary clerical expenses associated with the operation of Justices' Courts. If disputes arise regarding payment of those expenses, the procedural rule in State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975), applies. Although Boards may have some budgetary discretion when considering payment of actual and necessary court expenses, the statutes governing the county budgeting process do not preclude application of the Browman rule when disputes arise. 49 A.G. Op. 19 (2002).

Law Review Articles

The Increasing Use of the Power of Contempt, Hilts, 32 Mont. L. Rev. 183 (Summer 1971).

Collateral References

Courts *key* 78 and specific titles.

21 C.J.S. Courts §170, et seq.

Validity of searches conducted as condition of entering public premises. 28 ALR 4th 1250.

Use in state court of tape recorder or other electronic device by counsel or party to transcribe criminal trial proceedings. 67 ALR 3d 1013.

Inherent power of court to compel appropriation or expenditure of funds for judicial purposes. 59 ALR 3d 569.

3-1-112. Rules for courts of record.

Case Notes

Full-Time District Court Reporters Subject to Statutory Workweek Requirement — Recordkeeping Required — Designation of Court Reporter's "Workstation": A District Court reporter who is treated as a full-time salaried county employee is subject to the statutory 40-hour workweek requirement in 7-5-2108, and recordkeeping to document a court reporter's working hours, including overtime, annual leave, and sick leave, must be as determined by the District Court Judge who employs the court reporter. However, any method used to fulfill these requirements must comport with the District Court Judge's authority to control court assistants because allowing a Board of County Commissioners to enforce county personnel policies on court reporters would infringe on that authority. Any mandatory location of work for a court reporter that is set by anyone but the District Court Judge would interfere with the necessary flexibility of the judge. Thus, a court reporter's "workstation" is wherever that reporter is required to be to perform the duties for the judge for whom that court reporter works. Bd. of County Comm'rs v. District Court, 2000 MT 258, 301 M 496, 10 P3d 805, 57 St. Rep. 1061 (2000).

Rule Excluding Witnesses From Courtroom — Rebuttal Witnesses Exempt: In a prosecution for deliberate homicide, the court did not err in allowing a police officer to testify as a rebuttal witness after the same police officer allegedly violated a rule excluding witnesses from the courtroom and heard the defendant's testimony. Rebuttal witnesses are not within the rule governing exclusion of sworn witnesses from the courtroom during taking of testimony. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981).

Local Rule as Conflicting With Montana Rules of Civil Procedure: Local court Rule 3 of Park County District Court states in part that a party opposing a motion has 10 days after the filing and service of the moving party's brief to serve and file a reply brief. When applied to a motion for summary judgment, local Rule 3 conflicts with Rule 56(c), M.R.Civ.P. Whenever a local rule conflicts with Montana Rules of Civil Procedure, the local rule must be set aside. Krusemark v. Hansen, 186 M 174, 606 P2d 1082, 37 St. Rep. 304 (1980).

Force of Rules:

Trial court rule requiring filing of briefs in support of preliminary motions is proper exercise of authority under this section and may be enforced by summary denial of motion where brief has not been filed. Hansen v. Kiernan, 159 M 448, 499 P2d 787 (1972).

Court rules adopted by a Judge are not binding on his successor. State ex rel. Little v. District Court, 49 M 158, 141 P 151 (1914).

Rules of court, when once adopted, under the limitations prescribed by law, become binding upon the court and litigants, for they have the force of statutes within the limitations of their application and should be enforced, except when the court, for good cause shown, in a particular case, may relax them in order that justice may be done. State ex rel. Little v. District Court, 49 M 158, 141 P 151 (1914); State ex rel. Connors v. Foster, 36 M 278, 92 P 761 (1907); State ex rel. Nissler v. Donlan, 32 M 256, 80 P 244 (1905); Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 27 M 288, 70 P 1114 (1902), explained in 30 M 442, 76 P 1005 (1904); State ex rel. King v. District Court, 25 M 202, 64 P 352 (1901); Martin v. De Loge, 15 M 343, 39 P 312 (1895).

The requirement of a District Court rule that where, after perfection of an appeal from a Justice's Court, appellant fails to file the transcript and papers in the District Court within 10 days, such appeal shall be subject to dismissal, is not jurisdictional. Bush v. Baker, 46 M 535, 129 P 550 (1913).

Rules of court are binding upon District Courts and their officers insofar as such courts and officers have to do with appellate procedure. State ex rel. Connors v. Foster, 36 M 278, 92 P 761 (1907); Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 33 M 400, 84 P 706 (1900).

Extension of Time: A District Court may not condition the extension of time authorized by section 93-5505, R.C.M. 1947 (superseded, with 93-5504 and 93-5506 through 93-5509, by

M.R.App.Civ.P., now Montana Rules of Appellate Procedure), by requiring an order for a transcript from the court reporter and a deposit of his estimated cost. State ex rel. Ryan v. District Court, 140 M 135, 368 P2d 802 (1962).

Assignment of Judges: A rule of court assigning all of the criminal cases to one of the Judges of a District Court will not preclude another Judge of the same court from assuming jurisdiction of a criminal case. State ex rel. Little v. District Court, 49 M 158, 141 P 151 (1914).

Departmental Rules: Each Judge of a District Court that has more than one Judge has authority to make rules of court for the control of the business before the department over which he presides, provided they are confined to legitimate subjects for government by court rules. State ex rel. Little v. District Court, 49 M 158, 141 P 151 (1914).

Stipulations Between Parties: A rule of the District Court that agreements between attorneys relating to causes pending will be disregarded by the court unless made in open court and entered in the minutes or reduced to writing, subscribed by the party or his attorney, against whom they are urged, has no application to an executed oral agreement or stipulation admittedly entered into by an attorney. Bush v. Baker, 46 M 535, 129 P 550 (1913).

Collateral References

Courts *key* 81.

21 C.J.S. Courts §§173, 175.

20 Am. Jur. 2d Courts §§48 through 53.

Pretrial conference, power of court to adopt general rule requiring, as distinguished from exercising discretion in each case separately. 2 ALR 2d 1061.

Workers' Compensation Court Rules, Lawyers Deskbook and Directory, p. 97, State Bar of Montana, 1997-98.

3-1-113. Means to carry jurisdiction into effect.

Case Notes

Justice of the Peace Required to Follow Established Employee Disciplinary Procedures: Although Justices' Courts undoubtedly possess inherent power under this section to do those acts necessary to ensure proper court functioning, the exercise of that power is not unlimited. A Justice's Court is required to follow established methods for disciplinary action against a court office manager, including the grievance process, before the inherent power can be exercised to suspend the office manager. Clark v. Dussault, 265 M 479, 878 P2d 239, 51 St. Rep. 642 (1994).

District Court Remand of Appeal From City Court Precluded: A District Court has a number of powers respecting the conduct of its business, none of which include the remand of an appeal from City Court. While this section authorizes a District Court to use the means necessary for the exercise of jurisdiction conferred by the constitution or by statute, it does not grant blanket authority to respond to a defendant's failure to appear when the range of responses is circumscribed by statute. Rickett v. Billings, 262 M 339, 864 P2d 793, 50 St. Rep. 1586 (1993), affirming Hardin v. Myers, 194 M 248, 633 P2d 677 (1981), and distinguished in In re Driver's License of Anderson, 289 M 109, 943 P2d 978, 54 St. Rep. 797 (1997).

Lack of Jurisdiction — Lack of Power to Adjudicate: Generally, courts lacking subject matter jurisdiction over a cause of action have no power to adjudicate issues in the action. Sterrett v. Milk River Prod. Credit Ass'n, 234 M 459, 764 P2d 467, 45 St. Rep. 2048 (1988).

Bifurcation of Question of Common-Law Marriage From Issues of Child Custody, Property Distribution, and Maintenance: Subsection (1)(d) of 40-4-104 did not prohibit bifurcation of proceedings (to determine if parties had a common-law marriage) before hearing evidence on custody, property distribution, and maintenance. The trial court lacked authority to grant the requested relief until a determination of the marital relationship was completed because it could not dissolve or equitably distribute the fruits of that which may not exist. Bifurcation was well within the wide discretion of the court. In re Marriage of Geertz, 232 M 141, 755 P2d 34, 45 St. Rep. 942 (1988).

Judicial Immunity for Discharge of Predecessor Judge's Secretary: The summary discharge by a District Judge of his predecessor's personal secretary was a judicial action, and the judge was therefore immune from suit under 2-9-112(2). Mead v. McKittrick, 223 M 428, 727 P2d 517, 43 St. Rep. 1886 (1986), distinguished, with regard to applicability of judicial immunity to bar a grievance hearing regarding the suspension by a Justice of the Peace of a court manager who was not a key employee, in Clark v. Dussault, 265 M 479, 878 P2d 239, 51 St. Rep. 642 (1994).

Appointment of Director as "Suitable Process or Mode of Proceeding": Appointment of a director of family court services was a "suitable process or mode of proceeding" within the meaning of 3-1-113 for the District Court to follow to carry out its statutorily mandated duties

under the provisions of the Montana Conciliation Law. Since the District Court acted properly, the position was entitled to be funded. The Commissioners' refusal to comply with the funding order was an arbitrary and capricious abuse of the powers of their office. Bd. of Comm'rs v. District Court, 182 M 463, 597 P2d 728, 36 St. Rep. 1231 (1979).

Election Recount Proceedings: In the absence of statutory directions as to conduct of proceedings, the court could proceed in any suitable manner. State ex rel. Riley v. District Court, 103 M 576, 64 P2d 115 (1937).

Supervisory Control of Courts:

The power of supervisory control is a distinct power and may be exercised to control the discretion of an inferior court in making an order from which no appeal would lie and for which the writs appertaining to the appellate jurisdiction furnish no remedy. State ex rel. Regis v. District Court, 102 M 74, 55 P2d 1295 (1936); State ex rel. Anaconda Copper Min. Co. v. District Court, 25 M 504, 65 P 1020 (1901).

This section is broad enough to cover the exercise of the power of supervisory control by the Supreme Court and is ample to authorize its use in its utmost vigor in the absence of legislation upon the subject. State ex rel. Whiteside v. District Court, 24 M 539, 63 P 395 (1900), explained in State ex rel. Shores v. District Court, 27 M 349, 71 P 159 (1903), and distinguished in State ex rel. Estes v. District Court, 129 M 136, 284 P2d 249 (1955).

Lien Enforcement:

Where the statutory method of enforcing a materialmen's lien is adequate, it is conclusive; but if inadequate, the District Court under its general jurisdiction at law and in equity may adopt any suitable method of proceeding for enforcing it. Cont. Supply Co. v. White, 92 M 254, 12 P2d 569 (1932).

Where, pending action to foreclose a lien, the defendant dies before judgment, the plaintiff may present his claim in accordance with section 91-2714, R.C.M. 1947 (now repealed), and prosecute the action to judgment. In re Stevenson, 87 M 486, 289 P 566 (1930).

Notice of Proceedings: In the absence of statute prescribing the kind and manner of giving of notice to persons interested in an estate of a petition of the estate's attorney for allowance of his fees prior to final settlement, the court may adopt any suitable mode or method. In re Culver's Estate, 91 M 475, 8 P2d 662 (1932), distinguished in State ex rel. Regis v. District Court, 102 M 74, 55 P2d 1295 (1936).

Representative Actions: While there appears to be no method of procedure prescribed in the Code for bringing a representative suit into court when a court has jurisdiction of a cause, it may adopt any suitable mode of procedure or process. State ex rel. Lewis & Clark County v. District Court, 90 M 213, 300 P 544 (1931).

Attachment Affidavit: Where jurisdiction is conferred on a court, all the means necessary to give it effect are also given, and in the absence of such a provision the court may adopt any suitable process. Daley v. Torrey, 71 M 513, 230 P 782 (1924).

Homestead Selection: In selecting a homestead for the family of a decedent where none was selected prior to his death, the probate court may, in the absence of a mode of procedure prescribed by the statute, proceed in substantially the manner indicated by section 33-127, R.C.M. 1947 (now 70-32-106), for its selection during the lifetime of a decedent. In re Trepp's Estate, 71 M 154, 227 P 1005 (1924).

Probate Powers: Although the jurisdiction of the District Court sitting in probate is limited to the exercise of the powers conferred by statute, it nevertheless possesses all the authority incidentally necessary to the effective exercise of the powers expressly conferred. In re McLure's Estate, 68 M 556, 220 P 527 (1923).

Enforcement of Orders: Whenever jurisdiction is conferred upon a court, all the means necessary to carry the same into effect are expressly provided, and if a court has power to make an order, it has jurisdiction to enforce it. State ex rel. Eisenhauer v. District Court, 54 M 172, 168 P 522 (1917).

County Seat Selection: There being no remedy at law to contest the selection or removal of a county seat, equity will take cognizance of the matter under this section. Poe v. Sheridan County, 52 M 279, 157 P 185 (1916).

Execution: A decree for separate maintenance recovered by a married woman may be enforced by execution. Raymond v. Blancgrass, 36 M 449, 93 P 648 (1907), explained in Lewis v. Lewis, 109 M 42, 94 P2d 211 (1939).

Attorney General's Opinions

County Regulatory Power — District Courts: Montana's District Courts are clothed with inherent and statutory power to do all that is necessary to render their jurisdiction effective,

including the power to hire necessary court personnel and control them; but it appears that requiring District Court personnel to also abide by county policies and regulations is not an undue interference with the judicial branch. The scope of the judicial authority in this matter in relation to county authority is not an appropriate matter for an Attorney General opinion and would be more appropriately disposed of by either an understanding between the court and the county or a judgment in a court of proper jurisdiction. 39 A.G. Op. 38 (1981).

District Court Employees as County Employees: District Court employees are paid by the county in which the court is located, receive the same county benefits as all other county employees, and are therefore county employees. 39 A.G. Op. 38 (1981).

District Court Employees' Workweek: District Court employees are paid by the county in which the court is situated and are considered county employees; therefore, they are salaried county employees under this section and must work a 40-hour week if required. 39 A.G. Op. 38 (1981).

Collateral References

Courts *key* 27.
21 C.J.S. Courts §88.

3-1-120. Court financial accounts.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

3-1-125. County to provide district court office space.

Compiler's Comments

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.
Effective Date: Section 63(3), Ch. 585, L. 2001, provided that this section is July 1, 2002.

3-1-126. Local government authority to supplement district court budget.

Compiler's Comments

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.
Effective Date: Section 63(3), Ch. 585, L. 2001, provided that this section is July 1, 2002.

3-1-130. Supreme court — adoption of judicial branch personnel plan.

Compiler's Comments

2003 Amendment: Chapter 583 in (1) at end of first sentence deleted "county attorneys, deputy county attorneys, salaried public defenders, assistant public defenders, employees of the offices of public defenders, clerks of district court, and employees of the offices of the clerks of district court"; and made minor changes in style. Amendment effective July 1, 2003.

Transition: Section 51, Ch. 585, L. 2001, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

Transfer of County Employees to State Employment — Preservation of Rights: Section 57, Ch. 585, L. 2001, provided: "(1) District court employees who are employed by the county on June 30, 2002, and who are transferred to state employment by [this act] become state employees on July 1, 2002, except for purposes of application of the judiciary branch personnel plan, as provided in [section 63] [sic, section 64, not codified].

(2) The compensation of former county employees who become state employees under [this act] may not be impaired. This subsection does not preserve the right of any former county employee to any salary or compensation, including longevity benefits, that was payable while the employee was employed by the county and that was not accrued and payable as of June 30, 2002.

(3) An employee who is transferred from county employment to state employment under [this act] may elect to become a member of the state employee benefit plan on July 1, 2002, or remain on the employee's county benefit plan through the remainder of the plan year in effect on June 30, 2002. For an employee who elects to remain on a county benefit plan, the monthly state contribution toward insurance benefits must be transferred to the county benefit plan. Any benefit costs in excess of the state contribution must be paid by the employee.

(4) Accumulated sick and vacation leave and years of service with a county must be transferred fully to the state as of July 1, 2002, and become an obligation of the state at that time. Any liability for accumulated compensatory time of employees who are transferred from county employment to state employment under [this act] is not transferred to the state and remains an obligation of the county that employed the employee prior to the transfer, subject to federal law and the county's personnel policies.

(5) The state becomes a successor employer with regard to any collective bargaining agreement existing on July 1, 2002, that prior to July 1, 2002, covered any employee transferred from county employment to state employment by [this act]. The responsibilities and obligations of the parties to an agreement to which the state becomes a successor employer must, as applied to a transferred employee, continue until the expiration date of the agreement.

(6) In the development of a plan of personnel administration for employees of the judicial branch, the supreme court may recognize an appropriate bargaining unit."

Delayed Application of Judicial Branch Personnel Plan — Salaries for FY 2003: Section 59, Ch. 585, L. 2001, provided: "(1) All judicial branch employees, including district court employees, become subject to the judiciary branch personnel plan adopted by the supreme court, as required by [section 1] [3-1-130], on July 1, 2003.

(2) During fiscal year 2003, each district court employee who was a former county employee and who becomes a state employee under [this act] is entitled to the person's salary and compensation, including longevity payments, that the person is entitled to on June 30, 2002. In addition, the person is entitled to an increase equal to the average pay increase for judicial branch employees if any pay increase is granted for fiscal year 2003.

(3) An employee's compensation may not be reduced by transfer to the judicial branch personnel plan. If application of the judicial branch personnel plan would reduce an employee's compensation, the employee shall remain at the compensation earned at the time of transfer until compensation under the plan requires an increase in the employee's compensation."

Purchase of Court Reporters' Equipment: Section 60, Ch. 585, L. 2001, provided: "The state may:

(1) during fiscal year 2003, on a one-time basis, offer to purchase reporting and transcription equipment from a court reporter who becomes a state employee under 3-5-601(2)(a); or

(2) offer to purchase the equipment of a court reporter who becomes a state employee under 3-5-601(2)(b) under guidelines adopted by the supreme court and recommended by the district court council under [section 5] [3-1-1602]."

Effective Date: Section 63(2), Ch. 585, L. 2001, provided that this section is effective July 1, 2001.

Applicability: Section 64, Ch. 585, L. 2001, provided: "The judiciary branch personnel plan adopted under [section 1] [3-1-130] applies to fiscal years beginning July 1, 2003."

Part 2
Seals of Courts

3-1-201. What courts have seals.

Case Notes

Testing County Name: A Writ of Mandate to compel the Clerk to issue an execution with the seal bearing the former name of a county is the proper remedy where the Legislature, by a void act, has attempted to change the name of a county. State ex rel. Sackett v. Thomas, 25 M 226, 64 P 503 (1901).

Collateral References

Courts *key* 48.
21 C.J.S. Courts §§5, 13.
20 Am. Jur. 2d Courts §8.
Seal of court on process, judgment, etc. 30 ALR 724.

3-1-206. Documents requiring seals.

Compiler's Comments

1981 Amendment: Inserted "Unless otherwise specifically required" at the beginning of the section; substituted "a personal representative" for "an executor, administrator" in (2).

Part 3
General Rules Regarding Procedure

Part Collateral References

Place of holding sessions of trial court as affecting validity of its proceedings. 18 ALR 3d 572.

3-1-301. Days on which courts may be held.

Attorney General's Opinions

Legality of Evening City Court Hours: A City Judge is not prohibited by 3-1-302, 3-11-101, or this section from establishing regular sessions of the court during evening hours as long as regular sessions are not convened on Sundays or other legal holidays and the court is open for business on judicial days. These sections place no limitations on the hours of business. Although 7-4-102 requires that City Court offices be open for business continuously from 8 a.m. until 5 p.m. on weekdays, this does not prohibit a City Judge from setting office hours after 5 p.m. on weekdays. As long as the office is open during the required hours for the transaction of business, such as the filing of court documents with the clerk, the City Judge may set additional hours for regular court sessions. 43 A.G. Op. 61 (1990).

3-1-302. Nonjudicial day.

Case Notes

Waiver of Irregularities: By failure to interpose timely objection or by consenting to proceed with the case, a party waives his right to object to proceedings conducted on a holiday. Miller v. Emerson, 120 M 380, 186 P2d 220 (1947).

Publication of Summons: There is no direct statutory prohibition against publication of summons in a newspaper on Sunday, and neither does such publication constitute a judicial act or judicial business within the meaning of this section, it being purely a ministerial act for the purpose of giving public notice to interested parties. State ex rel. Fisher v. District Court, 110 M 61, 99 P2d 211 (1940).

Nonjudicial Acts: Every holiday, including Sunday, is qualifiedly a nonjudicial day; but the prohibition of this section extends only to strictly judicial acts, and some of them are excepted. It does not prohibit the doing of a ministerial act, such as the publishing of an amendment to the state constitution. State ex rel. Hay v. Alderson, 49 M 387, 142 P 210 (1914), explained in Tipton v. Mitchell, 97 M 420, 35 P2d 110 (1934).

Service of Summons: Service of summons on Sunday is not a nullity but a mere irregularity, and a judgment based upon it is not void but voidable. Burke v. Inter-State S&L Ass'n, 25 M 315, 64 P 879 (1901), overruling Hauswirth v. Sullivan, 6 M 203, 9 P 798 (1886).

Attorney General's Opinions

Legality of Evening City Court Hours: A City Judge is not prohibited by 3-1-301, 3-11-101, or this section from establishing regular sessions of the court during evening hours as long as regular sessions are not convened on Sundays or other legal holidays and the court is open for business on judicial days. These sections place no limitations on the hours of business. Although 7-4-102 requires that City Court offices be open for business continuously from 8 a.m. until 5 p.m. on weekdays, this does not prohibit a City Judge from setting office hours after 5 p.m. on weekdays. As long as the office is open during the required hours for the transaction of business, such as the filing of court documents with the clerk, the City Judge may set additional hours for regular court sessions. 43 A.G. Op. 61 (1990).

Conduct of Criminal Trial — Never on Sunday: Montana law does not permit criminal trials to be conducted on Sundays except to conclude a trial already initiated as specified in this section. The exercise of power on Sunday by a magistrate with regard to proceedings of a criminal nature, as outlined in subsection (1)(c) of this section, is limited to the issuance of arrest warrants. 43 A.G. Op. 27 (1989).

Collateral References

Courts *key* 75; Holidays *key* 5; Sunday *key* 30.

21 C.J.S. Courts §§148, 162; 40 C.J.S. Holidays §5; 83 C.J.S. Sunday §41, et seq.

Validity of court's judgment rendered on holiday. 85 ALR 2d 595.

Judicial, execution, or tax sale on election day or holiday. 58 ALR 1273.

Notice, publication of, on holiday. 13 ALR 667.

Writ and process, sufficiency of summons returnable on legal holiday. 6 ALR 841, supplemented by 97 ALR 746.

3-1-303. Adjournments from nonjudicial days.

Collateral References

Courts *key* 66(1).

21 C.J.S. Courts §152.

3-1-311. Proceedings not affected by vacancy in office.

Collateral References

Judges *key* 32.

48A C.J.S. Judges §§66 through 68.

3-1-312. Sittings of court to be public.

Case Notes

Closure of Probation Revocation Hearing — Interruption a Contempt — Prior Notice of Closure Not Required: The public and the press have the right, with limited exceptions, to attend and observe probation revocation hearings. In a proper case, a District Court may close such a hearing. When a hearing is properly closed, no member of the public or representative of the press may interrupt the due course of the hearing in a manner that might defeat the reason for closure. Such an interruption constitutes a contempt of court. A District Court may proceed on an ad hoc basis, without giving prior notice, to make a closure decision in accordance with the facts and circumstances facing it at the time. State ex rel. Great Falls Tribune Co., Inc. v. District Court, 238 M 310, 777 P2d 345, 46 St. Rep. 1292 (1989).

Preliminary Pleadings — Public's Right to Know: In a defamation case, an affirmative defense based on the privilege under 27-1-804(4) extends to newspaper accounts of preliminary pleadings. The Supreme Court acknowledged that the public has a right to know what happens in the judicial system, including the filing of civil suits. Cox v. Lee Enterprises, Inc., 222 M 527, 723 P2d 238, 43 St. Rep. 1476 (1986), followed, with respect to Commission on Practice investigation, in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993).

Exclusion From Courtroom: The power does not exist anywhere to exclude from the courtroom anyone sui juris who comes into the presence of the court when there is accommodation for him and who conducts himself in a becoming manner, except in the civil actions enumerated specifically. St. v. Keeler, 52 M 205, 156 P 1080 (1916).

Collateral References

Constitutional Law *key* 328; Criminal Law *key* 635, 659; Trial *key* 20, 30.

23 C.J.S. Criminal Law §§963(1), 970; 88 C.J.S. Trial §§38, 39.

20 Am. Jur. 2d Courts §§17 through 19.

Propriety of exclusion of press or other media representatives from civil trial. 39 ALR 5th 103.

Exclusion of public from state criminal trial by conducting trial or part thereof at other than regular place or time. 70 ALR 4th 632.

Exclusion of public from state criminal trial in order to avoid intimidation of witness. 55 ALR 4th 1196.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant. 55 ALR 4th 1170.

Exclusion of public during criminal trial. 48 ALR 2d 1436, §5 superseded by 55 ALR 4th 1170, §6 superseded by 55 ALR 4th 1196, §9 superseded by 70 ALR 4th 632.

3-1-317. User surcharge for court information technology — exception.

Compiler's Comments

2003 Amendment: Chapter 498 in (1)(a), (1)(b), and (1)(c) increased the surcharge from $5 to $10. Amendment effective June 28, 2003, and terminates June 30, 2005.

Termination Provision Extended: Section 5, Ch. 498, L. 2003, had the effect of extending the termination date of this section to June 30, 2005.

2001 Amendment: Chapter 257 in (4) substituted reference to department of revenue for reference to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

Extension of Termination Date: Section 1, Ch. 71, L. 1999, amended sec. 4, Ch. 361, L. 1995, by extending the termination date imposed by Ch. 361 to June 30, 2003. Effective March 16, 1999.

Effective Date: Section 4(1), Ch. 361, L. 1995, provided: "[This act] is effective July 1, 1995."

Termination: Section 4(2), Ch. 361, L. 1995, provided: "[This act] terminates June 30, 1999."

3-1-318. Surcharges upon certain criminal convictions — exception.

Compiler's Comments

Effective Date — Applicability: Section 4, Ch. 298, L. 2003, provided: "(1) [This act] is effective July 1, 2003.

(2) [Section 2] [3-1-318] applies to:

(a) a defendant convicted on or after July 1, 2003; and

(b) proceedings filed on or after July 1, 2003."

Part 4
Powers of Judicial Officers

Part Law Review Articles

The Effect of Lack of Jurisdiction, Slaight, 16 Mont. L. Rev. 54 (Spring 1955).

3-1-401. Powers of judges out of court.

Collateral References

Judges *key* 27.

48A C.J.S. Judges §58.

3-1-402. Powers of judicial officers as to conduct of proceedings.

Case Notes

Interruption of Closed Judicial Hearing — Reporter Liable for Contempt: When a probation revocation hearing was properly closed, a reporter who reentered the courtroom after being ordered by the judge to leave was guilty of contempt and subject to fine. State ex rel. Great Falls Tribune Co., Inc. v. District Court, 238 M 310, 777 P2d 345, 46 St. Rep. 1292 (1989).

Evidence — Witness Called by Judge: There was no merit to contention that due process was denied at suspended sentence revocation hearing when the judge called a witness to the stand to resolve a conflict in pertinent testimony, for a court may on its own motion call witnesses, and the asserted error was waived because it had not been objected to below. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982).

Injunctions Pendente Lite: Where an injunction pendente lite was granted without notice or hearing, after the lapse of a reasonable time it had spent its force, and to the extent that it attempted to restrain beyond a reasonable time, it was void for want of jurisdiction. State ex rel. Cook v. District Court, 105 M 72, 69 P2d 746 (1937), distinguished in State ex rel. McKenzie v. District Court, 111 M 241, 107 P2d 885 (1940).

Collateral References

Judges *key* 24; Oath *key* 2; Witnesses *key* 1.

48A C.J.S. Judges §§55, 59 through 65, 93; 67 C.J.S. Oaths and Affirmations §§5, 6; 98 C.J.S. Witnesses §5.

Validity of searches conducted as condition of entering public premises. 28 ALR 4th 1250.

Montana Justice of the Peace and City Judge Manual, Ch. 9.

3-1-403. Power to punish for contempt.

Case Notes

Criminal Contempt and Contempt of Court Distinguished — District Court Without Jurisdiction to Try Criminal Contempt: Criminal contempt, a misdemeanor crime defined in 45-7-309, is an offense against society prosecuted by the state, whereas contempt of court is a judicial power arising out of Art. VII, sec. 1, Mont. Const., and Title 3 that allows a court to enforce its own judgments and maintain decorum in its proceedings. Thus, while only the District Court could have found the defendant in contempt of court for failure to pay a fine from a criminal proceeding of that court, it lacked jurisdiction to try a misdemeanor criminal contempt action for failure to pay the fine because criminal contempt, like most other misdemeanors, must be brought in Justice's Court. St. v. Abrams, 209 M 508, 680 P2d 585, 41 St. Rep. 871 (1984).

Personal Liability for Official Action Holding One in Contempt: Action against county officials in their personal capacity, arising out of plaintiffs' being held in contempt of court after refusing to leave court upon order of the Justice of the Peace, was properly dismissed as there was no basis for personal liability because the defendants acted in their official capacities only. Stickney v. St., 195 M 415, 636 P2d 860, 38 St. Rep. 1991 (1981).

Law Review Articles

The Increasing Use of the Power of Contempt, Hilts, 32 Mont. L. Rev. 183 (Summer 1971).

Collateral References
Contempt *key* 36.
17 C.J.S. Contempt §§60 through 62.

3-1-404. Taking acknowledgments and affidavits.

Collateral References
Acknowledgment *key* 14 through 19; Affidavits *key* 5.
1 C.J.S. Acknowledgments §41, et seq.; 2A C.J.S. Affidavits §9.

3-1-405. Certificate of authenticity of justice's court's certificate of acknowledgment.

Collateral References
Acknowledgment *key* 28 through 34.
1A C.J.S. Acknowledgments §§60, 68; 14 C.J.S. Chattel Mortgages §82.

Part 5
Contempts

Part Case Notes

Taxpayer Properly Held in Contempt for Refusal to File Income Tax Returns — Privilege Against Self-Incrimination No Defense: Gillispie failed to file an income tax return for 4 years. The District Court ordered her to file the returns or to show cause why she should not be required to file them. At the hearing, the Department of Revenue introduced Gillispie's W-2 forms, which showed that she had made the minimum income necessary to require her to file returns. The District Court ordered her to file the returns or be found in contempt. When Gillispie failed to file the returns, the District Court held her in contempt, and Gillispie filed a petition for a writ of habeas corpus with the Supreme Court. The Supreme Court held that the District Court had jurisdiction to order Gillispie to file the returns and jurisdiction to hold Gillispie in contempt and that the District Court also had sufficient evidence to do so. The Supreme Court also held that Gillispie's privilege against self-incrimination does not justify the outright refusal to file a return and cannot be used as a method of evading payment of lawful taxes. The Supreme Court held that she must demonstrate the specific parts of the returns that would result in self-incrimination. Gillispie v. Sherlock, 279 M 21, 929 P2d 199, 53 St. Rep. 507 (1996).

Contempt Order — Costs Award Proper — Attorney Fees Award Improper: In reviewing a contempt order that arose out of a water rights dispute, the Supreme Court ruled that an award of costs to the irrigation district as the prevailing party was proper, but that an award of attorney fees to the district was not proper. The court reasoned that no applicable statute or contractual provision provided for attorney fees and that the case did not fit within the exceptions recognized in Foy v. Anderson, 175 M 507, 580 P2d 114, 35 St. Rep. 811 (1978). State ex rel. Foss v. District Court, 216 M 327, 701 P2d 342, 42 St. Rep. 845 (1985).

Part Law Review Articles
The Increasing Use of the Power of Contempt, Hilts, 32 Mont. L. Rev. 183 (Summer 1971).

Part Collateral References
Abuse or misuse of contempt power as ground for removal or discipline of judge. 76 ALR 4th 982.

3-1-501. What acts or omissions are contempts — civil and criminal contempt.

Compiler's Comments

2001 Amendment: Chapter 496 inserted (3) explaining the specifics of and the distinctions between civil and criminal contempts; inserted (4) requiring proof beyond a reasonable doubt for criminal contempt and providing that Title 46 procedures apply to a criminal contempt prosecution, except under 3-1-511; and made minor changes in style. Amendment effective October 1, 2001.

1993 Amendment: Chapter 10 in (1)(1), in two places, substituted "lower tribunal" for "inferior tribunal"; and made minor changes in style.

Case Notes

Generally 368
Procedure in Contempt Proceedings 370
Violation of Statute 373
Disobeying Court 373
Interference With Process 375

Disorderly or Insolent Behavior 376
Scandalous, Untruthful, or Critical Statements 376

GENERALLY

DUI Suspension or Revocation Clarified — Law of Case Doctrine and Collateral Estoppel Inapplicable — Contempt Order Refused: Sanders was arrested for a second DUI in a 5-year period and filed an action in District Court seeking review of the facts of the arrest. The District Court and the Supreme Court upheld the arrest and noted that a 6-month suspension of Sanders' license would take place. Later, after the Department of Justice refused to reinstate the license after the 6-month period expired because 61-8-402 applied and required a revocation of Sanders' license for 1 year, Sanders brought a contempt action in the District Court asking that the Department be held in contempt for failure to reinstate his license after expiration of the 6-month period. Sanders argued that the 6-month period had become the law of the case and that the failure of the Department to follow that law was a contempt of the District Court. After reviewing the records of the District Court and its own record in the previous DUI action, the Supreme Court held that the law of the case doctrine was inapplicable. Citing Haines Pipeline Constr., Inc. v. Mont. Power Co., 265 M 282, 876 P2d 632 (1994), and Scott v. Scott, 283 M 169, 939 P2d 998 (1997), the Supreme Court explained that the law of the case doctrine applies only to the rulings of a court that are necessary to the decision and, in the case of the District Court's and Supreme Court's prior ruling in Sanders' DUI conviction, a determination that only a 6-month suspension was required under 61-8-402 was not necessary to either the District Court's or the Supreme Court's prior ruling. Those rulings, the Supreme Court said, concerned only whether the arresting officer had probable cause for the arrest. Thus, the Supreme Court held, the reference to a 6-month suspension in the previous opinions was dicta, there was no law of the case determined concerning the law governing license suspension or revocation, and therefore there could be no contempt for failure to reinstate Sanders' license. The Supreme Court also held that collateral estoppel was likewise inapplicable to require the Department to reinstate the license because collateral estoppel applies only to previously litigated issues and the period of license suspension or revocation of Sanders' license had not been previously litigated. Sanders v. St., 1998 MT 62, 288 M 143, 955 P2d 1356, 55 St. Rep. 272 (1998).

Distinguishing Between Civil and Criminal Contempt: Contempts are neither wholly civil nor wholly criminal, but classification of a contempt as one or the other is crucial, particularly when the person is sentenced to confinement, because the classification determines the procedures that the court must follow. There is nothing inherent in a contemptuous act or refusal to act that classifies it as civil or criminal. Rather, it is the character and purpose of the punishment that the court chooses to impose that serves to distinguish between civil and criminal contempt. If the sanction is intended to force compliance with the court's order, the contempt is properly classified as civil. If the purpose is to punish the contemnor for a specific act and to vindicate the authority of the court, the contempt is criminal. (See 2001 amendment.) Huffine v. District Court, 285 M 104, 945 P2d 927, 54 St. Rep. 1065 (1997).

Necessity of Criminal Charge and Due Process in Contempt Proceeding Resulting in Criminal Penalty: The District Court stated that the purpose of its sentence for contempt for practicing law without a license was to compel performance and that the court was thus acting under 3-1-520, which allows incarceration until performance occurs. However, in reality, the sentence, 30 days in jail, to be suspended upon paying a $500 fine within 10 days, was punishment for past acts. Therefore, the contempt proceeding was properly characterized as criminal rather than civil because a contempt is classified as criminal if the purpose of the sanction imposed is punishment and civil if the purpose of the sanction imposed is to compel compliance with a court order. A criminal contempt proceeding must be under the procedures in Title 46 to ensure that criminal penalties are not imposed without affording the proper protections. The lower court erred by imposing a criminal sentence when no criminal charges were brought under 45-7-309, creating the crime of criminal contempt, and defendant was not afforded the due process that is guaranteed by the state and federal constitutions. (See 2001 amendment.) Huffine v. District Court, 285 M 104, 945 P2d 927, 54 St. Rep. 1065 (1997).

Nonlawyer Filing Brief and Notice of Appearance for Civil Defendant: In the state's action against Brue for an injunction, alleging operation of an unlicensed and unshielded motor vehicle wrecking facility, Huffine filed a notice of appearance as counsel for Brue and a brief in support of the pleadings. Huffine advised the court that it should direct all further correspondence to him, "a private citizen having been designated to act as counsel by and for the Defendant". The actions of Huffine, who was not a licensed attorney, constituted the practice of law without a

license and were a contempt of court. Huffine v. District Court, 285 M 104, 945 P2d 927, 54 St. Rep. 1065 (1997).

Contempt Order in Paternity Suit Upheld: Pedersen initiated a suit against Nordahl to establish that he was the father of her unborn twins and to obtain child support. During discovery, Nordahl stated that he knew of no other person who had had sexual intercourse with Pedersen during the period of the twins' conception. At the trial, when asked by the judge, Nordahl testified that a specific friend had sexual intercourse with Pedersen during the period of conception. On the basis of Nordahl's inconsistent answers, the District Court held him in contempt for a false answer. The Supreme Court ruled that a contempt order in a paternity action is subject to review and that Nordahl's falsehood was a sufficient legal basis for holding him in contempt. In re Pedersen v. Nordahl, 261 M 284, 862 P2d 411, 50 St. Rep. 1338 (1993).

Refusal to Allow Discovery in Criminal Case — Due Process and Standard of Proof — Contempt Upheld: Petitioner, a Yellowstone County Deputy Attorney, was ordered by the District Court in an omnibus hearing to allow discovery of the state witnesses and any written statements they had made. At the time of the hearing, petitioner knew of the existence of a 70-page statement by a drug informant but did not disclose it to the court or to the defendant in a criminal case because petitioner believed it to be "intelligence information" since the affidavit did not mention the defendant in the criminal case by name. Petitioner was held in contempt for failing to turn over the affidavit and petitioned the Supreme Court for a writ of certiorari. The Supreme Court noted that at the District Court hearing on the contempt charge, while the petitioner's supervisors testified that they believed the decision of whether the affidavit was relevant and should therefore be turned over to defense counsel should be made by the District Court, petitioner testified that that decision was for her to make. The Supreme Court also held that petitioner received due process in the form of a show cause hearing and that the standard of proof applicable to the District Court's finding of contempt required the affirmance of that finding unless it was not supported by substantial evidence. Because the Supreme Court found substantial evidence in the transcripts that petitioner refused to recognize the District Court's authority, the Supreme Court affirmed the findings and conclusions and refused to issue the writ. (See 2001 amendment.) State ex rel. O'Connor v. District Court, 245 M 88, 799 P2d 1056, 47 St. Rep. 1844 (1990).

Standard of Review in Contempt Appeal: In reviewing a contempt appeal, the Supreme Court's standard of review is whether substantial evidence supports the judgment of contempt. Marks v. District Court, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989).

Contempt Proceeding Independent of Appeal of Judgment Sought to Be Enforced: A contempt proceeding is entirely independent of the civil action out of which it arose; therefore, the District Court has the authority to enforce its judgment even though an appeal is pending on that judgment. Further, the finding by a District Court Judge that relator was in contempt of an order which that judge had issued a year earlier was proper even though another judge had since been assigned to the proceeding. The power of contempt is to enforce the decorum of the court, not the dignity of any particular judge of the court. State ex rel. Foss v. District Court, 216 M 327, 701 P2d 342, 42 St. Rep. 845 (1985).

Criminal Contempt and Contempt of Court Distinguished — District Court Without Jurisdiction to Try Criminal Contempt: Criminal contempt, a misdemeanor crime defined in 45-7-309, is an offense against society prosecuted by the state, whereas contempt of court is a judicial power arising out of Art. VII, sec. 1, Mont. Const., and Title 3 that allows a court to enforce its own judgments and maintain decorum in its proceedings. Thus, while only the District Court could have found the defendant in contempt of court for failure to pay a fine from a criminal proceeding of that court, it lacked jurisdiction to try a misdemeanor criminal contempt action for failure to pay the fine because criminal contempt, like most other misdemeanors, must be brought in Justice's Court. St. v. Abrams, 209 M 508, 680 P2d 585, 41 St. Rep. 871 (1984).

Contempt Proceeding Independent of Civil Matter: The filing of a notice of appeal to review the propriety of a contempt citation does not divest the District Court of jurisdiction over the underlying civil matter. Contempt proceedings are entirely independent of the civil action from which they arise. McPartlin v. Fransen, 178 M 178, 582 P2d 1255, 35 St. Rep. 1191 (1978), following State ex rel. Enochs v. District Court, 113 M 227, 123 P2d 971 (1942).

Independent Proceeding: A contempt proceeding is entirely independent from the action out of which it arose. State ex rel. Enochs v. District Court, 113 M 227, 123 P2d 971 (1942).

Civil Contempt: A criminal contempt is conduct that is directed against the dignity and authority of the court; a civil contempt consists in failing to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein and is therefore not an offense against the dignity of the court but against the party in whose behalf the violated order is made.

Contempts prosecuted to preserve or restore the rights of private parties are civil and remedial in their nature. Pelletier v. Glacier County, 107 M 221, 82 P2d 595 (1938).

Direct and Constructive Contempt: A direct contempt is an open insult committed in the presence of the court; and a constructive contempt is an act done not in the presence of the court but at a distance that tends to belittle, to degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice. Pelletier v. Glacier County, 107 M 221, 82 P2d 595 (1938).

Criminal Contempt: The enumeration in this section of certain acts as contempts is not exclusive, since other acts constitute contempts by law. State ex rel. Metcalf v. District Court, 52 M 46, 155 P 278 (1916).

Nature of Proceedings: Contempt proceedings are sui generis and have most, if not all, of the characteristics of a criminal case and few, if any, of a civil action. Dunlavey v. Doggett, 38 M 204, 99 P 436 (1909); State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. Harney, 30 M 193, 76 P 10 (1904), distinguished in State ex rel. Nissler v. Donlan, 32 M 256, 80 P 244 (1905).

Inherent Power of Courts: The power to punish for contempt is inherent in the courts of record of this state. Territory v. Murray, 7 M 251, 15 P 145 (1887), distinguished in In re Shannon, 11 M 67, 27 P 352 (1891); State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. Clancy, 30 M 193, 76 P 10 (1904); In re Mettler, 50 M 299, 146 P 747 (1915); State ex rel. Metcalf v. District Court, 52 M 46, 155 P 278 (1916).

PROCEDURE IN CONTEMPT PROCEEDINGS

Petition for Contempt of Court in Tribal Water Rights Case Dismissed: Despite prior holdings in In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073 (1996), and Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244 (1999), that the state does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights, the Department of Natural Resources and Conservation (DNRC) granted a permit for the use of ground water on the Flathead Indian Reservation. The Confederated Salish and Kootenai Tribes, in a petition for original jurisdiction, sought to hold DNRC and the DNRC employees who were involved in the permitting process in contempt of court. The Supreme Court granted respondents' motion to dismiss the petition without prejudice, holding that the matter would more properly be raised in trial court where venue is established so that evidence could be presented and factual issues resolved. Confederated Salish & Kootenai Tribes v. Stults, 2002 MT 280, 312 M 420, 59 P3d 1093 (2002).

Time Bar on Writ of Certiorari to Review Contempt Proceedings: In a case of first impression, the Supreme Court was asked to establish a timeframe within which a petition for review of a contempt order must be filed. The issue was whether the time limitation should come from Title 25, which includes the Montana Rules of Civil Procedure and the Montana Rules of Appellate Procedure, or from Title 27, which prescribes the various statutes of limitation for the commencement of actions. The court noted that there is no appeal, as such, from an order of contempt in a civil proceeding and that the exclusive method of review of civil contempt orders (with certain exceptions) is through a writ of certiorari or writ of review. That review is generally limited to jurisdictional questions and whether evidence supports the contempt. Therefore, the issue of timeliness for filing a petition for a writ of certiorari or review is not a statute of limitations issue, and to mechanically characterize those writs for the review of contempt proceedings as original proceedings governed by the 5-year statute of limitations in 27-2-231 would be to deny the basic nature of appellate review. Further, petitions for writs of certiorari to review contempt proceedings are fundamentally different from other original proceedings commenced in the Supreme Court and from petitions for writs of supervisory control, which do not so much involve appellate review of and a decision on the underlying proceedings as they involve the court dealing with discreet questions of law during the pendency of the underlying proceedings. Because the timeframe in which to file petitions for writs of certiorari to review contempt proceedings is a procedural issue analogous to the procedure for filing a notice of appeal, the Supreme Court held that Rule 72, M.R.Civ.P. (Title 25, ch. 20), Rule 1, M.R.App.P. (Title 25, ch. 21), Rule 17, M.R.App.P., and 27-25-103 require that the timeframe for those petitions be determined by the Montana Rules of Appellate Procedure. Specifically, pursuant to Rule 5, M.R.App.P., a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding. This may not be construed to limit the Supreme Court's power to grant writs of supervisory control or to consider applications for other types of original proceedings. The Supreme Court chose not to

establish a precedent that allows contempt proceedings to be delayed until the underlying cause is resolved. Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), overruling Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in 27-25-102.

Clarification of Family Law Exception to Supreme Court Review of District Court Contempt Orders — When Writ of Certiorari Required — Ancillary Order Exception: Seeking to narrow and clarify the judicially created family law exception to the writ of certiorari requirement of 3-1-523 that was expressly extended to dissolution of marriage contempt proceedings in In re Marriage of Smith, 212 M 223, 686 P2d 912 (1984), and In re Marriage of Sessions, 231 M 437, 753 P2d 1306, 45 St. Rep. 744 (1988), and to balance the exception with the statute and longstanding Montana case law generally allowing no direct appeal from a contempt order unless the writ is granted, the Supreme Court concluded that it would be poor public policy to create circumstances whereby a District Court's contempt powers are diminished in any manner by one party's ability to file a direct appeal that in turn frivolously and needlessly delays that party's compliance with the lower court's judgments and orders. To cover contentious disputes that arise in family law, the court created the ancillary order exception, establishing that the family law direct appeal exception applies only when the judgment appealed from includes an ancillary order, meaning an order that determines the rights of the parties as a result of the contemptuous conduct—all under one judgment, that affects the substantial rights of the parties. The ancillary order may result from the proper exercise of the court's jurisdiction, in which case a writ of certiorari would necessarily be denied. However, a lone contempt order, regardless of the underlying law of the case, cannot be reviewed by the Supreme Court on direct appeal. (See 2001 amendment to 3-1-523.) Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000), followed in In re Marriage of DeLude, 2000 MT 75, 299 M 123, 999 P2d 306, 57 St. Rep. 331 (2000). See also State ex rel. Zosel v. District Court, 56 M 578, 185 P 1112 (1919), and Milanovich v. Milanovich, 200 M 83, 655 P2d 959, 39 St. Rep. 1554 (1982).

Standard for Review of Family Law Contempt Orders — Jurisdiction and Evidence — Family Law Exception Clarified: The standard for review of contempt orders, pursuant to the granting of a writ of certiorari, is, first, to determine whether the court that found contempt acted within its jurisdiction. For a court to have acted within its jurisdiction: (1) it must have cognizance of the subject matter; (2) it must have presence of the proper parties; and (3) its action must be invoked by proper pleadings and the judgment must be within the issues raised. A court lacks or exceeds jurisdiction by any act that exceeds the defined power of the court, whether that power is defined by constitutional provision, statute, or court rule or under the doctrine of stare decisis. The second part of the standard for review of contempt orders is to determine whether substantial evidence exists to support the court's findings. The family law exception relevant to review on direct appeal of a District Court judgment and orders made in cases of contempt is subject to the same standard of review. (See 2001 amendment to 3-1-523.) Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000), following State ex rel. Porter v. First Judicial District, 123 M 447, 215 P2d 279 (1950), and Kauffman v. District Court, 1998 MT 239, 291 M 122, 966 P2d 715, 55 St. Rep. 1001 (1998), and followed in In re Marriage of Coward, 2000 MT 128, 300 M 1, 2 P3d 822, 57 St. Rep. 531 (2000). See also In re Marriage of Sullivan, 258 M 531, 853 P2d 1194, 50 St. Rep. 648 (1993).

When Summary Contempt Proceedings Appropriate — Entitlement to Due Process When Instant Action Not Necessary: Regardless of the type of contempt committed, direct or indirect, a court's primary consideration before subjecting a contemnor to summary contempt proceedings must be whether immediate corrective steps are necessary to restore order, maintain dignity and authority of the court, and prevent delay. However, in cases when it is not necessary for a court to take instant action, a contemnor is entitled to a full due process hearing traditionally associated with indirect contempt, a finding that the evidence establishes the contemnor's guilt beyond a reasonable doubt in instances when criminal punishment is a consequence, and a hearing in front of an unbiased court other than the court in which the misconduct occurred. In the present case, an attorney's conduct did not necessitate immediate District Court action, so the Supreme Court remanded the case for a hearing in front of a different judge to ensure the attorney's due process rights. (See 2001 amendment.) Kauffman v. District Court, 1998 MT 239, 291 M 122, 966 P2d 715, 55 St. Rep. 1001 (1998), followed in Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000).

Right of Allocution in Summary Contempt Proceedings: Following the rationale in State ex rel. Smith v. District Court, 210 M 344, 677 P2d 589 (1984), the Supreme Court held that in cases of direct contempt, the right to be heard, or right of allocution, should be afforded the accused

contemnor in a summary contempt proceeding. The right of allocution is particularly strong when contempt is contained in a brief and the contemnor has no notice that the court considers the brief to be contemptuous prior to receiving the court's written order. Before being sentenced, the contemnor should be afforded the opportunity to explain or excuse the written filing. A trial is not required, but the contemnor should be allowed a reasonable opportunity to defend or explain the actions or present arguments in mitigation. Failure to provide for allocution constituted grounds for vacation of sentence and remand for the opportunity for allocution. (See 2001 amendment.) Malee v. District Court, 275 M 72, 911 P2d 831, 53 St. Rep. 44 (1996), following Groppi v. Leslie, 404 US 496, 30 L Ed 2d 632, 92 S Ct 582 (1971), and U.S. v. Lumumba, 741 F2d 12 (2nd Cir. 1984), and followed in Kauffman v. District Court, 1998 MT 239, 291 M 122, 966 P2d 715, 55 St. Rep. 1001 (1998).

Conclusion Regarding Absence of Serious Endangerment in Contempt Proceeding as Error — Substantial Rights Not Affected: At a contempt hearing to determine whether mother fabricated an incident of child sexual abuse in order to deprive father of visitation rights, the District Court entered a conclusion of law regarding the absence of serious endangerment under 40-4-217. That conclusion exceeded the scope of the show cause hearing but did not constitute reversible error because the substantial rights of the mother were not affected, in light of the fact that the contempt ruling was sufficiently supported. Woolf v. Evans, 264 M 480, 872 P2d 777, 51 St. Rep. 355 (1994).

Failure to Stay Contempt Proceedings Until Resolution of Criminal Charge Not Error: Husband never moved to stay contempt proceedings against him and, in fact, consented to proceed, but later contended that the District Court should have acted sua sponte to suspend criminal proceedings pending against him in another state. Proceeding absent objection and with consent was not error. In re Marriage of Prescott, 259 M 293, 856 P2d 229, 50 St. Rep. 801 (1993).

Nine Days Sufficient to Obtain Counsel in Contempt Proceeding: Unless an act constituting contempt occurs in open court, due process requires that the person charged have the right to be represented by counsel. The right to counsel, however, has generally been held to mean that one charged is entitled to a reasonable opportunity to employ counsel. In this case, a period of 9 days was held to be an adequate opportunity to employ counsel. Marks v. District Court, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989). See Lilienthal v. District Court, 200 M 236, 650 P2d 779 (1982), where a 1-day period was held to provide an inadequate opportunity to employ counsel, and In re Marriage of Prescott, 259 M 293, 856 P2d 229, 50 St. Rep. 801 (1993), in which a 7-day period was held sufficient to provide an adequate opportunity to provide counsel. (See 2001 amendment.)

Lack of Sufficient Notice — Opportunity to Obtain Counsel Denied: In an action for contempt (not occurring in open court), notice was received on Thursday to defend the action on the following Monday. The District Court was informed that the person charged with the contempt was unable to be represented because he was unable to reach his attorney on such short notice. The court erred in proceeding with the hearing because the notice did not comport with due process requirements affording a person charged with contempt reasonable opportunity to secure counsel and to defend himself. (See 2001 amendment.) Lilienthal v. District Court, 200 M 236, 650 P2d 779, 39 St. Rep. 1711 (1982).

Jurisdiction to Issue Contempt Order — Service of Witness Subpoena Proper: The subpoena was delivered by the Deputy Sheriff to the relator's secretary who, in turn, showed the relator the subpoena. Because the secretary was over 18 years of age and was not a party to the action, the requirements of this section were fulfilled and the District Court had jurisdiction to issue a contempt order for disobedience to the witness subpoena. There was sufficient evidence to support the finding of contempt. State ex rel. Anderson v. District Court, 188 M 77, 610 P2d 1183, 37 St. Rep. 916 (1980).

Contempt — Disobedience of Court Order — Enforcement: Where an alleged contempt by disobedience of an order of the court occurs during the pendency of an appeal, an action should be instituted in court because a contempt proceeding is entirely independent from the civil action out of which it arose. Myhre v. Myhre, 168 M 521, 548 P2d 1395 (1976).

Disqualification of Judge: District Judge committed error in citing one for direct contempt for attacking his personal integrity in a matter which arose out of past litigation, in presiding at the hearing in which he was personally interested instead of calling in another judge, and in testifying as a witness in his own behalf. (See 2001 amendment.) State ex rel. Moser v. District Court, 116 M 305, 151 P2d 1002 (1944), distinguished in In re Marriage of Prescott, 259 M 293, 856 P2d 229, 50 St. Rep. 801 (1993), in which the District Court offered to testify but never actually took the stand to testify on its behalf.

Review of Proceedings: The only way in which one adjudged guilty of contempt may have the proceedings reviewed by the Supreme Court under sec. 3, Art. VIII, Mont. Const., is by invoking the Writ of Review or, in a proper case, the Writ of Supervisory Control. State ex rel. Burns v. District Court, 83 M 200, 271 P 439 (1928).

Proof of Guilt: Contempt proceedings are criminal in their nature, and the evidence must show that the accused is guilty beyond a reasonable doubt. State ex rel. Nett v. District Court, 72 M 206, 232 P 204 (1925).

Refusal of Process: The District Court may punish a defendant in an action in claim and delivery for contempt notwithstanding that technically it had not acquired jurisdiction over him. State ex rel. Bruce v. District Court, 33 M 359, 83 P 641 (1906).

Constitutional Limitations: A contempt of court is in a sense a public offense, yet it is not one a prosecution for which is exclusively controlled by constitutional limitations circumscribing methods of prosecution of strictly criminal offenses. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. Clancy, 30 M 193, 76 P 10 (1904); State ex rel. Flynn v. District Court, 24 M 33, 60 P 493 (1900).

VIOLATION OF STATUTE

Unauthorized Distribution of Records — Standards for Attorneys: Attorney charged with contempt of court for violating statute prohibiting unauthorized dissemination of material in records of dependent and neglected child proceeding was a licensed professional and an officer of the court and was not subject to the "reasonable man" standard but to a higher standard, one dictated by the nature of his profession. Wyse v. District Court, 195 M 434, 636 P2d 865, 38 St. Rep. 2005 (1981).

Unauthorized Distribution of Records — Defense Barred: Attorney charged with contempt of court for unauthorized dissemination of information in records of dependent and neglected child proceeding, in violation of 41-3-205, could not argue the statute was vague where he admitted that he knew such a statute existed and that a court order was probably needed to obtain the information but did not bother to look up the statute prior to his dissemination. Wyse v. District Court, 195 M 434, 636 P2d 865, 38 St. Rep. 2005 (1981).

DISOBEYING COURT

Fabrication of Child Abuse Allegation to Deny Visitation as Contempt: A District Court's belief that mother fabricated an incident of child sexual abuse in order to deprive father of visitation rights granted pursuant to the dissolution decree, a lawful court order, is a sufficient basis for a contempt ruling necessary to preserve the dignity and authority of the court. The District Court properly considered the credibility of the witnesses and the weight to be given their testimony, which are matters not subject to Supreme Court review. Woolf v. Evans, 264 M 480, 872 P2d 777, 51 St. Rep. 355 (1994).

No Contempt of Court When Judgment Failed to Require or Prohibit Specific Acts — Contempt Order Vacated: Goodover obtained a judgment establishing the proper boundaries of his property near Seeley Lake. Lindey's Inc. then attempted to relitigate those boundaries and appealed. With the appeal pending, a surveyor filed certificates of survey marking the boundaries contrary to the boundaries established in the first judgment. Lindey's was cited for contempt because of this filing. Citing cases from other jurisdictions, the Supreme Court held that there could be no contempt of the first judgment in this instance because that judgment did nothing more than establish the proper boundaries of the property and did not require or prohibit any specific acts by Lindey's. Goodover v. Lindey's Inc., 257 M 38, 847 P2d 699, 50 St. Rep. 150 (1993), followed in Sanders v. St., 1998 MT 62, 288 M 143, 955 P2d 1356, 55 St. Rep. 272 (1998).

No Contempt in Denial of Visitation by Parent — Concern for Child's Health: The trial court properly denied a motion that the mother be held in contempt for denying visitation to the father on several occasions after it found that the mother's denials were based on concerns for the child's health and not a desire to restrict the father's access. In re Marriage of Jacobson, 228 M 458, 743 P2d 1025, 44 St. Rep. 1678 (1987).

Control of Pipeline System Against Court Order as Contempt: Appellant contended that a system of pipelines and culverts installed by agreement to settle a water dispute had engineering and operational shortcomings that became apparent shortly after installation and that his actions in regulating the water supply were efforts to remedy those shortcomings and to protect his property. The trial court, in a judgment nunc pro tunc, had ordered compliance with the agreement, which did not allow appellant any control over the system. Appellant was properly

held in contempt for attempting to control the problems without express authority, in violation of the court order. Walker v. Warner, 228 M 162, 740 P2d 1147, 44 St. Rep. 1424 (1987).

Nonpayment of Child Support as Contempt: A noncustodial parent should not be held in contempt for nonpayment of child support when payments are made directly to the custodial parent and when the location of the custodial parent is concealed. However, when nonpayment occurred both before and after the period of concealment, contempt is proper. In re Marriage of Robbins, 219 M 130, 711 P2d 1347, 42 St. Rep. 1897 (1985).

No Finding of Willful Disobedience of Court Order — Contempt Not Found: The trial court adjusted the property settlement and the support and maintenance payment to allow the respondent to pay debts incurred in his name by the petitioner during a spending spree after separation but before the divorce. The case was remanded because the petitioner was penalized twice the amount of the spending spree. On remand, the court equalized the property distribution and adjusted the support and maintenance payments. There was no mention of the spending spree debts in the second decree. The petitioner is now being sued for the spending spree debts and brought this action seeking a contempt citation for respondent's failure to pay the debts. The Supreme Court affirmed the District Court's holding that the respondent was not in contempt. In re Marriage of Grenfell, 200 M 490, 652 P2d 1170, 39 St. Rep. 1891 (1982).

Personal Liability for Official Action Holding One in Contempt: Action against county officials in their personal capacity, arising out of plaintiffs' being held in contempt of court after refusing to leave court upon order of the Justice of the Peace, was properly dismissed as there was no basis for personal liability because the defendants acted in their official capacities only. Stickney v. St., 195 M 415, 636 P2d 860, 38 St. Rep. 1991 (1981).

Custody Agreement Interpreted as Contract — No Contempt Found Under Joint Custody Agreement: Where the plaintiff and defendant entered into an agreement for the joint custody of their three children and the agreement was incorporated into a decree divorcing the parties, the trial court committed reversible error in finding, upon a later petition by the plaintiff for modification of the divorce decree, that the decree granted custody of the children to the defendant and in holding the plaintiff in contempt for her custody of one of the children. Agreements for the dissolution of marriage are to be interpreted by the law of contracts, and the language of the agreement controls if it is clear and unambiguous. The plaintiff committed no contemptuous act by retaining custody of one child under a joint custody agreement. Quinn v. Quinn, 191 M 133, 622 P2d 230, 38 St. Rep. 93 (1981).

Constructive Contempt: The District Court ordered two defendants to be taken to Warm Springs for mental evaluation. The County Attorney and a Deputy Sheriff were present when the order was made. The County Attorney, who was not acting under a court order, sent the defendants to Malta where other charges were pending. The County Attorney and the Deputy Sheriff were found in contempt of court. The contempt was committed outside the presence of the court and consisted of violating the order to take the defendants to Warm Springs. In constructive contempt, the essence of whether the court's order has been abused is whether the party accused had knowledge of the order. The record in this case supported the contempt holding, as both parties were present when the order was given. In re the Contempt of Graveley and Hammerbacker, 188 M 546, 614 P2d 1033, 37 St. Rep. 1261 (1980), followed in Marks v. District Court, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989).

Contempt — Valid Underlying Order Required: A party cannot be held in contempt for violating an invalid court order, and in order for a collateral attack of a contempt citation to be allowed, it must appear from the record that the underlying order is void. Here, where plaintiff had failed to comply with the statutory requirements to create liens of execution and attachment, a contempt citation based on violation of the Writs of Attachment and Execution was also invalid. Phillips v. Loberg, 186 M 331, 607 P2d 561, 37 St. Rep. 401 (1980).

Disobeying Order Forbidding Public Comment on Prosecutions: The Attorney General was found guilty of contempt under this subsection for a willful, knowing, and deliberate violation of a court order commanding him to cease and desist from all public out-of-court statements that might influence public opinion on pending criminal prosecutions. State ex rel. Angel v. Woodahl, 171 M 13, 555 P2d 501 (1976).

Disobedience of Court Order:

Where the Supreme Court granted an injunction forever restraining and enjoining the State Board of Equalization (now the State Tax Appeal Board) from levying or collecting certain taxes upon oil and gas produced under a lease of Indian land, but the Board believed that a later decision of the Supreme Court of the United States superseded and overruled the former decision and took steps to collect the taxes, the oil company should have proceeded for a finding of

contempt under this section instead of instituting a proceeding for a new injunction. Santa Rita Oil & Gas Co. v. St. Bd. of Equalization, 112 M 224, 114 P2d 521 (1941).

Where an injunction pendente lite was granted without notice or hearing, to the extent that it attempted to restrain beyond a reasonable time, it was void for want of jurisdiction. State ex rel. Cook v. District Court, 105 M 72, 69 P2d 746 (1937), distinguished in State ex rel. McKenzie v. District Court, 111 M 241, 107 P2d 885 (1940).

Where a Writ of Mandate directed a Sheriff to levy upon and sell property on execution, an affidavit presented to the court charging contempt in that the officer had failed and refused to comply with the order was insufficient to meet the requirement that facts constituting the contempt must be alleged. State ex rel. Duggan v. District Court, 65 M 197, 210 P 1062 (1922).

For disobedience of a void order of court, a party cannot be adjudged guilty of contempt. State ex rel. O'Grady v. District Court, 61 M 346, 202 P 575 (1921).

Where a decree determining the relative rights of water users declared that the relator was not entitled to use water, use of a portion of the water constituted, prima facie, a violation of the decree and a contempt of the court. State ex rel. Zosel v. District Court, 56 M 578, 185 P 1112 (1919).

Where one pays out money in good faith to meet the just obligations of creditors and thereby incapacitates himself to obey an order of court, his failure to obey the order is not contempt. State ex rel. McLean v. District Court, 37 M 485, 97 P 841 (1908). See also Nixon v. Nixon, 15 M 6, 37 P 839 (1894), explained in State ex rel. Floch v. District Court, 107 M 185, 81 P2d 692 (1938).

One guilty of a contempt of court by a willful disobedience of an injunction order lawfully issued may be punished under the summary procedure provided for or he may be dealt with under the penal code (now Title 45, MCA). State ex rel. Flynn v. District Court, 24 M 33, 60 P 493 (1900).

Vacation Powers of Judge: Where an order made at a term of court has been disobeyed, the Judge at chambers in vacation has power to punish the same as a contempt. State ex rel. N. Pac. Ry. v. Loud, 24 M 428, 62 P 497 (1900).

INTERFERENCE WITH PROCESS

Failure to Comply With Dissolution Decree — Incarceration for Direct Contempt Proper: As part of the dissolution decree, the wife was ordered to return a quarterhorse and horse trailer to the husband. However, she sold both horse and trailer and used the proceeds for her own purposes, then failed to inform the husband, counsel, the District Court, or the Supreme Court that she had done so, all the while assuring or leading the respective tribunals to believe that the property would not be sold. The wife's conduct clearly fell within the elements of this section regarding deceit or abuse of the process, and the District Court was within its jurisdiction in charging the wife with contempt and sentencing her to 24 hours in the county jail. Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000). See also In re Marriage of Ensign, 227 M 357, 739 P2d 479, 44 St. Rep. 1146 (1987).

Interruption of Closed Judicial Hearing — Reporter Liable for Contempt: When a probation revocation hearing was properly closed, a reporter who reentered the courtroom after being ordered by the judge to leave was guilty of contempt and subject to fine. State ex rel. Great Falls Tribune Co., Inc. v. District Court, 238 M 310, 777 P2d 345, 46 St. Rep. 1292 (1989).

Delivery of Funds Not Deposited in Accordance With Court Order — No Interference With Process or Proceedings: Where the partner (Chilcote) of a contractor (defendant), against whose property the plaintiffs had obtained liens in satisfaction of a judgment requiring the defendant to complete construction of the plaintiffs' property, voluntarily provided the defendant with funds resulting indirectly from the sale of defendant's property after release of the liens and directed the defendant to take the funds to his lawyer in satisfaction of a trust established by court order for the benefit of the plaintiffs and the completion of their construction, the District Court erred in holding Chilcote in contempt of court for paying the funds directly to the defendant rather than to the defendant's lawyer. Although Chilcote knew of the establishment of the trust for the benefit of the plaintiffs' materialmen, he was under no court order to pay the funds to the defendant's lawyer and, upon payment to the defendant, did instruct him to take the money to his lawyer, and instead the defendant left the country. Chilcote therefore was under no order or process of the court and could not even be said to have frustrated any order or process of the court. Walters v. Campeau, 205 M 448, 668 P2d 1054, 40 St. Rep. 1419 (1983). See also Carl v. Chilcote, 255 M 526, 844 P2d 79, 49 St. Rep. 1109 (1992), in which summary judgment for Chilcote was properly granted as a matter of law because he was not named in either of the District Court's earlier orders, nor did the orders require or prohibit any conduct by him.

Corruption of Records:

The offer by defense counsel in a criminal case of a typewritten copy of a false statement did not constitute a contempt or an attempt to falsify court records. State ex rel. Hurley v. District Court, 76 M 222, 246 P 250 (1926).

Any act done for the purpose of corrupting the records of a court of justice, whether successful or not, constitutes an unlawful interference with the proceedings of the court, and when an attorney is the author of the act, he violates the duty enjoined by his position. State ex rel. Coleman v. District Court, 51 M 195, 149 P 973 (1915).

Repetitious Motions: Since a point once saved by exception is saved for all purposes of the case unless thereafter waived, an attorney who persisted in making the motion against the admonition of the court was properly adjudged guilty of contempt. State ex rel. Hurley v. District Court, 76 M 222, 246 P 250 (1926).

Suppression of Evidence: The action of a party in secreting and forcibly keeping in hiding a witness of his adversary until the trial was concluded constituted a contempt of court. Buntin v. Chicago, Milwaukee & St. Paul Ry., 54 M 495, 172 P 330 (1918), distinguished in Bell v. Bell, 133 M 572, 328 P2d 115 (1958).

Withholding of Papers: Where a party litigant serves upon his adversary the original draft of his proposed bill of exceptions instead of a copy thereof, and if by withholding it the settlement of the bill is prevented, such act constitutes an unlawful interference with the trial proceedings and a contempt of court. State ex rel. Thelen v. District Court, 51 M 337, 152 P 475 (1915).

Corruption of Jury: An attempt to corruptly influence a member of a jury panel is punishable as a contempt, irrespective of whether such juror has been actually sworn to try a cause or not. State ex rel. Webb v. District Court, 37 M 191, 95 P 593 (1908).

Resistance to Officer: Resistance of or interference with an officer while endeavoring to take property into his possession is an interference with the proceedings of the court and constitutes a contempt. State ex rel. Bruce v. District Court, 33 M 359, 83 P 641 (1906).

DISORDERLY OR INSOLENT BEHAVIOR

"Disorderly, Contemptuous, or Insolent Behavior Toward the Judge": A lawyer's defiance of a judge's repeated order to sit down while another lawyer was speaking constitutes contempt within the meaning of this section in that the lawyer exhibited "disorderly, contemptuous, or insolent behavior toward the judge while holding the court tending to interrupt the due course of a trial or other judicial proceeding". State ex rel. Smith v. District Court, 210 M 344, 677 P2d 589, 41 St. Rep. 385 (1984), overruling In re Mettler, 50 M 299, 146 P 747 (1915), to the extent Mettler is inconsistent.

SCANDALOUS, UNTRUTHFUL, OR CRITICAL STATEMENTS

False Accusations of Abuse in Child Custody Case — Contempt Charge Proper: The trial court ordered supervised visitation in issuing its decision for joint custody. The mother decided that visitation would endanger the child's health and, without any limiting or restrictive authority, consistently frustrated father's visitation. She also levied false accusations of sexual and physical abuse against father without reasonable justification in a calculated attempt to deprive him of contact with his child and to gain advantage in the dissolution proceedings. Under these circumstances, the trial court properly found mother in contempt. In re Marriage of Dreesbach, 265 M 216, 875 P2d 1018, 51 St. Rep. 374 (1994).

Criticism of Decisions:

Bank president's statement that he was displeased with jury verdict against bank and that jurors could not expect to do business with bank did not constitute contempt, since statement could not have interfered with court proceedings. State ex rel. Polish v. District Court, 156 M 220, 478 P2d 270 (1970).

Criticism of a court's rulings or decisions is not improper and may not be restricted after the cause in which made has been finally disposed of and has ceased to be pending. State ex rel. Moser v. District Court, 116 M 305, 151 P2d 1002 (1944).

Scandalous Publications:

Where contempt was based on scandalous and defamatory allegations concerning the grand jury in pleading, which allegations were immaterial and irrelevant, the truth or falsity of the allegations is immaterial. State ex rel. Porter v. First Judicial District, 123 M 447, 215 P2d 279 (1950).

Neither libel nor slander constitutes contempt unless the attack on the character or the acts of the Judge interferes with the administration of justice by the Judge attacked. State ex rel. Moser v. District Court, 116 M 305, 151 P2d 1002 (1944).

Unauthorized Practice of Law: Where a person without a license to practice law employs all the customary methods to advertise himself as an attorney and counselor-at-law, he is guilty of contempt. In re Bailey, 50 M 365, 146 P 1101 (1915).

Collateral References

Contempt *key* 6 through 26, et seq., and other particular topics; Injunction *key* 216 through 233, et seq., and other particular topics; Witnesses *key* 21 and other particular topics.

17 C.J.S. Contempt §11, et seq.; 43A C.J.S. Injunctions §§285, 313; 98 C.J.S. Witnesses §§53 through 56, 59 through 61.

17 Am. Jur. 2d Contempt §§13, 25, 28.

Holding jurors in contempt under state law. 93 ALR 5th 493.

Compelling testimony of opponent's expert in state court. 66 ALR 4th 213.

Intoxication of witness or attorney as contempt of court. 46 ALR 4th 238.

Failure to rise in state courtroom as constituting criminal contempt. 38 ALR 4th 563.

Failure to co-operate with or obey disciplinary authorities as ground for disciplining attorney—modern cases. 37 ALR 4th 646.

Contempt based on violation of court order where another court has issued contrary order. 36 ALR 4th 978.

Attorney's use of objectionable questions in examination of witness in state judicial proceeding as contempt of court. 31 ALR 4th 1279.

Oral communications insulting to particular state judge, made to third party out of judge's physical presence, as criminal contempt. 30 ALR 4th 155.

Attorney's failure to attend court, or tardiness, as contempt. 13 ALR 4th 122.

Removal by custodial parents of child from jurisdiction in violation of court order as justifying termination, suspension, or reduction of child support payments. 8 ALR 4th 1231.

Attorney's conduct in delaying or obstructing discovery as basis for contempt proceeding. 8 ALR 4th 1181.

Third person: violation of state court order by one other than party as contempt. 7 ALR 4th 893.

Oral court order implementing prior written order or decree as independent basis of charge of contempt within contempt proceedings based on violation of written order. 100 ALR 3d 889.

Acquittal of criminal charges other than contempt as precluding contempt proceedings relating to same transactions. 88 ALR 3d 1089.

Compensation: right of injured party to award of compensatory damages or fine in contempt proceedings. 85 ALR 3d 895.

Compromise and settlement: contempt for violation of compromise and settlement the terms of which were approved by court but not incorporated in court order, decree, or judgment. 84 ALR 3d 1047.

Power of court to impose standard of personal appearance or attire. 73 ALR 3d 353.

Affidavit or motion for disqualification of judge as contempt. 70 ALR 3d 797.

Refusal to answer questions before state grand jury as direct contempt of court. 69 ALR 3d 501.

Conduct of attorney in connection with making objections or taking exceptions as contempt of court. 68 ALR 3d 314.

Addressing allegedly insulting remarks to court during course of trial as contempt. 68 ALR 3d 273.

Assault on attorney as contempt. 61 ALR 3d 500.

Picketing of court or judge as contempt. 58 ALR 3d 1297.

Mortgagor's interference with property subject to order of foreclosure and sale as contempt of court. 54 ALR 3d 1242.

Power of court to control evidence or witnesses going before grand jury. 52 ALR 3d 1316.

Allowance of attorneys' fees in civil contempt proceedings. 43 ALR 3d 793.

Defense of entrapment in contempt proceedings. 41 ALR 3d 418.

Attacks on judiciary as a whole as indirect contempt. 40 ALR 3d 1204.

Attorney's refusal to accept appointment to defend indigent, or to proceed in such defense, as contempt. 36 ALR 3d 1221.

Publication or broadcast, during course of trial, of matter prejudicial to criminal defendant, as contempt. 33 ALR 3d 1116.

Contempt adjudication or conviction as subject to review, other than by appeal or writ of error. 33 ALR 3d 589.

Appealability of contempt adjudication or conviction. 33 ALR 3d 448.

Power of divorce court, after child attained majority, to enforce by contempt proceedings payment of arrears of child support. 32 ALR 3d 888.

Prejudicial effect of holding accused in contempt of court in presence of jury. 29 ALR 3d 1399.

Appealability of acquittal from or dismissal of charge of contempt of court. 24 ALR 3d 650.

Effect of witness' violation of order of exclusion. 14 ALR 3d 16.

Release of information concerning forthcoming or pending trial as ground for contempt proceedings or other disciplinary measures against member of the bar. 11 ALR 3d 1104.

Interference with enforcement of judgment in criminal or juvenile delinquent case as contempt. 8 ALR 3d 657.

Perjury or false swearing as contempt. 89 ALR 2d 1258.

Refusal of expert witness to testify as contempt. 77 ALR 2d 1182, §3 superseded by 66 ALR 4th 213.

Contempt proceedings against prosecution witness for refusal to disclose identity of informer. 76 ALR 2d 306.

Published article or broadcast as direct contempt of court. 69 ALR 2d 676.

Assaulting, threatening, or intimidating witness as contempt of court. 52 ALR 2d 1297.

Privilege against self-incrimination as to testimony before grand jury as affecting contempt proceedings. 38 ALR 2d 239.

Bail jumping after conviction, failure to surrender or to appear for sentencing and the like, as contempt. 34 ALR 2d 1100.

Procuring perjury as contempt. 29 ALR 2d 1157.

Punishment of civil contempt in other than divorce cases by striking pleading or entering default judgment for dismissal against contemner. 14 ALR 2d 580.

Right to punish for contempt for failure to obey court order or decree either beyond power or jurisdiction of court or merely erroneous. 12 ALR 2d 1059.

Enforcement of contract by party to procure insurance on his own life by contempt proceedings. 12 ALR 2d 983.

Courts and officers possessing power to punish for contempt. 8 ALR 1543, supplemented by 54 ALR 318 and 73 ALR 1185.

Refusal to obey court order relating to proposed testimony as constituting criminal contempt under 18 USCS §401(3). 63 ALR Fed. 878.

Bankruptcy Code: violation of automatic stay provisions of 1978 Bankruptcy Code (11 USCS §362) as contempt of court. 57 ALR Fed. 927.

3-1-502. Order refused — subsequent applications prohibited.

Case Notes

Motion Refiled After Suit Transferred to Another County: The suit was originally brought in Roosevelt County. The case was then transferred to Missoula County. A memorandum from the Roosevelt County Judge, which accompanied the transfer, stated that the matters which have been briefed, considered by the court, and ruled upon are the rule and law of the case and that the District Court in Missoula County is bound by the ruling of the transferring court. Disregarding the Judge's opinion, the defendant refiled in the Missoula County District Court motions that had been previously ruled upon in Roosevelt County. Such refiling constitutes a contempt. Hayes v. Aetna Fire Underwriters, 187 M 148, 609 P2d 257, 37 St. Rep. 485 (1980).

Disqualification of Judge: Motion for disqualification of Judge was a flagrant abuse of this section where affidavit was filed 3 weeks subsequent to denial of petition for restoration to capacity and petition for restoration was again filed and oral argument heard on same evidence. Application of Stewart, 163 M 432, 517 P2d 879 (1974).

Pending Motions and Proceedings: This section cannot have application to any motion or proceeding pending for hearing. State ex rel. Working v. District Court, 50 M 435, 147 P 614 (1915).

Restoration of Incompetent: Where a petition for the restoration of an incompetent person to capacity has been denied by one department of the District Court, this section forbids an application to another department of the same court for the release of the incompetent on habeas corpus proceedings. State ex rel. Carroll v. District Court, 50 M 428, 147 P 612 (1915). See Lutey Bros. v. Jackson, 55 M 556, 179 P 459 (1919).

Collateral References

Courts *key* 481; Motions *key* 41, 42.

21 C.J.S. Courts §501; 60 C.J.S. Motions and Orders §39, et seq.

3-1-503. Effect of violation.

Case Notes

Motion Refiled After Suit Transferred to Another County: The suit was originally brought in Roosevelt County. The case was then transferred to Missoula County. A memorandum from the Roosevelt County Judge, which accompanied the transfer, stated that the matters which have been briefed, considered by the court, and ruled upon are the rule and law of the case and that the District Court in Missoula County is bound by the ruling of the transferring court. Disregarding the Judge's opinion, the defendant refiled in the Missoula County District Court motions that had been previously ruled upon in Roosevelt County. Such refiling constitutes a contempt. Hayes v. Aetna Fire Underwriters, 187 M 148, 609 P2d 257, 37 St. Rep. 485 (1980).

Frivolous Appeal: Where attorney specified as error in his appellate brief in a second action the same point raised in his complaint in a previous action involving the same parties, the appeal was frivolous and damages were assessed in favor of the respondents. Weinheimer v. Scott, 143 M 243, 388 P2d 790 (1963).

3-1-504. Reentry on property after eviction.

Case Notes

Rights Not Adjudicated: Neither a contempt proceeding nor a Writ of Possession is a proper remedy to restore the plaintiff in an ejectment suit to the possession of premises adjudged to belong to him. Baker v. Butte Water Co., 40 M 583, 107 P 819 (1910).

3-1-511. Procedure — contempt committed in presence of court.

Compiler's Comments

2001 Amendment: Chapter 496 in first sentence inserted "and the contemptuous conduct requires immediate action in order to restore order, maintain the dignity or authority of the court, or prevent delay" and inserted third and fourth sentences requiring the person to be informed of the contempt and given an opportunity to defend before an order may be issued and providing for a fine, imprisonment, or both, and for reasonable conditions or restrictions on the person; and made minor changes in style. Amendment effective October 1, 2001.

Case Notes

Failure to Comply With Dissolution Decree — Incarceration for Direct Contempt Proper: As part of the dissolution decree, the wife was ordered to return a quarterhorse and horse trailer to the husband. However, she sold both horse and trailer and used the proceeds for her own purposes, then failed to inform the husband, counsel, the District Court, or the Supreme Court that she had done so, all the while assuring or leading the respective tribunals to believe that the property would not be sold. The wife's conduct clearly fell within the elements of 3-1-501 regarding deceit or abuse of the process, and the District Court was within its jurisdiction in charging the wife with contempt and sentencing her to 24 hours in the county jail. Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000). See also In re Marriage of Ensign, 227 M 357, 739 P2d 479, 44 St. Rep. 1146 (1987).

Standard for Review of Family Law Contempt Orders — Jurisdiction and Evidence — Family Law Exception Clarified: The standard for review of contempt orders, pursuant to the granting of a writ of certiorari, is, first, to determine whether the court that found contempt acted within its jurisdiction. For a court to have acted within its jurisdiction: (1) it must have cognizance of the subject matter; (2) it must have presence of the proper parties; and (3) its action must be invoked by proper pleadings and the judgment must be within the issues raised. A court lacks or exceeds jurisdiction by any act that exceeds the defined power of the court, whether that power is defined by constitutional provision, statute, or court rule or under the doctrine of stare decisis. The second part of the standard for review of contempt orders is to determine whether substantial evidence exists to support the court's findings. The family law exception relevant to review on direct appeal of a District Court judgment and orders made in cases of contempt is subject to the same standard of review. (See 2001 amendment to 3-1-523.) Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000), following State ex rel. Porter v. First Judicial District, 123 M 447, 215 P2d 279 (1950), and Kauffman v. District Court, 1998 MT 239, 291 M 122, 966 P2d 715, 55 St. Rep. 1001 (1998), and followed in In re Marriage of Coward, 2000 MT 128, 300 M 1, 2 P3d 822, 57 St. Rep. 531 (2000). See also In re Marriage of Sullivan, 258 M 531, 853 P2d 1194, 50 St. Rep. 648 (1993).

When Summary Contempt Proceedings Appropriate — Entitlement to Due Process When Instant Action Not Necessary: Regardless of the type of contempt committed, direct or indirect, a court's primary consideration before subjecting a contemnor to summary contempt proceedings

must be whether immediate corrective steps are necessary to restore order, maintain dignity and authority of the court, and prevent delay. However, in cases when it is not necessary for a court to take instant action, a contemnor is entitled to a full due process hearing traditionally associated with indirect contempt, a finding that the evidence establishes the contemnor's guilt beyond a reasonable doubt in instances when criminal punishment is a consequence, and a hearing in front of an unbiased court other than the court in which the misconduct occurred. In the present case, an attorney's conduct did not necessitate immediate District Court action, so the Supreme Court remanded the case for a hearing in front of a different judge to ensure the attorney's due process rights. (See 2001 amendment.) Kauffman v. District Court, 1998 MT 239, 291 M 122, 966 P2d 715, 55 St. Rep. 1001 (1998), followed in Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000).

Application of Both Sanctions Under This Part for Same Contempt Prohibited: The sanctions in 3-1-519 (now repealed) and 3-1-520 may not both be imposed for the same contempt. Huffine v. District Court, 285 M 104, 945 P2d 927, 54 St. Rep. 1065 (1997).

Distinguishing Between Civil and Criminal Contempt: Contempts are neither wholly civil nor wholly criminal, but classification of a contempt as one or the other is crucial, particularly when the person is sentenced to confinement, because the classification determines the procedures that the court must follow. There is nothing inherent in a contemptuous act or refusal to act that classifies it as civil or criminal. Rather, it is the character and purpose of the punishment that the court chooses to impose that serves to distinguish between civil and criminal contempt. If the sanction is intended to force compliance with the court's order, the contempt is properly classified as civil. If the purpose is to punish the contemnor for a specific act and to vindicate the authority of the court, the contempt is criminal. Huffine v. District Court, 285 M 104, 945 P2d 927, 54 St. Rep. 1065 (1997).

Necessity of Criminal Charge and Due Process in Contempt Proceeding Resulting in Criminal Penalty: The District Court stated that the purpose of its sentence for contempt for practicing law without a license was to compel performance and that the court was thus acting under 3-1-520, which allows incarceration until performance occurs. However, in reality, the sentence, 30 days in jail, to be suspended upon paying a $500 fine within 10 days, was punishment for past acts. Therefore, the contempt proceeding was properly characterized as criminal rather than civil because a contempt is classified as criminal if the purpose of the sanction imposed is punishment and civil if the purpose of the sanction imposed is to compel compliance with a court order. A criminal contempt proceeding must be under the procedures in Title 46 to ensure that criminal penalties are not imposed without affording the proper protections. The lower court erred by imposing a criminal sentence when no criminal charges were brought under 45-7-309, creating the crime of criminal contempt, and defendant was not afforded the due process that is guaranteed by the state and federal constitutions. (See 2001 amendment to 3-1-501, 3-1-511, and 3-1-518.) Huffine v. District Court, 285 M 104, 945 P2d 927, 54 St. Rep. 1065 (1997).

Right of Allocution in Summary Contempt Proceedings: Following the rationale in State ex rel. Smith v. District Court, 210 M 344, 677 P2d 589 (1984), the Supreme Court held that in cases of direct contempt, the right to be heard, or right of allocution, should be afforded the accused contemnor in a summary contempt proceeding. The right of allocution is particularly strong when contempt is contained in a brief and the contemnor has no notice that the court considers the brief to be contemptuous prior to receiving the court's written order. Before being sentenced, the contemnor should be afforded the opportunity to explain or excuse the written filing. A trial is not required, but the contemnor should be allowed a reasonable opportunity to defend or explain the actions or present arguments in mitigation. Failure to provide for allocution constituted grounds for vacation of sentence and remand for the opportunity for allocution. (See 2001 amendment.) Malee v. District Court, 275 M 72, 911 P2d 831, 53 St. Rep. 44 (1996), following Groppi v. Leslie, 404 US 496, 30 L Ed 2d 632, 92 S Ct 582 (1971), and U.S. v. Lumumba, 741 F2d 12 (2nd Cir. 1984), and followed in Kauffman v. District Court, 1998 MT 239, 291 M 122, 966 P2d 715, 55 St. Rep. 1001 (1998).

Contempt Punishment Imposing Counseling Costs Affirmed: After finding mother in contempt for consistently frustrating father's visitation and for levying false accusations of sexual and physical abuse against father without reasonable justification, the District Court required her to seek ongoing professional counseling and to bear the costs of that counseling. Mother contended that requiring her to pay counseling costs amounted to an open-ended blank check in contravention of the statutory limitation of $500 on financial punishment for contempt. However, a District Court has equitable powers to punish a party for contempt beyond the confines of 3-1-519 (now repealed). The District Court was warranted in ordering the 2-year therapy requirement because: (1) the evidence supported the finding of contempt; (2) the court

acted within its jurisdiction and equitable powers when imposing the punishment; and (3) contempt penalties imposed by the court had largely been previously imposed through separate findings. In re Marriage of Dreesbach, 265 M 216, 875 P2d 1018, 51 St. Rep. 374 (1994).

Nature of Contempt in Criminal Proceedings: Defendant asserted "unlawful predicate for contempt without jury". The court responded that contempt may be punished summarily and that contempt orders are not appealable. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

Contempt Order — Costs Award Proper — Attorney Fees Award Improper: In reviewing a contempt order that arose out of a water rights dispute, the Supreme Court ruled that an award of costs to the irrigation district as the prevailing party was proper, but that an award of attorney fees to the district was not proper. The court reasoned that no applicable statute or contractual provision provided for attorney fees and that the case did not fit within the exceptions recognized in Foy v. Anderson, 175 M 507, 580 P2d 114, 35 St. Rep. 811 (1978). State ex rel. Foss v. District Court, 216 M 327, 701 P2d 342, 42 St. Rep. 845 (1985).

Contemnor to Be Given Opportunity to Explain Conduct: In addition to this section's requirement of an order setting forth the facts of the contempt, the contemnor must be granted an opportunity to explain or excuse himself. However, the opportunity to be heard need not arise in a formal hearing, separate and distinct from the proceeding in which the contempt arose. (See 2001 amendment.) State ex rel. Smith v. District Court, 210 M 344, 677 P2d 589, 41 St. Rep. 385 (1984).

Compensatory Damages Not Authorized: Compensatory damages are not expressly authorized by law under contempt actions. Section 3-1-519 (now repealed) provides the exclusive monetary punishment a court may impose for contempt. Lilienthal v. District Court, 200 M 236, 650 P2d 779, 39 St. Rep. 1711 (1982).

Compensation Not Allowed for Unnecessary or Useless Services — Judge's Discretion: Judge did not abuse discretion in disallowing attorney's claim for services rendered for indigent defendant for time spent asking educational questions on voir dire over repeated protest from the court. Judge has discretion to disallow compensation for substantial time consumed in improper, unnecessary,or useless services. It was, however, an abuse of discretion to reduce compensation for other attorney's wasted time. State ex rel. Stephens v. District Court, 170 M 22, 550 P2d 385 (1976).

Excessive Penalty:

District Court's sentence of 10 days' imprisonment for contempt exceeded jurisdiction of such court (at the time, 5 days was the maximum allowable prison term). Fuchs v. District Court, 153 M 485, 458 P2d 776 (1969).

A judgment pronounced from the bench and imposing an excessive term of imprisonment was harmless error when corrected within the period of a stay of execution granted contemporaneously. Niewoehner v. District Court, 142 M 1, 381 P2d 464 (1963).

Under 3-1-519 (now repealed), one found guilty of contempt of court may be fined and ordered imprisoned in the county jail not exceeding 5 days, a longer term not being permissible except where it is sought to compel payment of the fine or the performance of a required act still in his power.

Imprisonment to Enforce Fine:

The payment of a fine imposed upon one adjudged guilty of contempt may be enforced by imprisonment, and imprisonment in excess of 5 days (under 3-1-519, now repealed) is permissible to compel such payment. State ex rel. Lay v. District Court, 122 M 61, 198 P2d 761 (1948).

Judgment of the District Court in a contempt proceeding arising out of the failure of defendant husband to pay alimony was proper. State ex rel. Murphy v. District Court, 99 M 209, 41 P2d 1113 (1935).

An attorney found guilty of contempt was properly subject to punishment by fine and imprisonment in the county jail until the fine was paid. State ex rel. Coleman v. District Court, 51 M 195, 149 P 973 (1915).

Purge Order: A purge order contained in a judgment for contempt is not coercive and beyond the jurisdiction of the court, since it is for the defendant's benefit. State ex rel. Lay v. District Court, 122 M 61, 198 P2d 761 (1948).

Privileges Denied for Contempt:

While the general rule is that a litigant in contempt of court will be denied any favors or privileges which the court may extend to litigants, it is limited in its application to the proceedings in the cause in which the contempt occurred. Davenport v. Davenport, 69 M 405, 222 P 422 (1924).

On the hearing of an order to show cause why an injunction should not issue, it was error to reject defendant's evidence and issue the injunction because defendant was in contempt for violating a restraining order. Such action on the part of the court was a denial of due process of law. Harley v. Mont. Ore Purchasing Co., 27 M 388, 71 P 407 (1903). See also King Tonopah Min. Co. v. Lynch, 232 F 485 (D.C. Nev. 1916).

Expenses of Proceedings: In the absence of statute on the subject, attorney's fees and other expenses incurred by the owner of a water right in instituting and prosecuting to a successful determination a contempt proceeding for the violation of a decree of court settling his rights are not recoverable as items in an action against the contemner. Dunlavey v. Doggett, 38 M 204, 99 P 436 (1909), distinguished in Smith v. Fergus County, 98 M 377, 39 P2d 193 (1934).

Indemnity for Private Wrong: Contempt proceedings do not furnish a remedy available to the plaintiff for the redress or prevention of a private wrong. Dunlavey v. Doggett, 38 M 204, 99 P 436 (1909).

Improper Penalty: An injunction to restrain a party from working in a mine, imposed as a punishment for an alleged contempt, is void because it attempts to denounce a penalty for a contempt not warranted by 3-1-519 (now repealed). In re Sutton, 26 M 557, 71 P 1131 (1902).

Collateral References

Contempt *key* 70, et seq.; Injunction *key* 230, 232, and other particular topics.

17 C.J.S. Contempt §107, et seq.; 43A C.J.S. Injunctions §§308 through 313.

17 Am. Jur. 2d Contempt §104, et seq.

Disqualification of judge in state proceedings to punish contempt against or involving himself in open court and in his actual presence. 37 ALR 4th 1004.

Allowance of attorneys' fees in civil contempt proceedings. 43 ALR 3d 793.

Punishment for contempt by perjury or false swearing. 89 ALR 2d 1304 through 1324.

Allowance of attorney's fees as a fine in contempt proceedings. 55 ALR 2d 979, §2 superseded by 43 ALR 3d 793.

3-1-512. Procedure — contempt not in presence of the court.

Case Notes

Contemptuous Pleading or Brief Presented to Unseated Court — Direct Contempt: Malee submitted a brief to the District Court, while the court was not sitting, containing a contemptuous comment about opposing counsel. No accusatory affidavit was filed, nor was a hearing held on the matter. In deciding whether the comment constituted indirect or direct contempt, the Supreme Court held that because the contemptuous pleadings and briefs were in the immediate view and presence of the court or judge at chambers, they were considered direct contempt. The District Court had no need of testimony from third parties, an affidavit of facts, a confession from the contemnor, or other extrinsic evidence to gain knowledge of the offense. A judge's sanctioning authority is not limited to what is seen or heard in person. Contemptuous tactics and arguments can be as easily made on paper as in open court. Malee v. District Court, 275 M 72, 911 P2d 831, 53 St. Rep. 44 (1996), following Brownell v. McCormick, 7 M 12, 14 P 651 (1887), and Kunik v. Racine County, Wis., 946 F2d 1574 (7th Cir. 1991), and overruling contrary holdings in State ex rel. Stagg v. District Court, 76 M 495, 248 P 213 (1926), Porter v. District Court, 123 M 447, 215 P2d 279 (1950), and State ex rel. Kidder v. District Court, 155 M 442, 472 P2d 1008 (1970).

Nine Days Sufficient to Obtain Counsel in Contempt Proceeding: Unless an act constituting contempt occurs in open court, due process requires that the person charged have the right to be represented by counsel. The right to counsel, however, has generally been held to mean that one charged is entitled to a reasonable opportunity to employ counsel. In this case, a period of 9 days was held to be an adequate opportunity to employ counsel. Marks v. District Court, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989). See Lilienthal v. District Court, 200 M 236, 650 P2d 779 (1982), where a 1-day period was held to provide an inadequate opportunity to employ counsel, and In re Marriage of Prescott, 259 M 293, 856 P2d 229, 50 St. Rep. 801 (1993), in which a 7-day period was held sufficient to provide an adequate opportunity to provide counsel.

Contempt — Affidavit to State Facts: Plaintiff was found guilty of contempt for refusing to allow the wife her court-ordered visitation for Christmas of 1979 and the summer of 1981. The husband contended on appeal that it was error to hold him in contempt for the 1979 violation because it was not mentioned in the affidavit she presented to the court. The Supreme Court agreed, holding that where the affidavit does not include facts constituting contempt, a court is without jurisdiction to address that incident. The 1981 violation was addressed in the affidavit, however, and the District Court found the wife's testimony to be the most credible. By disobeying

a lawful order of the court regarding visitation, the husband committed an act of contempt and could be punished therefor. In re Marriage of Milanovich, 201 M 332, 655 P2d 963, 39 St. Rep. 2146 (1982).

Lack of Sufficient Notice — Opportunity to Obtain Counsel Denied: In an action for contempt (not occurring in open court), notice was received on Thursday to defend the action on the following Monday. The District Court was informed that the person charged with the contempt was unable to be represented because he was unable to reach his attorney on such short notice. The court erred in proceeding with the hearing because the notice did not comport with due process requirements affording a person charged with contempt reasonable opportunity to secure counsel and to defend himself. Lilienthal v. District Court, 200 M 236, 650 P2d 779, 39 St. Rep. 1711 (1982).

Constructive Contempt: The District Court ordered two defendants to be taken to Warm Springs for mental evaluation. The County Attorney and a Deputy Sheriff were present when the order was made. The County Attorney, who was not acting under a court order, sent the defendants to Malta where other charges were pending. The County Attorney and the Deputy Sheriff were found in contempt of court. The contempt was committed outside the presence of the court and consisted of violating the order to take the defendants to Warm Springs. In constructive contempt, the essence of whether the court's order has been abused is whether the party accused had knowledge of the order. The record in this case supported the contempt holding, as both parties were present when the order was given. In re the Contempt of Graveley and Hammerbacker, 188 M 546, 614 P2d 1033, 37 St. Rep. 1261 (1980), followed in Marks v. District Court, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989).

Recital of Facts in Order: Order of contempt that failed to specify facts that constituted contempt before the court was deficient under this section, since it did not provide opportunity for appellate review. State ex rel. Shea v. District Court, 156 M 266, 479 P2d 281 (1971).

Affidavit Required:

The filing of a complaint in a civil action containing immaterial and irrelevant allegations of scandalous and defamatory matter concerning the lives and characters of the members of the grand jury constituted indirect contempt. State ex rel. Porter v. First Judicial District, 123 M 447, 215 P2d 279 (1950).

In the case of an "indirect" contempt—one committed without the immediate view and presence of the court—the court or judge acquires jurisdiction only by the filing of an affidavit or statement of the facts. State ex rel. Stagg v. District Court, 76 M 495, 248 P 213 (1926).

In all contempt proceedings not committed in the court's immediate presence, an affidavit is essential. State ex rel. Gemmell v. Clancy, 24 M 359, 61 P 987 (1900).

Sufficiency of Affidavit:

County Attorney's accusatory affidavit was not insufficient because made on information and belief. State ex rel. Porter v. First Judicial District, 123 M 447, 215 P2d 279 (1950).

Affidavit charging contempt was not insufficient by reason of the fact that some of its averments were made on information and belief or some of the violations trivial. State ex rel. Young v. District Court, 102 M 487, 58 P2d 1243 (1936).

A proceeding in contempt must be instituted by affidavit which must state facts sufficient to disclose that a contempt has been committed, no intendments or presumptions in favor of its averments being permissible. State ex rel. Bacorn v. District Court, 73 M 297, 236 P 553 (1925).

A general statement substantial enough to justify a conclusive inference of knowledge and intent in the contemner at the time it was alleged he willfully attempted to influence jurors was sufficient to confer jurisdiction upon the District Court. State ex rel. Webb v. District Court, 37 M 191, 95 P 593 (1908).

Review of Proceedings:

If in adjudging one guilty of contempt the court acts without jurisdiction, the proceedings may be reviewed on certiorari; and in cases where the court acts within jurisdiction but in a manner so arbitrary and unlawful as to be tyrannical, the Supreme Court may intervene by virtue of its constitutional power of supervisory control over inferior courts. State ex rel. Young v. District Court, 102 M 487, 58 P2d 1243 (1936).

On certiorari to review an order of the District Court adjudging one guilty of a direct contempt, the Supreme Court may not look beyond the order adjudging the contemner guilty, which constitutes the record of the case, to determine from the facts whether the judgment was proper. State ex rel. Breen v. District Court, 34 M 107, 85 P 870 (1906).

Discretion of Court: The power of the District Court to punish as contempt disobedience of a lawful order or judgment is not arbitrary; it must be exercised only when the necessity arises and

then with intelligent discretion. State ex rel. Middleton v. District Court, 85 M 215, 278 P 122 (1929).

Findings of Fact: While in a proceeding for constructive contempt the affidavit, the process, the answer of the contemner, and the evidence, together with the judgment, constitute the record, the court should make findings of fact in its order of commitment showing as a matter of law that the accused is in fact guilty of contempt. State ex rel. Burns v. District Court, 83 M 200, 271 P 439 (1928).

Recital of Facts in Order:

Where the trial court having had under consideration the question of a direct contempt recites the facts as occurring in its immediate view or presence, the reviewing court cannot look to the counterstatement of the person found guilty but must rely upon the recitation of the court. State ex rel. Hurley v. District Court, 76 M 222, 246 P 250 (1926).

The participial expression "as occurring" is equivalent to "which occurred" and does not merely relate to time and place. State ex rel. Rankin v. District Court, 58 M 276, 191 P 772 (1920).

An order declaring a person guilty of a direct contempt must recite the facts upon which the conclusion that the contemner is guilty is based. State ex rel. Breen v. District Court, 34 M 107, 85 P 870 (1906), distinguished in State ex rel. Cheadle v. District Court, 92 M 94, 10 P2d 586 (1932).

Hearing Required:

A direct contempt may be punished summarily, but a constructive contempt can be punished only after a hearing upon an affidavit showing the facts constituting the contempt and the answer thereto. In re Mettler, 50 M 299, 146 P 747 (1915), distinguished in State ex rel. Cheadle v. District Court, 92 M 94, 10 P2d 586 (1932).

It was improper to refuse to allow relator to move to dissolve a temporary injunction or to be heard in opposition to the motion to continue it on the ground that he was in contempt for violating the injunction when no contempt proceedings had been instituted. State ex rel. Gemmell v. Clancy, 24 M 359, 61 P 987 (1900). See also Harley v. Mont. Ore Purchasing Co., 27 M 388, 71 P 407 (1903).

Notice of Proceedings: In cases where the alleged contempt consists in the violation by a party of an order made in a civil suit still pending, such party is entitled to a separate and distinct notice of the contempt proceedings in order that he may be afforded an opportunity to prepare his defense. State ex rel. Gemmell v. Clancy, 24 M 359, 61 P 987 (1900).

Collateral References

Contempt *key* 53.

17 C.J.S. Contempt §75, et seq.

Summary proceedings for contempt by perjury or false swearing. 89 ALR 2d 1304 through 1322.

Use of affidavits to establish contempt. 79 ALR 2d 657.

Necessity of affidavit or sworn statement as foundation for constructive contempt. 41 ALR 2d 1263.

3-1-513. Warrant — statement of charge.

Compiler's Comments

2001 Amendment: Chapter 496 in first sentence after "warrant" deleted "of attachment", after "charged to" inserted "the court to", and at end substituted "the charge" for "or, without a previous arrest, a warrant of commitment may, upon notice or upon an order to show cause, be granted. No warrant of commitment can be issued without such previous attachment to answer or notice or order to show cause" and inserted second and third sentences requiring an adequate statement of the charge to accompany the warrant and providing for a hearing under 3-1-518. Amendment effective October 1, 2001.

Case Notes

Lack of Sufficient Notice — Opportunity to Obtain Counsel Denied: In an action for contempt (not occurring in open court), notice was received on Thursday to defend the action on the following Monday. The District Court was informed that the person charged with the contempt was unable to be represented because he was unable to reach his attorney on such short notice. The court erred in proceeding with the hearing because the notice did not comport with due process requirements affording a person charged with contempt reasonable opportunity to secure counsel and to defend himself. (See 2001 amendment.) Lilienthal v. District Court, 200 M 236, 650 P2d 779, 39 St. Rep. 1711 (1982).

Collateral References

Contempt *key* 55, et seq.; Injunction *key* 230(1), (2), and other particular topics.

17 C.J.S. Contempt §§78 through 84.

17 Am. Jur. 2d Contempt §66, et seq.

Proceeding on notice and hearing for contempt by perjury or false swearing. 89 ALR 2d 1322 through 1324.

Sufficiency of notice to, or service upon, contemner's attorney in civil contempt proceeding. 60 ALR 2d 1244.

3-1-516. Bail bond — form and conditions of.

Case Notes

Conflicting Evidence Whether Indemnity Note on Bail Bond Considered Valid Contract — District Court's Finding Not Clearly Erroneous: Rohrich signed an indemnity agreement with Anderson, who owned a bail bond business, to secure a bond posted for the release of Brummer. When signing the indemnity note, Rohrich did not question Anderson about the note and signed it without discussion regarding the effect of his signature. The note provided that should Anderson become liable for the forfeiture of the bail bond, the indemnitor would indemnify Anderson, with interest, and also pay reasonable attorney fees in the event that a suit was necessary to collect the amount owed. Brummer subsequently fled the state, and the County Attorney moved for bail forfeiture. The District Court ordered that judgment in the full amount of bail be entered against Brummer and against Anderson as the surety. After Anderson satisfied the judgment, he waited to see if Rohrich would indemnify him, but Rohrich did not do so; therefore, Anderson brought an action to enforce the indemnity note. At trial, Rohrich maintained that the note was blank when he signed it and that therefore he did not sign a valid contract. Rohrich also contended that the date on the note, which was 1 year after Brummer was released from prison, was further evidence that Anderson did not complete the terms of the note prior to Rohrich's signature. Anderson testified that the note did contain all essential terms when Rohrich signed it, and that testimony was affirmed by Anderson's assistant. Anderson also testified that the date was a typographical error and that as a matter of business practice, he would not provide an indemnitor with a blank note. Further, Rohrich was familiar with indemnity notes, having signed notes on three prior occasions with Anderson, including two that he signed for himself. After weighing the conflicting evidence, the District Court ordered Rohrich to pay the full amount, plus attorney fees, interest, and costs. Rohrich appealed, and the Supreme Court affirmed, paying substantial deference to the trial court because as the factfinder, the trial court was in the best position to evaluate the testimony and judge the credibility of the witnesses. Anderson v. Rohrich, 2001 MT 106, 305 M 274, 26 P3d 99 (2001).

3-1-518. Hearing on contempt not committed in immediate view and presence of court or judge at chambers.

Compiler's Comments

2001 Amendment: Chapter 496 in (1) in first sentence inserted "for a contempt not committed in the immediate view and presence of the court or judge at chambers" and substituted "shall schedule and hold a hearing on" for "must hear" and inserted second sentence forbidding the complaining judge from being the one who investigates and hears the charge unless the contempt arose from violation of an order of the complaining judge issued after a hearing on the merits and the complaining judge can impartially address the contempt; inserted (2) requiring a reasonable opportunity for the person to obtain counsel and prepare a defense and granting the right to testify and call witnesses; and made minor changes in style. Amendment effective October 1, 2001.

Case Notes

Lack of Sufficient Notice — Opportunity to Obtain Counsel Denied: In an action for contempt (not occurring in open court), notice was received on Thursday to defend the action on the following Monday. The District Court was informed that the person charged with the contempt was unable to be represented because he was unable to reach his attorney on such short notice. The court erred in proceeding with the hearing because the notice did not comport with due process requirements affording a person charged with contempt reasonable opportunity to secure counsel and to defend himself. (See 2001 amendment.) Lilienthal v. District Court, 200 M 236, 650 P2d 779, 39 St. Rep. 1711 (1982).

Burden of Proof: In action for contempt for failure to pay alimony pendente lite, it is not necessary for the wife to show the husband's ability to pay, but lack of ability to perform is a

defense to be advanced and to be proved by the accused. State ex rel. Houtchens v. District Court, 122 M 76, 199 P2d 272 (1948).

Defenses Permitted: A person charged with constructive contempt may make answer by affidavit, by a verified answer, or by a verbal plea of not guilty, and on the hearing should be permitted to present every defense to show that he is not guilty of the contempt charged. State ex rel. Nett v. District Court, 72 M 206, 232 P 204 (1925).

Collateral References

Contempt *key* 61, et seq.; Injunction *key* 230(1) and other particular topics.

17 C.J.S. Contempt §§92 through 95.

Admissibility, in contempt proceeding against witness, of evidence of incriminating nature of question as to which he invoked privilege against self incrimination. 88 ALR 2d 463.

Pleading in contempt proceedings as to ability to comply with order for payment of alimony or child support. 53 ALR 2d 591.

3-1-520. Penalty to compel performance.

Compiler's Comments

2001 Amendment: Chapter 496 in first sentence substituted "sanction imposed for a contempt seeks to compel the contemnor to perform" for "contempt consists in the omission to perform", and substituted "incarcerated, subjected to a fine in an amount not to exceed $500, or both" for "imprisoned"; and made minor changes in style. Amendment effective October 1, 2001.

Case Notes

Application of Both Sanctions Under This Part for Same Contempt Prohibited: The sanctions in 3-1-519 (now repealed) and this section may not both be imposed for the same contempt. Huffine v. District Court, 285 M 104, 945 P2d 927, 54 St. Rep. 1065 (1997).

Distinguishing Between Civil and Criminal Contempt: Contempts are neither wholly civil nor wholly criminal, but classification of a contempt as one or the other is crucial, particularly when the person is sentenced to confinement, because the classification determines the procedures that the court must follow. There is nothing inherent in a contemptuous act or refusal to act that classifies it as civil or criminal. Rather, it is the character and purpose of the punishment that the court chooses to impose that serves to distinguish between civil and criminal contempt. If the sanction is intended to force compliance with the court's order, the contempt is properly classified as civil. If the purpose is to punish the contemnor for a specific act and to vindicate the authority of the court, the contempt is criminal. (See 2001 amendment.) Huffine v. District Court, 285 M 104, 945 P2d 927, 54 St. Rep. 1065 (1997).

Necessity of Criminal Charge and Due Process in Contempt Proceeding Resulting in Criminal Penalty: The District Court stated that the purpose of its sentence for contempt for practicing law without a license was to compel performance and that the court was thus acting under this section, which allows incarceration until performance occurs. However, in reality, the sentence, 30 days in jail, to be suspended upon paying a $500 fine within 10 days, was punishment for past acts. Therefore, the contempt proceeding was properly characterized as criminal rather than civil because a contempt is classified as criminal if the purpose of the sanction imposed is punishment and civil if the purpose of the sanction imposed is to compel compliance with a court order. A criminal contempt proceeding must be under the procedures in Title 46 to ensure that criminal penalties are not imposed without affording the proper protections. The lower court erred by imposing a criminal sentence when no criminal charges were brought under 45-7-309, creating the crime of criminal contempt, and defendant was not afforded the due process that is guaranteed by the state and federal constitutions. (See 2001 amendment.) Huffine v. District Court, 285 M 104, 945 P2d 927, 54 St. Rep. 1065 (1997).

Ability to Comply:

A person may be sentenced for contempt under this section for failure to pay alimony pendente lite although he has no money and no income, where it is shown that the defendant has the ability to obtain such funds by his labor. State ex rel. Houtchens v. District Court, 122 M 76, 199 P2d 272 (1948).

Under this section, inability to perform is a good defense unless the inability has been brought on contumaciously by the individual himself. State ex rel. Murphy v. District Court, 99 M 209, 41 P2d 1113 (1935).

Where the evidence in a contempt proceeding does not show that it was within the power of the contemner to perform an act required of him by an order of court or that he voluntarily and contumaciously brought the disability upon himself, he may not be punished by imprisonment in jail until he does perform it. State ex rel. Burns v. District Court, 83 M 200, 271 P 439 (1928).

One adjudged guilty of contempt for failure to pay alimony and imprisoned in the county jail under this section until he shall have performed is, upon proof of inability to pay, entitled to his release from confinement. State ex rel. Cash v. District Court, 78 M 92, 252 P 388 (1927).

The commitment of a person to jail for failure to pay alimony under this section is void, where the record shows that at the time of the contempt proceeding it was not within the power of the contemner to comply with the order of the court. State ex rel. Scott v. District Court, 58 M 355, 192 P 829 (1920).

Inability to render obedience to an order of court is a good defense to a charge of contempt. State ex rel. McLean v. District Court, 37 M 485, 97 P 841 (1908).

Collateral References

Contempt *key* 70, 72, 78, 79, et seq.; Injunction *key* 232 and other particular topics.

17 C.J.S. Contempt §§107, 108, 110, 112, 119; 43A C.J.S. Injunctions §§308 through 312.

Pleading in contempt proceedings as to ability to comply with order for payment of alimony or child support. 53 ALR 2d 591.

3-1-523. Judgment and orders in contempt cases final — family law exception.

Compiler's Comments

2001 Amendment: Chapter 136 in (1) in second sentence at beginning inserted exception clause; inserted (2) providing condition for appeal of contempt judgment or order in family law proceeding; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 136, L. 2001, provided: "WHEREAS, in Lee v. Lee, 2000 MT 67, 996 P.2d 389, 57 St. Rep. 308 (2000), the Montana Supreme Court formally adopted the "family law" exception for appeals of contempt orders."

Case Notes

Time Bar on Writ of Certiorari to Review Contempt Proceedings: In a case of first impression, the Supreme Court was asked to establish a timeframe within which a petition for review of a contempt order must be filed. The issue was whether the time limitation should come from Title 25, which includes the Montana Rules of Civil Procedure and the Montana Rules of Appellate Procedure, or from Title 27, which prescribes the various statutes of limitation for the commencement of actions. The court noted that there is no appeal, as such, from an order of contempt in a civil proceeding and that the exclusive method of review of civil contempt orders (with certain exceptions) is through a writ of certiorari or writ of review. That review is generally limited to jurisdictional questions and whether evidence supports the contempt. Therefore, the issue of timeliness for filing a petition for a writ of certiorari or review is not a statute of limitations issue, and to mechanically characterize those writs for the review of contempt proceedings as original proceedings governed by the 5-year statute of limitations in 27-2-231 would be to deny the basic nature of appellate review. Further, petitions for writs of certiorari to review contempt proceedings are fundamentally different from other original proceedings commenced in the Supreme Court and from petitions for writs of supervisory control, which do not so much involve appellate review of and a decision on the underlying proceedings as they involve the court dealing with discreet questions of law during the pendency of the underlying proceedings. Because the timeframe in which to file petitions for writs of certiorari to review contempt proceedings is a procedural issue analogous to the procedure for filing a notice of appeal, the Supreme Court held that Rule 72, M.R.Civ.P. (Title 25, ch. 20), Rule 1, M.R.App.P. (Title 25, ch. 21), Rule 17, M.R.App.P., and 27-25-103 require that the timeframe for those petitions be determined by the Montana Rules of Appellate Procedure. Specifically, pursuant to Rule 5, M.R.App.P., a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding. This may not be construed to limit the Supreme Court's power to grant writs of supervisory control or to consider applications for other types of original proceedings. The Supreme Court chose not to establish a precedent that allows contempt proceedings to be delayed until the underlying cause is resolved. Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), overruling Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in 27-25-102.

Certiorari to Review Proceedings:

The standard for review of contempt orders, pursuant to the granting of a writ of certiorari, is, first, to determine whether the court that found contempt acted within its jurisdiction. For a

court to have acted within its jurisdiction: (1) it must have cognizance of the subject matter; (2) it must have presence of the proper parties; and (3) its action must be invoked by proper pleadings and the judgment must be within the issues raised. A court lacks or exceeds jurisdiction by any act that exceeds the defined power of the court, whether that power is defined by constitutional provision, statute, or court rule or under the doctrine of stare decisis. The second part of the standard for review of contempt orders is to determine whether substantial evidence exists to support the court's findings. The family law exception relevant to review on direct appeal of a District Court judgment and orders made in cases of contempt is subject to the same standard of review. (See 2001 amendment.) Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000).

In reviewing a contempt citation by Writ of Certiorari, the Supreme Court is limited to the following considerations: (1) whether the lower court had jurisdiction to issue the order; and (2) whether there was evidence supporting the order. State ex rel. Foss v. District Court, 216 M 327, 701 P2d 342, 42 St. Rep. 845 (1985).

The Writ of Certiorari is discretionary and is granted only when there has been a showing that the tribunal making the judgment of contempt acted in excess of jurisdiction. State ex rel. Porter v. First Judicial District, 123 M 447, 215 P2d 279 (1950).

Where in a contempt proceeding relator challenged the jurisdiction of the trial court, certiorari is the proper remedy. Supervisory control concedes jurisdiction. State ex rel. Enochs v. District Court, 113 M 227, 123 P2d 971 (1942).

A judgment or order of the District Court made in a contempt proceeding is reviewable by the Supreme Court on Writ of Certiorari, the review going no further than to determine whether the lower court regularly pursued its authority; the Writ cannot be used to correct errors committed in the exercise of jurisdiction. State ex rel. Murphy v. District Court, 99 M 209, 41 P2d 1113 (1935).

Clarification of Family Law Exception to Supreme Court Review of District Court Contempt Orders — When Writ of Certiorari Required — Ancillary Order Exception: Seeking to narrow and clarify the judicially created family law exception to the writ of certiorari requirement of this section that was expressly extended to dissolution of marriage contempt proceedings in In re Marriage of Smith, 212 M 223, 686 P2d 912 (1984), and In re Marriage of Sessions, 231 M 437, 753 P2d 1306, 45 St. Rep. 744 (1988), and to balance the exception with the statute and longstanding Montana case law generally allowing no direct appeal from a contempt order unless the writ is granted, the Supreme Court concluded that it would be poor public policy to create circumstances whereby a District Court's contempt powers are diminished in any manner by one party's ability to file a direct appeal that in turn frivolously and needlessly delays that party's compliance with the lower court's judgments and orders. To cover contentious disputes that arise in family law, the court created the ancillary order exception, establishing that the family law direct appeal exception applies only when the judgment appealed from includes an ancillary order, meaning an order that determines the rights of the parties as a result of the contemptuous conduct—all under one judgment, that affects the substantial rights of the parties. The ancillary order may result from the proper exercise of the court's jurisdiction, in which case a writ of certiorari would necessarily be denied. However, a lone contempt order, regardless of the underlying law of the case, cannot be reviewed by the Supreme Court on direct appeal. (See 2001 amendment.) Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000), followed in In re Marriage of DeLude, 2000 MT 75, 299 M 123, 999 P2d 306, 57 St. Rep. 331 (2000). See also State ex rel. Zosel v. District Court, 56 M 578, 185 P 1112 (1919), and Milanovich v. Milanovich, 200 M 83, 655 P2d 959, 39 St. Rep. 1554 (1982).

Standard for Review of Family Law Contempt Orders — Jurisdiction and Evidence — Family Law Exception Clarified: The standard for review of contempt orders, pursuant to the granting of a writ of certiorari, is, first, to determine whether the court that found contempt acted within its jurisdiction. For a court to have acted within its jurisdiction: (1) it must have cognizance of the subject matter; (2) it must have presence of the proper parties; and (3) its action must be invoked by proper pleadings and the judgment must be within the issues raised. A court lacks or exceeds jurisdiction by any act that exceeds the defined power of the court, whether that power is defined by constitutional provision, statute, or court rule or under the doctrine of stare decisis. The second part of the standard for review of contempt orders is to determine whether substantial evidence exists to support the court's findings. The family law exception relevant to review on direct appeal of a District Court judgment and orders made in cases of contempt is subject to the same standard of review. (See 2001 amendment.) Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000), following State ex rel. Porter v. First Judicial District, 123 M 447, 215 P2d 279 (1950), and Kauffman v. District Court, 1998 MT 239, 291 M 122, 966 P2d 715, 55 St. Rep.

1001 (1998), and followed in In re Marriage of Coward, 2000 MT 128, 300 M 1, 2 P3d 822, 57 St. Rep. 531 (2000). See also In re Marriage of Sullivan, 258 M 531, 853 P2d 1194, 50 St. Rep. 648 (1993).

Exception for Contempt Review in Family Law Cases: Although contempt orders are generally final and not reviewable on appeal, except by writ of certiorari, the Supreme Court has created an exception in family law cases. In such cases, the review is limited to examining the record to determine whether the District Court acted within its jurisdiction and whether the evidence supports the District Court's contempt findings. (See 2001 amendment.) In re Marriage of Heath, 272 M 522, 901 P2d 590, 52 St. Rep. 915 (1995), followed in In re Marriage of Nevin, 284 M 468, 945 P2d 58, 54 St. Rep. 981 (1997).

Fabrication of Child Abuse Allegation to Deny Visitation as Contempt: A District Court's belief that mother fabricated an incident of child sexual abuse in order to deprive father of visitation rights granted pursuant to the dissolution decree, a lawful court order, is a sufficient basis for a contempt ruling necessary to preserve the dignity and authority of the court. The District Court properly considered the credibility of the witnesses and the weight to be given their testimony, which are matters not subject to Supreme Court review. Woolf v. Evans, 264 M 480, 872 P2d 777, 51 St. Rep. 355 (1994).

Placement of Child Support in Escrow Pending Modification of Support Order as Contempt of Court — Limited Review of Contempt Order: After Gordon and Annette dissolved their marriage, Gordon made a motion to modify the order for child support payments. Pending judicial action on that motion, he placed the arrearages in escrow with the Clerk of the District Court. The Supreme Court held that the District Court order holding him in contempt for failure to pay the arrearages directly to Annette could be reviewed by the Supreme Court for limited purposes and that the facts supported the District Court's finding of contempt. In re Marriage of Sullivan, 258 M 531, 853 P2d 1194, 50 St. Rep. 648 (1993).

Sanctions and Contempt Imposed on Attorney by City Court Invalid: A City Court imposed sanctions on an attorney for failing to appear to defend a client in a DUI case. The attorney argued that he had been required to attend a hearing in District Court and had diligently tried to inform the City Court of the conflict. The City Court refused to revoke the sanctions, adding instead a contempt charge. The Supreme Court ruled that the sanctions were improper in that the City Court acted arbitrarily in imposing them. The Supreme Court went on to reverse the contempt, finding on the basis that the sanctions did not constitute a lawful order and therefore the attorney could not be found in contempt for failing to pay the sanctions. Doran v. City Court of Whitefish, 239 M 94, 779 P2d 68, 46 St. Rep. 1539 (1989).

Jurisdiction of Contempt Case Not Lost Despite Bankruptcy Filing: A bankruptcy proceeding does not divest a state court of jurisdiction over a contempt matter; it only stays or suspends the contempt proceedings. A writ of certiorari seeking review of a contempt order was denied upon a finding that despite petitioner's bankruptcy filing, the District Court had not lacked or exceeded its jurisdiction. Valley Unit Corp. v. Bozeman, 232 M 52, 754 P2d 822, 45 St. Rep. 860 (1988).

Exception in Review of Marriage Dissolution Proceedings: Although contempt of court orders by a District Court are final and usually unreviewable by the Supreme Court in any manner except by writ of certiorari, an exception is made in dissolution of marriage proceedings. In re Marriage of Sessions, 231 M 437, 753 P2d 1306, 45 St. Rep. 744 (1988). See also In re Marriage of Prescott, 259 M 293, 856 P2d 229, 50 St. Rep. 801 (1993), In re Marriage of Jurgens/Turner, 260 M 528, 861 P2d 186, 50 St. Rep. 1202 (1993), In re Marriage of Dreesbach, 265 M 216, 875 P2d 1018, 51 St. Rep. 374 (1994), and Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000).

Contempt Order Not Subject to Appeal: A contempt order is not appealable. The power to inflict punishment by contempt is inherent in the courts. This power must be exercised by the courts with the knowledge that it will not be upset on appeal. This is necessary to preserve the dignity and authority of the court. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985); In re the Marriage of O'Neill, 184 M 415, 603 P2d 257, 36 St. Rep. 2154 (1979), following State ex rel. Rankin v. District Court, 58 M 376, 191 P 772 (1920). See also Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001).

When Issue of Constitutionality Not Properly Before Court: The issue of constitutionality of this section was not properly before the Supreme Court when it was not first raised in the District Court and when a notice of constitutional challenge was not properly filed as required by Rule 38, M.R.App.P. In re Marriage of Robbins, 219 M 130, 711 P2d 1347, 42 St. Rep. 1897 (1985).

Certiorari — Review of Contempt Order: The judgment and orders of the District Court in contempt cases are "final and conclusive", and no appeal may be taken from them. The Supreme

Court will not consider matters of contempt on direct appeal. The proper avenue to use to gain review of a contempt order is a Writ of Certiorari. In re Marriage of Milanovich, 201 M 332, 655 P2d 959, 39 St. Rep. 1554 (1982), followed in In re Marriage of Robbins, 219 M 130, 711 P2d 1347, 42 St. Rep. 1897 (1985), Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604, 50 St. Rep. 509 (1993), and in In re Marriage of Jurgens/Turner, 260 M 528, 861 P2d 186, 50 St. Rep. 1202 (1993).

Challenge to Contempt Citation Improperly Presented on Appeal: If the Gordons wish this court to consider the propriety of the District Court's action regarding the contempt proceedings and to review any underlying supportive findings, conclusions, or orders, it will be necessary to file an appropriate Writ of Review. In re Gordon, 192 M 499, 628 P2d 1117, 38 St. Rep. 887 (1981).

Record Required for Contempt Review: Defendant was held in contempt of court for failure to comply with a judgment entered against him. Contempt of a District Court is reviewable only by application for a Writ of Certiorari to the Supreme Court. Where an indirect contempt is involved, as here, the Writ would command the District Court to transmit its record of the contempt proceedings. The Supreme Court's review would be limited to an examination of the record to determine whether the District Court acted within its jurisdiction and whether the evidence supported the finding and order of contempt. In this case, no transcript of the contempt proceeding was made. The Supreme Court set aside the contempt order for lack of a record. Schneider v. Ostwald, 190 M 29, 617 P2d 1293, 37 St. Rep. 1728 (1980).

Writ of Certiorari Not Proper — Writ of Supervisory Control Proper: Because the Supreme Court did not have a fully certified transcript of the record and proceedings pursuant to 27-25-202, a Writ of Certiorari was not a proper remedy to review a contempt order. But under Art. VII, sec. 2, Mont. Const., the Supreme Court may exercise supervisory power since the relator is barred from using a Writ of Certiorari. State ex rel. Anderson v. District Court, 188 M 77, 610 P2d 1183, 37 St. Rep. 916 (1980). See also Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001).

Contempt Proceeding Independent of Civil Matter: The filing of a notice of appeal to review the propriety of a contempt citation does not divest the District Court of jurisdiction over the underlying civil matter. Contempt proceedings are entirely independent of the civil action from which they arise. McPartlin v. Fransen, 178 M 178, 582 P2d 1255, 35 St. Rep. 1191 (1978), following State ex rel. Enochs v. District Court, 113 M 227, 123 P2d 971 (1942). See also In re Marriage of Sessions, 231 M 437, 753 P2d 1306, 45 St. Rep. 744 (1988).

Presumption of Validity: District Court judgments whose prima facie authority extends to questions of the kind purported to have been adjudicated are entitled to every presumption of validity. State ex rel. Enochs v. District Court, 113 M 227, 123 P2d 971 (1942).

Proof Required for Punishment: Contempt proceedings are essentially criminal in character, and before a court may render a judgment imposing punishment for contempt, the evidence must establish the contemner's guilt beyond a reasonable doubt. State ex rel. Tague v. District Court, 100 M 383, 47 P2d 649 (1935).

Dismissal of Contempt Proceedings:

An attempted appeal from an order dismissing a proceeding in contempt after a hearing will be dismissed. Hanson v. Hanson, 83 M 428, 272 P 543 (1928).

Where the District Judge dismissed contempt proceedings, holding that he was not authorized to entertain them, mandamus to compel him to hear and determine them was the proper remedy. State ex rel. N. Pac. Ry. v. Loud, 24 M 428, 62 P 497 (1900).

Supervisory Control by Supreme Court:

The only way in which one adjudged guilty of contempt may have the proceedings reviewed by the Supreme Court under Art. VIII, sec. 3, Mont. Const., is by invoking the Writ of Review or, in a proper case, the Writ of Supervisory Control. State ex rel. Burns v. District Court, 83 M 200, 271 P 439 (1928).

If a District Court acts, but in a manner so arbitrary and unlawful as to be tyrannical, the Supreme Court may intervene by virtue of the power of supervisory control. But in such a case the court is limited to an examination of the record to ascertain whether there is substantial evidence to justify the order adjudging the accused guilty. State ex rel. Zosel v. District Court, 56 M 578, 185 P 1112 (1919).

The Supreme Court is not limited to review a judgment of contempt by Writ of Certiorari but may also do so by Writs of Supervisory Control. State ex rel. Sutton v. District Court, 27 M 128, 69 P 988 (1902).

Exclusive Power of Court: Contempt proceedings are sui generis, and for the violation of a lawful judgment of the District Court, that court alone has authority to inflict punishment. State ex rel. Zosel v. District Court, 56 M 578, 185 P 1112 (1919).

Collateral References

Contempt *key* 66, 67, et seq.; Injunction *key* 231.

17 C.J.S. Contempt §§128 through 130, 138 through 140; 43A C.J.S. Injunctions §275.

Part 6
Restrictions on Judicial Officers

Part Collateral References

Validity and application of state statute prohibiting judge from practicing law. 17 ALR 4th 829.

3-1-601. Certain officers not to practice law or administer estates.

Compiler's Comments

1987 Amendment: In (1) inserted "except for a judge pro tempore"; and in (3) inserted "except a judge pro tempore".

1983 Amendment: At beginning of (1), inserted "Except as provided in 3-1-604".

Case Notes

Municipal Ordinance Prohibiting Outside Employment by Municipal Judge Void: The city of Bozeman passed municipal ordinance 2.06.050 prohibiting the Municipal Court Judge from obtaining outside employment. The city contended that under 3-6-202, it was allowed to enact an ordinance governing the qualifications of the judge, as long as the ordinance did not violate Art. VII, sec. 9, Mont. Const., and also argued that the ordinance was consistent with 3-1-604, which precludes a Municipal Court Judge from practicing law in that judge's own court. The Supreme Court agreed with the District Court that the ordinance was void because it conflicted with 3-1-604 when read in conjunction with this section. The legislative history also demonstrated that the statutes are intended to allow Municipal Court Judges to practice law in courts other than their own in order to supplement their income. Although the constitutional provision prohibits a District Court Judge from the outside practice of law and 3-6-202 requires a Municipal Court Judge to have the same qualifications as a District Court Judge, qualifications should not be confused with restrictions. Although 3-1-604 does not affirmatively declare that Municipal Court Judges can practice law outside their own courts, its intent is clear. The ordinance conflicted with the statutes and was therefore void. Carlson v. Bozeman, 2001 MT 46, 304 M 277, 20 P3d 792 (2001).

Collateral References

Judges *key* 21.

48A C.J.S. Judges §§38, 39.

Validity and application of state statute prohibiting judge from practicing law. 17 ALR 4th 829.

What amounts to practice of law within constitutional or statutory provision making such practice a condition of eligibility to a judicial office or forbidding such practice by one holding a judicial position. 106 ALR 508.

3-1-602. Restrictions on justices of the peace practicing law or taking claims for collection.

Compiler's Comments

Section Not Codified: The part of section 93-902, R.C.M. 1947, that is redundant with 3-1-602, MCA, was not codified in the MCA. The provision has not been repealed and is still valid law. Reference may be made to sec. 1, Ch. 23, L. 1963.

Collateral References

Justices of the Peace *key* 13, 21.

51 C.J.S. Justices of the Peace §§14, 21.

3-1-603. No judicial officer of court of record to have partner practicing law.

Compiler's Comments

1987 Amendment: In (2), after "partner of", inserted "either", after "court judge" inserted "or a judge pro tempore", and before "court" deleted "municipal".

1983 Amendment: In (1), inserted "except as provided in subsection (2)"; and inserted (2) stating when a partner of a Municipal Court Judge may act as counsel.

3-1-604. Restrictions on municipal court judges.

Compiler's Comments

1983 Amendment: After "practice law", inserted "before his own municipal court".

Case Notes

Municipal Ordinance Prohibiting Outside Employment by Municipal Judge Void: The city of Bozeman passed municipal ordinance 2.06.050 prohibiting the Municipal Court Judge from obtaining outside employment. The city contended that under 3-6-202, it was allowed to enact an ordinance governing the qualifications of the judge, as long as the ordinance did not violate Art. VII, sec. 9, Mont. Const., and also argued that the ordinance was consistent with this section, which precludes a Municipal Court Judge from practicing law in that judge's own court. The Supreme Court agreed with the District Court that the ordinance was void because it conflicted with this section when read in conjunction with 3-1-601. The legislative history also demonstrated that the statutes are intended to allow Municipal Court Judges to practice law in courts other than their own in order to supplement their income. Although the constitutional provision prohibits a District Court Judge from the outside practice of law and 3-6-202 requires a Municipal Court Judge to have the same qualifications as a District Court Judge, qualifications should not be confused with restrictions. Although this section does not affirmatively declare that Municipal Court Judges can practice law outside their own courts, its intent is clear. The ordinance conflicted with the statutes and was therefore void. Carlson v. Bozeman, 2001 MT 46, 304 M 277, 20 P3d 792 (2001).

Collateral References

Judges *key* 31.

48A C.J.S. Judges §§36, 38.

3-1-606. Justice of the peace or constable not to purchase judgment.

Collateral References

81A C.J.S. States §§98, 99.

3-1-607. Supreme court justice or district court judge candidacy for nonjudicial office — resignation required.

Compiler's Comments

1985 Amendment: In (1) in middle of first sentence, after "under the laws of the state of Montana", inserted "other than a judicial position"; and in (3) substituted "another judicial position" for "another nonpartisan judicial office the term of which does not commence earlier than the end of the term of the office then occupied by him".

Case Notes

Right of Sitting Judge to Run for Another Judicial Office Without Resigning: Article VII, sec. 10, Mont. Const., providing that one holding a judicial position forfeits that position by filing for an elective public office other than a judicial position, requires a Judge to forfeit his judicial office if he files for either a legislative or executive office. While it does not affirmatively declare that a Judge does not forfeit his judicial office by filing for another judicial office, that is its intent as shown by the minutes of the Constitutional Convention and that is what it means. Sections 3-1-607 and 3-1-608 forbid what Art. VII, sec. 10, Mont. Const., authorizes and are therefore unconstitutional as being in direct conflict with Art. VII, sec. 10, Mont. Const. (The unconstitutional provision was deleted from 3-1-607 by a 1985 amendment. Amendment to 3-1-608 was not necessary.) The Comm. for an Effective Judiciary v. St., 209 M 105, 679 P2d 1223, 41 St. Rep. 581 (1984).

Attorney General's Opinions

Trustee of Community College District — Authority to Hold Office: A City Judge is prohibited by Art. VII, sec. 10, Mont. Const., from holding office as an elected trustee of a community college district. 44 A.G. Op. 21 (1991).

Law Review Articles

The Constitutionality of Resign-to-Run Statutes: Morial v. Judiciary Commission of Louisiana, 53 St. John's L. Rev. 571 (1979).

Collateral References

States *key* 52.

81A C.J.S. States §97.

3-1-608. Forced vacancy.

Case Notes

Right of Sitting Judge to Run for Another Judicial Office Without Resigning: Article VII, sec. 10, Mont. Const., providing that one holding a judicial position forfeits that position by filing for an elective public office other than a judicial position, requires a Judge to forfeit his judicial office if he files for either a legislative or executive office. While it does not affirmatively declare that a Judge does not forfeit his judicial office by filing for another judicial office, that is its intent as shown by the minutes of the Constitutional Convention and that is what it means. Sections 3-1-607 and 3-1-608 forbid what Art. VII, sec. 10, Mont. Const., authorizes and are therefore unconstitutional as being in direct conflict with Art. VII, sec. 10, Mont. Const. (The unconstitutional provision was deleted from 3-1-607 by a 1985 amendment. Amendment to 3-1-608 was not necessary.) The Comm. for an Effective Judiciary v. St., 209 M 105, 679 P2d 1223, 41 St. Rep. 581 (1984).

Part 7
Court Administrator

Part Law Review Articles

Will Colorado's Effort to Improve the Administration of Justice Help Montana?, Erickson, 33 Mont. L. Rev. 52 (Winter 1972).

3-1-702. Duties.

Compiler's Comments

2001 Amendment: Chapter 585 at end of (1) inserted reference to costs of state-funded district court program; inserted (4) requiring court administrator to administer legal assistance for indigent victims of domestic violence; inserted (6) requiring court administrator to administer judicial branch personnel plan; and made minor changes in style. Amendment effective July 1, 2002.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1993 Amendment: Chapter 349 at end of (2) substituted "on request" for "pursuant to 5-11-210"; and made minor changes in style.

1991 Amendments: Chapter 112 at end of (2) substituted "pursuant to 5-11-210" for "upon request"; and made minor change in style. Amendment effective March 20, 1991.

Chapter 704 inserted (4) requiring Court Administrator to administer state funding for District Courts; and made minor changes in style. Amendment effective July 1, 1991.

Part 8
Disqualification and Substitution of Judges
Supreme Court Rule

Part Compiler's Comments

Final Form of Rules Adopted — Effective Date: The Supreme Court order dated September 13, 1988, provided, in part, as follows: "1. The final form of the rules promulgated by this Court for the disqualification and substitution of judges [codified as 3-1-803 through 3-1-805, MCA] shall be as attached hereto and set forth therein.

2. The effective date of said rules shall continue to be September 1, 1987."

Former Rules Superseded — Effective Dates: Supreme Court Order dated June 17, 1987, provided, in part, as follows: "By the authority of Article VII, Section 2, of the 1972 Montana Constitution, this rule supersedes and is to be used to the exclusion of the rule on disqualification and substitution of judges adopted by Supreme Court Order dated June 29, 1981, and published as sections 3-1-801 and 3-1-802, MCA.

This rule shall take effect on September 1, 1987."

Supreme Court Order dated June 29, 1981, provided, in part, as follows: "By the authority of Article VII, Section 2, of the 1972 Montana Constitution, this rule supersedes and is to be used to the exclusion of the rule on disqualification and substitution of judges adopted by Supreme Court Order dated December 29, 1976, and published as section 3-1-801, MCA.

This rule shall take effect on July 1, 1981."

Effect of Publication: Section 2, Ch. 1, L. 1979, which adopted the MCA, provided that publication of a Supreme Court Rule is done for the benefit of code users. The publication of this section should not be construed as a legislative attempt to readopt or promulgate the rule.

Statutes Superseded — Effective Date: Subsection 9 of the Supreme Court's order dated Dec. 29, 1976 (now superseded), provided in part: "This rule supersedes and is to be used to the exclusion of sections 93-901, 93-2906(4), 93-2907, 93-6602(2), 95-1709, and 95-2010, R.C.M. 1947.

This rule shall be effective on March 1, 1977, it to apply to all actions filed on or after that date."

Part Case Notes

DECISIONS UNDER FORMER LAW

Jurisdiction of Original Judge Retained Following Motion for Substitution — Applicability of 1985 Law: On March 27, 1987, plaintiff moved for a substitution of judge, but the Clerk of Court did not give notice to either the judge or the opposing parties, nor was a notice of substitution filed as required by 3-1-802, the law in effect at the time the motion was filed. On appeal, the Supreme Court held that 3-1-804 did not apply to the unique circumstances of the case because that statute was not in effect until 3-1-802 was superseded on June 29, 1987. Because the requirements of 3-1-802 were not met, the original judge retained jurisdiction. Also, the judge could not obtain jurisdiction through stipulation of the parties. Daniels v. Thomas, Dean & Hoskins, Inc., 246 M 125, 804 P2d 359, 47 St. Rep. 2293 (1990).

Failure to File Certificate of Good Faith: The defendant, acting pro se, in seeking to have the judge disqualified, did not file a timely and sufficient affidavit alleging facts showing personal bias or prejudice. Therefore, the challenge was properly treated as a preemptory disqualification and his attempt to disqualify the second judge by preemptory challenge was void because defendant had exhausted the one preemptory challenge allowed in a criminal case. St. v. Hoch, 234 M 405, 763 P2d 1119, 45 St. Rep. 2007 (1988).

Disqualification Motion at Sentencing Hearing: Defendant filed a motion to disqualify at his sentencing hearing, which was held later than the statutory 20 days before the original date of trial. The motion was denied by the District Judge, who found that it was not timely filed and that no cause was shown for failure to timely file. Citing St. v. Harvey, 219 M 402, 713 P2d 517, 43 St. Rep. 46 (1986), the Supreme Court affirmed, holding that the timeliness of a motion to disqualify a judge for cause is an initial matter for the District Court to determine. St. v. Lattin, 222 M 382, 722 P2d 622, 43 St. Rep. 1349 (1986).

Disqualification Motion Three Months After Judgment: In a per curiam decision, the Supreme Court dismissed as untimely respondent's motion asking the District Judge to disqualify himself when the motion was not made until 3 months after trial and judgment had been entered. In re Marriage of Cole, 222 M 370, 722 P2d 624, 43 St. Rep. 1339 (1986).

Disqualification of Judge Upon Failure of Pretrial Settlement Negotiations: Where a judge is to be the trier of fact and he participates in pretrial settlement negotiations that subsequently fail, he should, upon request, disqualify himself from sitting as the trial judge. Shields v. Thunem, 220 M 449, 716 P2d 217, 43 St. Rep. 518 (1986), followed in In re Marriage of Cole, 224 M 207, 729 P2d 1276, 43 St. Rep. 2136 (1986).

Allegations of Improper Conduct of Counsel — No Disqualification of Judge: In statements made to a presentence investigator and ultimately to the District Judge, Gleed alleged improper conduct by his trial counsel. On appeal, he argued that the seriousness of the charges could have caused the judge to take a negative view in sentencing him and that therefore the judge should have disqualified himself. The proper procedure for disqualifying a judge is outlined in 3-1-802; however, none of the circumstances for disqualification were present in this case. Gleed did not follow the statutory procedure for disqualification, nor did he attempt to have his sentence reviewed by the sentence review division under Title 46, ch. 18, part 9. Instead, he raised the issue on appeal, alleging in a conclusory fashion that the judge was biased against him. The Supreme Court held that there was no merit to Gleed's argument that the judge was biased and should have disqualified himself. Sentence was affirmed. St. v. Gleed, 220 M 56, 713 P2d 543, 43 St. Rep. 169 (1986).

Disqualification Motion Ten Days Before Trial: This section requires that a motion to disqualify a judge be filed not less than 20 days before the original date of trial. Where defendant filed a motion just 10 days prior to the rescheduled trial date, the District Court was correct in denying the motion. St. v. Harvey, 219 M 402, 713 P2d 517, 43 St. Rep. 46 (1986).

Affidavit Alone Not Sufficient to Disqualify Judge for Bias: On August 31, the petitioner filed a petition for dissolution of marriage and child custody. A judge was assigned to the case that day. When, on September 12, the petitioner filed a motion for substitution of the judge, it was denied as untimely because unless a peremptory challenge is filed within 10 days of the date the

judge is assigned, the party's right to move for peremptory substitution of the judge is considered waived. The petitioner then, on September 15, filed an affidavit for disqualification of the judge for bias. At the subsequent disqualification proceeding, the petitioner failed to present evidence to demonstrate bias. His motion was properly denied because he did not satisfy the requisite burden of proof by raising a strong presumption of actual bias. In re Marriage of Gahr, 212 M 481, 689 P2d 257, 41 St. Rep. 1879 (1984).

No Explicit Authority for Award of Attorney Fees in Disqualification Action: As there is no provision in this section that allows a judge to award attorney fees to a party or damages to a nonparty, such award is improper. Unless a statute provides explicitly for an award of attorney fees to the prevailing party, a court cannot make such an award. In re Marriage of Gahr, 212 M 481, 689 P2d 257, 41 St. Rep. 1879 (1984).

Lower Court Judge Sitting on Lower Court Case in Which He Was Involved: On appeal from dismissal of a disqualification hearing, the court rejected appellant's contention that under this section a lower court judge may not sit on a lower court case when he rendered or made the judgment. The section applies to trial court judges substituting for appellate judges. The court also rejected appellant's attempt to analogize that the judge should be disqualified for bias. Under 46-16-304 (renumbered 46-16-115), the judge could not sit as a juror on the case because he was an adversary in a federal case instituted by the appellant. Thus, appellant argued the judge should be disqualified to sit as a judge. The court, however, held that disqualification for cause is controlled by this section and not by other MCA sections by analogy. Downs v. Smyk, 211 M 374, 685 P2d 347, 41 St. Rep. 1424 (1984).

District Judge Who Had Represented Petitioners in Criminal Case — Disqualification Required in Postconviction Relief Proceeding Involving Same Criminal Case: A petition for postconviction relief was filed in the District Court before a judge who, 7 years earlier, had been involved as defense counsel in the preliminary stages of the criminal prosecution. The petition was denied, and petitioners appealed. The Supreme Court ruled that the District Judge had committed error in not disqualifying himself. The case was remanded for a postconviction hearing before another District Judge. St. v. Hintz, 205 M 295, 667 P2d 434, 40 St. Rep. 1280 (1983).

Relinquishment of Jurisdiction — Reassumption of Jurisdiction: A District Court Judge experiencing a heavy workload invited a second judge to assume jurisdiction. The second judge assumed jurisdiction; defendant moved for substitution of another judge, and a third judge assumed jurisdiction. State then moved for substitution of another judge, and the original judge, no longer under a disability of heavy workload, by order reassumed jurisdiction. Where there are no problems involving two judges concurrently having jurisdiction, the original judge is not prevented from reassuming full jurisdiction by timely order showing that the prior reason for relinquishing jurisdiction was removed. State ex rel. McKendry v. District Court, 201 M 244, 653 P2d 847, 39 St. Rep. 2085 (1982).

Application to City Court Judges: A defendant in an action involving dog licensing citations in City Court submitted an affidavit of disqualification of the City Judge because of bias and prejudice. City Court Judges can be disqualified for cause under this section, even though it does not specifically refer to them. State ex rel. Joslyn v. City Court, 198 M 223, 645 P2d 428, 39 St. Rep. 884 (1982).

Two Judge Disqualifications Unavailable to Postconviction Petitioner: Although a postconviction petition filed under the provisions of Title 46, ch. 21, is civil in nature, the petitioner is not entitled to two substitutions of presiding judges as allowed in 3-1-801 (superseded by 3-1-802). An applicant for postconviction relief is directed by the more specific provisions of the postconviction statute to bring the petition in the Supreme Court or in the court that sentenced him. A specific statute controls over a general statute. Coleman v. St., 194 M 428, 633 P2d 624, 38 St. Rep. 1352 (1981).

Timeliness of Motion to Substitute Judge: On appeal from his conviction for sexual intercourse without consent and for sexual assault, the defendant claimed that the District Judge's refusal to grant his motion for substitution of a judge was error. Although he was on notice that a particular judge would preside over the proceedings both before and after the severance of the codefendants' cases, the defense motion was not filed until 52 days after the defense was informed which judge had been assigned to the case. The substitution motion was clearly untimely, as defense had 10 days after learning of judge's assignment in which to file its motion. The defense urged that the filing of a separate information after severance of a criminal trial revived the right to peremptorily disqualify the judge. The Supreme Court noted that no authority for that argument was cited and said it found none to support it. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981). (Annotator's note: Case decided under 3-1-801, which

was superseded by 3-1-802, but which had same filing period for substitution motion as 3-1-802.) See also In re S.L.T., 215 M 289, 697 P2d 472, 42 St. Rep. 366 (1985).

Affidavit of Actual Prejudice — Jurisdiction to Proceed: Where a defendant previously convicted of deceptive practices and the sale of unregistered securities filed an affidavit alleging specific acts of prejudice against him by a court scheduled to preside over a postconviction relief hearing, and another court found there existed no actual prejudice on the part of the first court, the first court erred in then proceeding with the postconviction relief hearing. The Supreme Court's rule on disqualification is clear that when an affidavit alleging actual prejudice is filed, the trial court may proceed no further. At that point the case comes under the jurisdiction of the Supreme Court, and the power to assign a judge to hear the Court, and the power to assign a judge to hear the disqualification motion rested solely with the Chief Justice of the Montana Supreme Court. St. v. Duncan, 191 M 253, 623 P2d 953, 38 St. Rep. 202 (1981). (Annotator's note: Case decided under 3-1-801, which is superseded but is substantially similar to 3-1-802 in portions relevant to this case.)

Disqualification of Judge After Entry of Findings and Conclusions: Defendants filed affidavits of disqualification of the District Judge in a property dispute case after the entry of the judge's findings of fact and conclusions of law. Defendants contend that this precludes the judge from entering judgment in accordance with his findings and conclusions. The disqualification was attempted under section 93-901, R.C.M. 1947 (superseded by this section), which was in effect at the time. The findings and conclusions entered by the judge, prior to the filing of the affidavit of disqualification, expressly directed that a judgment be prepared "in accordance with" the findings and conclusions. Under these circumstances, the judgment was a part of the findings and conclusions. Accordingly, although the disqualification prevented the District Judge from ruling on posttrial motions under Rules 59 and 60, M.R.Civ.P., and from withdrawing the findings and conclusions previously entered, it was not effective to prevent entry of judgment in favor of plaintiff in accordance with findings and conclusions entered prior to the filing of the affidavit for disqualification. Macpherson v. Smoyer, 191 M 53, 622 P2d 188, 37 St. Rep. 2079 (1980).

No Duty to Inform Defendant of Procedure: Defendant was acting as his own counsel. The District Court Judge had no duty to inform him of the law concerning disqualification. Defendant was aware of who was presiding and failed to challenge him within the proper time limits. The Judge properly denied the affidavit because it was not timely. The Judge could not be disqualified for cause after the time limit because defendant's affidavit alleging bias was not accompanied by a certificate of good faith, as required by statute. St. v. Poncelet, 187 M 528, 610 P2d 698, 37 St. Rep. 760 (1980).

Disqualification of Trial Judge: Membership on a commission which drafted Montana's criminal code did not per se constitute grounds for disqualification of a trial Judge for cause, nor did the acquisition of information during the plea bargaining process or the drafting of preliminary instructions to the jury. Whatever knowledge the Judge obtained was during the course of legal proceedings in the case and not from any outside source. As long as the Judge's preliminary instructions are a correct statement of the law, it is immaterial whether they are drafted by the Judge or given over the objections of one or both adversary counsel. None of these things will support a disqualification. St. v. McKenzie, 186 M 481, 608 P2d 428, 37 St. Rep. 325 (1980).

Conviction Overturned When Rule on Disqualification and Substitution of Judges Not Followed: No published local court rule was discovered, so the Supreme Court rule on disqualification and substitution of Judges applied. There was no evidence that Judge Freebourn (the original Judge) specifically called in Judge Olsen or that Judge Olsen filed an acceptance of jurisdiction as required by the Supreme Court rule. Judge Olsen decided the case. The conviction was overturned because Judge Olsen was presiding in violation of the rule and did not have the power to hear the case. St. v. Daugherty, 184 M 474, 603 P2d 1041, 36 St. Rep. 2180 (1979).

Applicability of Supreme Court Order: When the filing date of the original complaint preceded the effective date of the Supreme Court order for disqualification and substitution of Judges, that order is inapplicable. Town Pump, Inc. v. District Court, 180 M 358, 590 P2d 1126, 36 St. Rep. 282 (1979).

Statutory Time Limit: Under former law, any attempt to disqualify a District Judge more than 3 days after notification that he had assumed jurisdiction was a nullity and did not have the effect of depriving the Judge of jurisdiction. Town Pump, Inc. v. District Court, 180 M 358, 590 P2d 1126, 36 St. Rep. 282 (1979).

Filing Motion for Disqualification Before Motion for New Trial: A Judge may be disqualified after return of verdict but before new trial motion was made. State ex rel. Bellon v. District Court, 140 M 447, 373 P2d 314 (1962); Russell v. Sunburst Ref. Co., 83 M 452, 272 P 998 (1928); Hill v. Nelson Coal Co., 40 M 1, 104 P 876 (1909); State ex rel. Carelton v. District Court, 33 M 138, 82 P 789 (1905). But see State ex rel. Cline v. District Court, 142 M 278, 384 P2d 490 (1963); State ex rel. Peery v. District Court, 145 M 287, 400 P2d 648 (1965), where the doctrine was criticized and the statute was considered improperly construed when disqualification is permitted pending a motion for a new trial. And, see State ex rel. Wilson v. District Court, 143 M 543, 393 P2d 39 (1964), where the Supreme Court refused to follow the interpretation given the civil statute and declined to permit the disqualification of a Judge in a criminal case following verdict and before hearing upon a motion for a new trial.

Part Collateral References

Construction and validity of state provisions governing designation of substitute, pro tempore, or special judge. 97 ALR 5th 537.

Laws governing judicial recusal or disqualification in state proceeding as violating federal or state constitution. 91 ALR 5th 437.

Disqualification of judge because of political association or relation to attorney in case. 65 ALR 4th 73.

3-1-803. Disqualification of judges — all courts.

Compiler's Comments

2000 Amendment: In item 2 substituted "third degree" for "fourth degree". Amendment effective January 1, 2001.

1987 Amendment: In first unnumbered paragraph inserted "listed in section 3-1-101 except a court of impeachment in the state senate"; in second unnumbered paragraph inserted "municipal court judge or city court judge"; in paragraph 2 inserted "or any attorney or member of a firm of attorneys of record for a party" and before "degree" substituted "fourth" for "sixth"; in paragraph 3 inserted "sitting in a case on appeal" and "as a judge in the lower court"; and made minor changes in phraseology and punctuation.

Case Notes

Judge's Alleged Interest in Outcome of Case — Off-the-Record Discussion — Failure to Recuse or Grant Mistrial Not Error: In a situation in which a judge, upon assuming the bench, referred several cases to other attorneys, including the plaintiff's attorney in this case, on a fee-splitting basis, the judge did not abuse his discretion by not recusing himself or by not granting a motion for mistrial. Defendant failed to demonstrate that the judge had any interest in the outcome of the case or that the judge and plaintiff's attorney had engaged in any wrongdoing. Further, when defendant failed to ask the court to admonish the jury or to question it to determine if anyone overheard off-the-record discussion between counsel and the judge, defendant failed to preserve the right to appeal the issue. Lutz v. Nat'l Crane Corp., 267 M 368, 884 P2d 455, 51 St. Rep. 810 (1994).

Disqualification in Malpractice Action of Judge Who Represented Plaintiff in Underlying Matter: A judge who had represented plaintiff on the underlying guardianship accounting matter prior to the time that the attorney being sued for malpractice began to represent plaintiff as to the accounting should have disqualified himself from presiding over the malpractice action. A judge may preside over a matter involving a former client if the action over which the judge presides involves a matter different from the one as to which the judge represented the client. In this case, the malpractice action is technically a separate action from the underlying accounting proceeding; however, the malpractice action arose from the legal representation in the accounting proceeding. Default judgment for plaintiff for failure of attorney to plead or in any manner appear was reversed and remanded for a ruling, before another judge, on attorney's motion for relief from judgment for excusable neglect. Shultz v. Hooks, 263 M 234, 867 P2d 1110, 51 St. Rep. 34 (1994).

Judge Involved in Pretrial Negotiations That Ultimately Fail — Disqualification Upon Request: The Supreme Court held that although it approved of the lower court's attempt to mediate a settlement between the parties, the judge should have disqualified himself when requested by one of the parties because the pretrial negotiations ultimately failed. Schellin v. N. Chinook Irrigation Ass'n, 257 M 262, 848 P2d 1043, 50 St. Rep. 260 (1993).

Disqualification Unwarranted but Writ of Supervisory Control Granted Because of Aura of Possible Bias: Defendant mining company sought a writ of supervisory control disqualifying a presiding judge based on the fact that: (1) the judge's son was employed by plaintiff's counsel of

record as a legal intern; and (2) the judge knew and associated with the partners of that counsel's law firm on a social basis, in particular at a university football game where he was invited to the firm's stadium box for a drink and conversed only about football. The Supreme Court found these facts insufficient to disqualify the judge under the criteria of this section. However, the court exercised its power of supervisory control under Art. VII, sec. 2, Mont. Const., to disqualify the judge because the facts when viewed in light of other circumstances, including the appearance of another attorney from the law firm as a witness and a newspaper article describing the meeting at the football game, rendered the realization of the standard that a judge's conduct should be free from the appearance of impropriety a virtual impossibility. Washington v. Mont. Min. Properties, Inc., 243 M 509, 795 P2d 460, 47 St. Rep. 1366 (1990).

Attorney General's Opinions

When Substitute Justice of the Peace May Be Called — Reliance on Letters of Unavailability: How a substitute Justice of the Peace is selected depends on the reasons for the absence of the sitting Justice of the Peace. If the sitting Justice of the Peace is disqualified pursuant to 3-1-805 or this section, only another Justice of the Peace may be called in and the substitute may not be a person qualified pursuant to 3-10-231(2). If the sitting Justice of the Peace is sick, disabled, or absent, another Justice of the Peace or City Judge may be called in if available or a person may be called in who is qualified pursuant to 3-10-231(2) if another Justice of the Peace or City Judge is not readily available. If the sitting Justice of the Peace is on vacation or in training, the substitute is to be chosen in the same manner as if the sitting Justice of the Peace is sick, disabled, or absent, as long as there is not another Justice of the Peace from the county of the sitting Justice of the Peace. In determining who is available to act as a substitute, the sitting Justice of the Peace may rely on letters from other Justices of the Peace and City Judges that they are unavailable. However, after a reasonable time, the sitting Justice of the Peace should contact those who wrote the letters to determine if they are still unavailable. 48 A.G. Op. 11 (2000). See also 40 A.G. Op. 26 (1983), and Potter v. District Court, 266 M 384, 880 P2d 1319 (1994).

Collateral References

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case. 16 ALR 4th 550.

Disqualification of judge, justice of the peace, or similar judicial officer for pecuniary interest in fines, forfeitures, or fees payable by litigants. 72 ALR 3d 375.

Stock ownership: disqualification of judge because of his or another's holding or owning stock in corporation involved in litigation. 25 ALR 3d 1331.

3-1-804. Substitution of district judges.

Compiler's Comments

1995 Amendment: In (1)(c), in three places, substituted reference to 30 consecutive days for reference to 20 consecutive days. Amendment effective June 1, 1995.

1994 Amendment: In (1)(c), in first sentence after "10", inserted "consecutive" and after "time period" inserted remainder of sentence concerning no longer having right of substitution, inserted second sentence concerning party named in summons, inserted third sentence concerning 10-day period for subsequently served person, and in last sentence, after "20", inserted "consecutive". Amendment effective February 1, 1995.

1989 Amendment: By Supreme Court order dated November 20, 1989, effective on that date, in (1)(a), at end of motion form, substituted "case" for "cause" and in first sentence of last paragraph inserted "and the first judge in jurisdiction, if there has already been a substitution"; in (1)(b) inserted second sentence relating to adherence to internal operating rules in multi-judge court; and made minor change in grammar.

1987 Amendment: In opening paragraph inserted "it does not . . . Workers' Compensation Court judge"; in second paragraph of paragraph 1(a) inserted "or to decide legal issues therein", after "including arraignments" deleted "omnibus hearings in criminal cases", inserted "in civil cases", and at end substituted reference to judge in jurisdiction for reference to sitting judge; in paragraph 1(c) inserted "or herself, or a new judge . . . multi-judge court", inserted "in the cause by the moving party", and inserted exception at end relating to right of one substitution by a third party defendant who is not an original party; in paragraph 1(d), at end, substituted "No filing fee is required by law in criminal cases" for "This filing fee is waived in criminal cases where the defendant has received a court-appointed counsel or in civil cases where there has been an affidavit and order waiving filing fees"; in paragraph 1(e) substituted "for whom substitution . . . is untimely" for "having jurisdiction"; in paragraph 1(g) substituted present

language regarding substitution of judge for former language that read: "When a new trial is ordered in any case, whether by order of the district court or the supreme court, each adverse party shall be entitled to one additional motion for substitution of judge in the manner provided herein. Such motion must be filed, with the required filing fee, within twenty (20) days after a new trial has been ordered by the district court or after the remittitur has been filed with the district court clerk. No right of further substitution shall arise in cases remanded by the supreme court which call for additional hearings, but not a new trial"; and made minor changes in phraseology.

Case Notes

Motion to Modify Child Custody Not Considered New Proceeding Vesting New Right to Substitute Judge: More than 19 months after commencement of a dissolution action, the father petitioned to modify the parenting plan, at which point the mother moved for substitution of the presiding judge, contending that the petition for modification was a new action entitling her to a change of venue to her latest county of residence. The District Court denied the substitution motion, and the Supreme Court affirmed. A motion to modify child custody is not considered the commencement of a new proceeding and cannot result in the vesting of a new right to substitute a District Court Judge. In re Marriage of Toavs, 2002 MT 230, 311 M 455, 56 P3d 356 (2002).

Joined or Substituted Party Denied Substitution Without Cause Once Thirty-Day Deadline for Original Parties to Substitute Judge Has Passed: Mattson filed a complaint against Montana Power Co. and, more than 30 days following service, moved without objection to join PPL Montana, LLC (PPL), as an additional party defendant. PPL moved to substitute the District Court Judge without cause, but the motion was denied, so PPL appealed, citing Challinor v. Glacier Nat'l Bank, 266 M 396, 880 P2d 1327 (1994), for the proposition that this section entitles each party in a civil or criminal suit to one judicial substitution and contending that the statutory exclusion from the right of substitution pertained only to voluntary intervenors. The Supreme Court affirmed, clarifying Challinor and Taylor v. Matejovsky, 261 M 514, 863 P2d 1022 (1993), to the extent that those cases infer that each adverse party is entitled to one substitution without cause. This section effectively affords an original party 30 days from service of summons to move for substitution, but once the time has expired for the original parties to move for substitution, subsequently joined parties may not move for substitution without objection. Mattson v. Mont. Power Co., 2002 MT 113, 309 M 506, 48 P3d 34 (2002).

Limitation on Right of Subsequently Joined Party to Substitute Judge Without Cause Not Violative of Substantive Due Process: Mattson filed a complaint against Montana Power Co. and, more than 30 days following service, moved without objection to join PPL Montana, LLC (PPL), as an additional party defendant. PPL moved to substitute the District Court Judge without cause, but the motion was denied. PPL contended that this section violated substantive due process by distinguishing between three classes of parties—original parties, subsequently joined parties and intervenors, and third-party defendants—and that no rational basis existed for treating the three classes of parties differently for purposes of substituting a District Court Judge without cause. The Supreme Court disagreed and affirmed. Because the state may not use its power to take unreasonable, arbitrary, or capricious action against an individual, a statute must be reasonably related to a permissible government objective in order to satisfy the guarantees of substantive due process. In this case, there is not only a rational basis for distinguishing the classes, but responsible judicial administration requires doing so. Subsequently joined parties and intervenors often appear at a much later stage of the proceedings, and to allow a joined or substituted defendant to remove the presiding judge without cause, after the judge has presided over the case for what could be a substantial period, would disrupt the continuity of litigation, precipitate delay, cause duplication of effort, and waste time and expense while providing little corresponding benefit. The right of a subsequently joined party to move for substitution for cause is preserved under 3-1-805. Mattson v. Mont. Power Co., 2002 MT 113, 309 M 506, 48 P3d 34 (2002).

No Error in Denial of Request for Substitution of Judge Following Remand: Defendants appealed a District Court summary judgment, and the Supreme Court concluded that the trial court ruling was not appealable, dismissed the appeal without prejudice, ordered the District Court to vacate its prior findings, conclusions, and order, and remanded the matter to the District Court for an evidentiary hearing pursuant to the parties' stipulation. On remand, defendants moved for substitution of the judge. The District Court concluded that the Supreme Court's dismissal was not a reversal of the summary judgment ruling, so defendants were not entitled to substitution of the judge. Defendants appealed, contending that the remand effectively set aside the District Court's prior judgment, allowing substitution of the judge under

this section. The Supreme Court held that its orders did not involve any judgment on the merits or reverse the summary judgment ruling, thus there was no basis for defendants to seek substitution of the District Court Judge, and the District Court did not err in denying the request for substitution. Williams v. Schwager, 2002 MT 107, 309 M 455, 47 P3d 839 (2002).

Cases Involving Multiple Parties — Showing of Adversity Required to Trigger Independent Right of Substitution: To invoke the right of substitution in cases involving multiple parties, the moving party must demonstrate adversity with a coparty to the action that has already exercised its right of substitution. To conclude otherwise based on the language in subsection (1)(c) of this section, which refers to the right of any party to substitute a judge, would effectively nullify the adversity requirement. The adversity requirement must be satisfied before reaching the classification and timeliness requirements in subsection (1)(c) of this section. The determination of adversity is based solely on the allegations set forth in the complaint. In the present case, rather than demonstrating adversity between the defendants, the complaint simply alleged that all the defendants were privy to and part of a strategy to transfer corporate assets without shareholder approval, which indicated that plaintiffs lumped all defendants together for purposes of culpability without demonstrating adversity. Although the District Court used the term "hostility" rather than "adversity", the court nevertheless properly interpreted this section in requiring adversity among the codefendants in order for the right of substitution to be exercised. Goldman Sachs Group, Inc. v. District Court, 2002 MT 83, 309 M 287, 46 P3d 606 (2002).

Right of Substitution in Cases Involving Multiple Parties — Supervisory Control Appropriate: The question of whether a District Court properly interpreted this section, to require a defendant to demonstrate its adversity to another defendant that had already exercised its right of substitution in order to invoke an independent right of substitution, was an issue of both first impression and statewide importance. Based on these extraordinary circumstances and a particular need to keep an injustice from occurring, the Supreme Court accepted supervisory control to address the issue. The District Court's interpretation was held to be proper. Goldman Sachs Group, Inc. v. District Court, 2002 MT 83, 309 M 287, 46 P3d 606 (2002).

Time Limits Applicable to Request for Substitution of District Judge: Under this section, a party who files an initiating document has 10 consecutive days after service of that document to move for substitution of the presiding judge, but a party who is served with a summons has 30 consecutive days thereafter to move for substitution of the presiding judge. If no motion for substitution has been filed within the time period applicable to the particular party, that party no longer has a right of substitution. In re Marriage of Archibald, 1999 MT 258, 297 M 20, 993 P2d 653, 56 St. Rep. 1030 (1999).

Ineffective Assistance Claims Denied — No Prejudice Shown Under Strickland Test: Applying the Strickland test for determining effectiveness of counsel, the Supreme Court dismissed defendant's claims that he was ineffectively represented at trial, during the penalty phase proceedings, and during the course of direct appeal, including claims based on: (1) failure to object to prosecutor's statements that defendant was intoxicated at the time of the crime, when that was in fact true, and to object to an intoxication instruction that was based on statutory language; (2) failure to object to closing arguments during which the prosecutor portrayed himself as the victim and narrated in the first person (following U.S. v. Necoechea, 986 F2d 1273 (9th Cir. 1993)); (3) failure to object to the lack of corroborating evidence regarding a witness's testimony when the objection lacked merit and would have been properly overruled (following St. v. Rodgers, 257 M 413, 849 P2d 1028 (1993)); (4) failure to investigate and pursue a mental defect defense after defendant's own psychologist of choice found him capable of going to trial (see Harris v. Vasquez, 949 F2d 1497 (9th Cir. 1990)); (5) failure to move for a substitute judge when there was no reasonable probability that the outcome of the trial would have differed with another judge presiding; (6) failure to request a change of venue absent evidence of juror bias and failure to adequately voir dire the jury when there was no reasonable probability that the outcome of the trial would have differed had voir dire been conducted more thoroughly; (7) ineffectiveness in investigating a witness's background when counsel's investigation fell within the wide range of competent assistance; (8) failure to investigate defendant's suicide attempt; (9) failure to object to certain jury instructions allowing inference of the existence of the requisite mental state from the acts of the accused (following St. v. Cowan, 260 M 510, 861 P2d 884 (1993)); (10) failure to object to instructions setting out the elements of aggravated kidnapping when defendant did not specify which of the alternatives in the instruction were objectionable (following Schad v. Ariz., 501 US 624, 115 L Ed 2d 555, 111 S Ct 2491 (1991)); (11) failure to object to the absence of Native Americans on the jury when, given recent census data, counsel could not have demonstrated that Native Americans were underrepresented on the panel; and

(12) failure to object to the presence of armed officers in the courtroom (following Holbrook v. Flynn, 475 US 560, 89 L Ed 2d 525, 106 S Ct 1340 (1986)). Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995).

Authority of Replacement Judge to Reset Execution Date: McKenzie argued that the judge presiding over the resetting of McKenzie's execution date had no jurisdiction to do so because the original presiding judge or that judge's successor did not enter an order conferring jurisdiction. However, 46-19-103 rather than this section controls in this situation. Section 46-19-103 reposes the act of setting the execution date and signing the death warrant in the court in which the defendant was sentenced. Because both judges preside in the same district, resetting of the execution by the subsequent judge was proper and the requirement in this section, which relates to the substitution of District Court Judges, did not apply. St. v. McKenzie, 271 M 32, 894 P2d 289, 52 St. Rep. 312 (1995).

Judge May Preside Over Second Capital Case When Judge Sentenced Defendant to Death in Previous Case: Langford, imprisoned on a capital offense and sentenced to death, was tried for a second capital offense stemming from a homicide during a prison riot. Langford alleged that the trial judge had erred in not recusing himself since he had previously sentenced Langford to death in an unrelated case. The Supreme Court held that Langford waived his right to one substitution by failing to file in time, that he had failed to file his affidavit alleging bias in time, and that there was no appearance of impropriety for a trial judge to preside over a potential capital case when the judge had previously sentenced the defendant to death in an unrelated case. St. v. Langford, 267 M 95, 882 P2d 490, 51 St. Rep. 962 (1994), distinguishing Shields v. Thunem, 220 M 449, 716 P2d 217 (1986).

No Waiver of Judicial Substitution Until Completion of Service of Process: Each adverse party in a civil or criminal case is entitled to one substitution of a District Court Judge. Under this section, a motion for substitution must be brought within 20 consecutive days after service of summons. The judge for whom substitution is sought has jurisdiction to determine timeliness, and if the motion is untimely, that judge shall issue an order declaring the motion void. While the time period for exercising the right of substitution is not clear with regard to multiple defendants, the Supreme Court held that the phrase "after service of summons" contemplates that the time should run from the completion of service of process. The right of any party to move for judicial substitution, whether the party is one named in the original complaint or in any complaint amended without order of the court, is not waived until a judge is assigned to a cause for 20 consecutive days after all of the defendants have been served. Consequently, a motion made by any party within 20 days after completion of service of process is timely. Thus, it was error for a District Court to dismiss a motion for substitution made 3 days after summons was served on a codefendant, and because the court was without jurisdiction to act on the merits of the case after the timely filing of the motion, subsequent court actions were vacated and the case remanded for a new hearing after substitution of the judge. Challinor v. Glacier Nat'l Bank, 266 M 396, 880 P2d 1327, 51 St. Rep. 863 (1994), clarified in Mattson v. Mont. Power Co., 2002 MT 113, 309 M 506, 48 P3d 34 (2002), regarding the inference that "each" adverse party, not just an original party, is entitled to one substitution without cause because once the time has expired for the original parties to move for substitution, a subsequently joined party may not move for substitution without objection. In response to Challinor, the Supreme Court recognized that such a time period for substitution could result in misuse in multiple party actions or proceedings and thus adopted an amendment to subsection (1)(c) of this section, effective February 1, 1995. See In re Rules for Disqualification & Substitution of Judges, 51 St. Rep. 1123 (1994).

Timely Substitution — Error in Disallowing Motion: When a motion for substitution of a judge was made within the time allowed and granting of the motion would not have had the effect of causing a violation of the statute in question, it was error for the trial court to disallow exercise of the statutory right to substitution of the judge. Once the motion was timely filed, the judge was without jurisdiction to act on the merits of the case, and a subsequent order by the judge was vacated. Taylor v. Matejovsky, 261 M 514, 863 P2d 1022, 50 St. Rep. 1434 (1993), clarified in Mattson v. Mont. Power Co., 2002 MT 113, 309 M 506, 48 P3d 34 (2002), regarding the inference that "each" adverse party, not just an original party, is entitled to one substitution without cause because once the time has expired for the original parties to move for substitution, a subsequently joined party may not move for substitution without objection.

No Substitution of Judge Upon Remand for Resentencing: This section does not allow for substitution of a District Court Judge when a cause of action is remanded for resentencing. On resentencing, a defendant is not entitled to a new judge or to move for substitution of a sentencing judge. St. v. Willson, 250 M 241, 818 P2d 1199, 48 St. Rep. 907 (1991).

Jurisdiction of Original Judge Retained Following Motion for Substitution — Applicability of 1985 Law: On March 27, 1987, plaintiff moved for a substitution of judge, but the Clerk of Court did not give notice to either the judge or the opposing parties, nor was a notice of substitution filed as required by 3-1-802, the law in effect at the time the motion was filed. On appeal, the Supreme Court held that this section did not apply to the unique circumstances of the case because that statute was not in effect until 3-1-802 was superseded on June 29, 1987. Because the requirements of 3-1-802 were not met, the original judge retained jurisdiction. Also, the judge could not obtain jurisdiction through stipulation of the parties. Daniels v. Thomas, Dean & Hoskins, Inc., 246 M 125, 804 P2d 359, 47 St. Rep. 2293 (1990).

Motion to Reinstate Original Judge Denied: Upon remand of the first case, the defendant moved for substitution of the original judge and the motion was granted in contravention of this section. This section was subsequently amended and applied retroactively to a period commencing before the second judge denied the plaintiff's motion to reinstate the first judge. Under the amended statute, the defendant's motion to remove the first judge was proper. Young v. Flathead County, 241 M 223, 786 P2d 658, 47 St. Rep. 226 (1990).

Timely Motion for Substitution — No Jurisdiction for Order: Defendant timely moved for substitution of a District Judge under 3-1-802 (superseded by 3-1-804 in 1987); therefore, subsequent findings and order by that judge were made without proper jurisdiction. Erickson v. Hart, 231 M 7, 750 P2d 1089, 45 St. Rep. 388 (1988).

Collateral References

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor. 84 ALR 5th 399.

Removal or suspension: power of court to remove or suspend judge. 53 ALR 3d 882.

3-1-805. Disqualification for cause.

Compiler's Comments

2003 Amendment: In an order dated June 19, 2003, the Supreme Court in 1 at beginning of third sentence inserted requirement for affidavit to comply with subsections (a) through (c); at end of second sentence of 1(b) substituted "which can be addressed in an appeal from the final judgment" for "made by the challenged judge and from which an appeal could have been taken"; and made minor changes in style. Amendment effective June 19, 2003.

1994 Amendment: The Supreme Court, in an order dated January 6, 1994, in (c), after "allege", inserted "facts". Amendment effective January 6, 1994.

1987 Amendment: In opening paragraph inserted reference to City Courts; in paragraph 1, near end, inserted two references to City Court and inserted "presiding in the district of the court involved"; in paragraph 1(a) deleted provisions that the party filing the affidavit must pay a filing fee, that failure to pay the fee rendered the affidavit void, and that the fee was waived in criminal cases in which defendant had court-appointed counsel and in civil cases in which there was an affidavit and order waiving the fee; in paragraph 1(c), after "does not allege", deleted "facts"; and made minor changes in phraseology.

Case Notes

Limitation on Right of Subsequently Joined Party to Substitute Judge Without Cause Not Violative of Substantive Due Process: Mattson filed a complaint against Montana Power Co. and, more than 30 days following service, moved without objection to join PPL Montana, LLC (PPL), as an additional party defendant. PPL moved to substitute the District Court Judge without cause, but the motion was denied. PPL contended that 3-1-804 violated substantive due process by distinguishing between three classes of parties—original parties, subsequently joined parties and intervenors, and third-party defendants—and that no rational basis existed for treating the three classes of parties differently for purposes of substituting a District Court Judge without cause. The Supreme Court disagreed and affirmed. Because the state may not use its power to take unreasonable, arbitrary, or capricious action against an individual, a statute must be reasonably related to a permissible government objective in order to satisfy the guarantees of substantive due process. In this case, there is not only a rational basis for distinguishing the classes, but responsible judicial administration requires doing so. Subsequently joined parties and intervenors often appear at a much later stage of the proceedings, and to allow a joined or substituted defendant to remove the presiding judge without cause, after the judge has presided over the case for what could be a substantial period, would disrupt the continuity of litigation, precipitate delay, cause duplication of effort, and waste time and expense while providing little corresponding benefit. The right of a subsequently joined party to move for substitution for cause

is preserved under this section. Mattson v. Mont. Power Co., 2002 MT 113, 309 M 506, 48 P3d 34 (2002).

Denial of Motion to Disqualify Judge Proper Absent Failure to Allege Bias or Prejudice: Plaintiff's attorney moved to disqualify a District Court Judge. The motion was denied, and the court went on to assess sanctions against the attorney for discovery abuses. The attorney contended on appeal that when he filed the motion to dismiss, the court was divested of jurisdiction to order sanctions under this section. The Supreme Court disagreed. Failure to allege bias or prejudice in the motion to dismiss rendered the motion inappropriate and without merit, and denial of the motion was not error. Dambrowski v. Champion Int'l Corp., 2000 MT 149, 300 M 76, 3 P3d 617, 57 St. Rep. 581 (2000).

Judge May Preside Over Second Capital Case When Judge Sentenced Defendant to Death in Previous Case: Langford, imprisoned on a capital offense and sentenced to death, was tried for a second capital offense stemming from a homicide during a prison riot. Langford alleged that the trial judge had erred in not recusing himself since he had previously sentenced Langford to death in an unrelated case. The Supreme Court held that Langford waived his right to one substitution by failing to file in time, that he had failed to file his affidavit alleging bias in time, and that there was no appearance of impropriety for a trial judge to preside over a potential capital case when the judge had previously sentenced the defendant to death in an unrelated case. St. v. Langford, 267 M 95, 882 P2d 490, 51 St. Rep. 962 (1994), distinguishing Shields v. Thunem, 220 M 449, 716 P2d 217 (1986).

Case Remanded to Different Judge to Eliminate Any Question of Impropriety: The wife asked that the District Court Judge be disqualified because a newspaper article criticizing the judge cited his handling of her divorce case. The newspaper had also printed the judge's letter and her letter replying to the article. The Supreme Court held that it did not find it necessary to rule on the disqualification issue but stated that on remand, the case was to be heard by a different judge. In re Marriage of Miller, 239 M 12, 778 P2d 888, 46 St. Rep. 1471 (1989).

Failure to Follow Statutory Procedure — Motion to Disqualify Properly Denied: On the opening day of trial an attorney verbally moved for a District Court Judge to remove himself for cause based on an off-the-record comment by the judge 3 weeks before trial that he was acquainted with the parents of one of the parties 13 years earlier. Failure to follow the procedure outlined in this section, coupled with counsel's failure to act immediately, warranted denial of the motion for disqualification. In re Marriage of Eklund, 236 M 77, 768 P2d 340, 46 St. Rep. 194 (1989).

Motion for Disqualification Not Filed Within Statutory Limit: Under former 3-1-802, defendant claimed he was unable to make a motion to disqualify the District Court Judge because the motion had to be filed not less than 20 days before trial, and defense counsel was substituted at a later date so as to preclude the motion to disqualify. However, while the case was pending, 3-1-802 was superseded by this section, which requires a 30-day filing. The change was effective September 1, 1987. Defense counsel was substituted September 29, 1987, and hearing was set for November 4, 1987. Therefore, counsel had 5 days in which to properly file for disqualification. St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988).

Attorney General's Opinions

When Substitute Justice of the Peace May Be Called — Reliance on Letters of Unavailability: How a substitute Justice of the Peace is selected depends on the reasons for the absence of the sitting Justice of the Peace. If the sitting Justice of the Peace is disqualified pursuant to 3-1-803 or this section, only another Justice of the Peace may be called in and the substitute may not be a person qualified pursuant to 3-10-231(2). If the sitting Justice of the Peace is sick, disabled, or absent, another Justice of the Peace or City Judge may be called in if available or a person may be called in who is qualified pursuant to 3-10-231(2) if another Justice of the Peace or City Judge is not readily available. If the sitting Justice of the Peace is on vacation or in training, the substitute is to be chosen in the same manner as if the sitting Justice of the Peace is sick, disabled, or absent, as long as there is not another Justice of the Peace from the county of the sitting Justice of the Peace. In determining who is available to act as a substitute, the sitting Justice of the Peace may rely on letters from other Justices of the Peace and City Judges that they are unavailable. However, after a reasonable time, the sitting Justice of the Peace should contact those who wrote the letters to determine if they are still unavailable. 48 A.G. Op. 11 (2000). See also 40 A.G. Op. 26 (1983), and Potter v. District Court, 266 M 384, 880 P2d 1319 (1994).

Collateral References

Disqualification of judge for having decided different case against litigant—state cases. 85 ALR 5th 547.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case. 85 ALR 5th 471.

Disqualification of judge for bias against counsel for litigant. 54 ALR 5th 575.

Disqualification of judge because of assault or threat against him by party or person associated with party. 25 ALR 4th 923.

Waiver or loss of right to disqualify judge by participation in proceedings—modern state civil cases. 24 ALR 4th 870.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge. 75 ALR 3d 1021.

Affidavit or motion for disqualification of judge as contempt. 70 ALR 3d 797.

Disqualification of judge by state, in criminal case, for bias or prejudice. 68 ALR 3d 509.

Disqualification of original trial judge to sit on retrial after reversal or mistrial. 60 ALR 3d 176.

Disqualification of judge on ground of being a witness in the case. 22 ALR 3d 1198.

Disqualification of judge for having decided different case against litigant. 21 ALR 3d 1369.

Part 10
Judicial Nomination Commission

3-1-1001. Creation, composition, and function of commission.

Compiler's Comments

1991 Amendment: In (1)(b) substituted "one from that part of the state that is composed of judicial districts 1 through 5, 9, 11, and 18 through 20 (changed to 21 pursuant to sec. 6, Ch. 810, L. 1991, a coordination instruction, effective January 1, 1993) and one from that part of the state that is composed of judicial districts 6 through 8, 10, and 12 through 17" for "one from each congressional district".

1987 Amendment: At end of second sentence of (1) inserted "and to provide the chief justice of the supreme court with a list of candidates for appointment to fill any term or vacancy for the chief water judge pursuant to 3-7-221".

Attorney General's Opinions

Appointment of Judges: The Senate confirmation of an individual appointed by the Governor to the office of District Judge is required before that office may be placed on the ballot for election. 37 A.G. Op. 115 (1978).

3-1-1002. Staggered terms of members.

Compiler's Comments

1991 Amendment: At beginning of (1) substituted "Members of" for "All original members named to" and after "serve" substituted "staggered" for "until January 1, 1976. Their successors shall serve as follows: (a) The members appointed by the governor shall serve"; deleted (1)(b) and (1)(c) that read: "(b) The attorneys appointed by the supreme court shall serve 2-year terms.

(c) The judge elected shall serve a 2-year term"; and in (2) substituted "A member may not serve more than two full 4-year terms" for "Thereafter all members shall serve terms of 4 years".

Implementation of Staggered Terms: Section 5, Ch. 810, L. 1991, provided: "In order to implement the staggering of terms required in 3-1-1002, the initial appointment of members must be as follows:

(1) the governor shall appoint members to replace the members whose terms expire December 31, 1991, to terms of 1, 2, 3, and 4 years;

(2) the two attorney members appointed by the supreme court whose terms expire December 31, 1994, shall be appointed to a 2-year and a 3-year term, respectively; and

(3) the judicial member elected under 3-1-1001(1)(d)[c] shall serve a 4-year term."

Applicability: Section 7, Ch. 810, L. 1991, provided: "The limitation on terms contained in 3-1-1002(2) applies to terms commencing after October 1, 1991."

3-1-1006. Secretary — election and duties.

Compiler's Comments

1987 Amendment: At end of (2) inserted "and with the office of the chief justice of the supreme court".

3-1-1007. Commission to make rules — confidentiality of proceedings.

Compiler's Comments

1991 Amendment: Near beginning of (1) substituted "adopt and publish" for "make"; in (1)(a) inserted "and the format of reports filed under 3-1-1010"; inserted (1)(b) requiring Commission to adopt rules establishing procedure for providing public notice of vacancy within 10 days of notice of vacancy receipt; inserted (1)(c) requiring Commission to adopt rules establishing application period and procedure; inserted (1)(d) requiring Commission to adopt rules establishing reasonable period for reviewing applications and conducting applicant interviews; inserted (2) requiring copy of rules to be filed with Supreme Court Clerk; inserted (3) providing that time between vacancy notice and when list submitted to Governor or Chief Justice may not exceed 90 days; at end of (4) substituted "disclosure" for "exposure"; and made minor changes in style.

Case Notes

Commission Rules: In a dissenting opinion to an order denying application for Writ of Supervisory Control, the Commission was charged with failure to follow the law which requires establishment of rules for the conduct of its affairs. German v. Judicial Nomination Comm'n, 173 M 549, 566 P2d 405, 34 St. Rep. 1026 (1977).

3-1-1008. Quorum.

Compiler's Comments

1987 Amendment: In second sentence, after "governor", inserted "or to the chief justice of the supreme court".

3-1-1009. Investigation by commission — application for consideration.

Case Notes

Commission Rules: In a dissenting opinion to an order denying application for Writ of Supervisory Control, the Commission was charged with failure to follow the law which requires establishment of rules for the conduct of its affairs. German v. Judicial Nomination Comm'n, 173 M 549, 566 P2d 405, 34 St. Rep. 1026 (1977).

3-1-1010. Lists submitted to governor and chief justice — report on proceedings.

Compiler's Comments

1991 Amendment: In (1), in first sentence, inserted "the workers' compensation judge, or the chief water judge", inserted third sentence requiring meeting to be held in compliance with 3-1-1007, and in fourth sentence inserted "or chief justice", after "within" substituted "the time period established under 3-1-1007" for "30 days after the resignation date has been verified by the chief justice, or within 30 days after the date of the vacancy if no notice of intent to resign is given", and after "appointment" inserted "to the vacant position"; deleted former (2) that read: "(2) The commission shall meet to prepare and submit to the chief justice of the supreme court a list of not less than three or more than five nominees for appointment to fill any term or vacancy for the chief water judge. The list must be submitted at least 30 days prior to a new term or within 30 days from the date of a vacancy"; in (2) inserted "letters and public comments received regarding the nominee" and inserted second sentence requiring report to give specific reasons for recommending each nominee; and made minor changes in style.

1987 Amendments: Chapter 344 in (1) inserted first sentence requiring the Judicial Nomination Commission to meet as soon as possible after verification of a proposed resignation date and "If no notice is given" at beginning of second sentence; at end of second sentence deleted "on the supreme court or district court"; inserted "The commission shall" at beginning of third sentence; in third sentence substituted "after the resignation date has been verified by the chief justice, or within 30 days after" for "from" and after "vacancy" inserted "if no notice of intent to resign is given"; and made minor changes in phraseology.

Chapter 651 inserted (2) requiring a Commission meeting to prepare and submit a list of nominees to fill a Chief Water Judge's term or vacancy; and at beginning of (3) substituted "Any" for "The" and after "report" deleted "to the governor".

Case Notes

Constitutionality of Judicial Nomination Procedure: The established procedures for filling judicial vacancies in Montana are constitutional and not repugnant to applicable provisions of the Montana Constitution. Jones v. Judge, 176 M 251, 577 P2d 846 (1978).

3-1-1011. Governor or chief justice of the supreme court to nominate from list.

Compiler's Comments

1987 Amendments: Chapter 344 substituted "a nomination" for "an appointment".

Chapter 651 inserted "or the chief justice of the supreme court for the office described in 3-7-221".

Case Notes

Constitutionality of Judicial Nomination Procedure: The established procedures for filling judicial vacancies in Montana are constitutional and not repugnant to applicable provisions of the Montana Constitution. Jones v. Judge, 176 M 251, 577 P2d 846 (1978).

3-1-1012. When governor fails to nominate.

Compiler's Comments

1987 Amendment: Substituted "nominate" for "appoint", following "list" inserted "of nominees", and at end substituted "nomination" for "appointment".

3-1-1013. Senate confirmation — exception — nomination in the interim — appointment contingent on vacancy.

Compiler's Comments

1993 Amendment: Chapter 377 in (1)(a), at beginning, deleted "Each nomination" and inserted exception clause; in (1)(a)(i), at beginning, inserted "each appointment", after "confirmed" deleted "as an appointment", and after "senate" deleted "but a nomination"; in (1)(a)(ii), at beginning, inserted "an appointment", after "effective" deleted "as an appointment", and before "session" inserted "special or regular legislative"; at beginning of (1)(b) substituted "If the appointment is subject to senate confirmation under subsection (1)(a) and is not confirmed" for "If the nomination is not confirmed" and near end substituted "appointment" for "nomination"; inserted (2) that read: "(2) The following appointments are not subject to senate confirmation, and there must be an election for the office at the general election immediately preceding the scheduled expiration of the term or following the appointment, as applicable:

(a) an appointment made while the senate is not in session if the term to which the appointee is appointed expires prior to the next legislative session, regardless of the time of the appointment in relation to the candidate filing deadlines for the office; and

(b) an appointment made while the senate is not in session if a general election will be held prior to the next legislative session and the appointment is made prior to the candidate filing deadline for primary elections held pursuant to 13-1-107, in which case the position is subject to election at the next primary and general elections"; and made minor changes in style. Amendment effective April 15, 1993.

1987 Amendment: In (1), throughout subsection, substituted "nomination" for "appointment" and in first sentence inserted "as an appointment" after "confirmed" and after "effective"; and inserted (2) providing that no nomination is effective unless a vacancy occurs.

Attorney General's Opinions

When Judicial Appointee to Run for Election: An individual appointed by the Governor to the office of District Judge need not run in the general election in the year in which Senate confirmation takes place if, at the time of confirmation, the filing date for judicial candidates has passed. (See 1993 amendment.) 41 A.G. Op. 52 (1986).

Appointment of Judges: The Senate confirmation of an individual appointed by the Governor to the office of District Judge is required before that office may be placed on the ballot for election. (See 1993 amendment.) 37 A.G. Op. 115 (1978).

3-1-1014. Duration of appointment — election for remainder of term.

Compiler's Comments

1993 Amendment: Chapter 377 in (1) substituted first sentence that read: "If an appointment subject to 3-1-1013(1) is confirmed by the senate, the appointee shall serve until the appointee or another person elected at the first general election after confirmation is elected and qualified" for "An appointee confirmed by the senate serves until the next succeeding general election"; inserted (2) and (3) that read: "(2) If an appointment is subject to 3-1-1013(2), the appointee shall serve until the day before the first Monday of January following the first general election after appointment. The candidate elected at that election holds the office for the full term to which elected or for the remainder of the unexpired term, as applicable.

(3) If an incumbent judge or justice files for election to the office to which the judge or justice was elected or appointed and no other candidate files for election to that office, the name of the

incumbent must nevertheless be placed on the general election ballot to allow voters of the district or state to approve or reject the incumbent. If an incumbent is rejected at an election for approval or rejection, the incumbent shall serve until the day before the first Monday of January following the election, at which time the office is vacant and another selection and appointment must be made"; and made minor changes in style. Amendment effective April 15, 1993.

Case Notes

Term of Office Unaffected by Tenure of Appointed Officer: The fact that an appointed officer's tenure necessarily extends beyond the end of a statutory term or impinges on the following term does not lengthen or shorten the term of office. (See 1993 amendment.) State ex rel. Racicot v. District Court, 243 M 379, 794 P2d 1180, 47 St. Rep. 961 (1990), following State ex rel. Olsen v. Swanberg, 130 M 202, 299 P2d 466 (1956).

Attorney General's Opinions

Tenure of Judge Nominated When Senate Not in Session — Succession in Cases of Overlapping Terms: When the tenure of an individual nominated by the Governor to fill a vacancy in the office of District Court Judge runs into a next term of office, this fact does not shorten the length of the next term. At the next general election for District Court Judge, a successor is elected to serve the remainder of the unexpired term of office. (See 1993 amendment.) 42 A.G. Op. 31 (1987).

Term of Judge Nominated When Senate Not in Session: If the Governor nominates an individual to fill a vacancy in the office of District Court Judge when the Senate is not in session, the individual serves until the end of the next legislative session. If confirmed at the next session, he or she continues to serve until the next general election for which the statutory filing deadline has not passed. (See 1993 amendment.) 42 A.G. Op. 31 (1987).

When Judicial Appointee to Run for Election: An individual appointed by the Governor to the office of District Judge need not run in the general election in the year in which Senate confirmation takes place if, at the time of confirmation, the filing date for judicial candidates has passed. (See 1993 amendment.) 41 A.G. Op. 52 (1986).

Appointment of Judges: The Senate confirmation of an individual appointed by the Governor to the office of District Judge is required before that office may be placed on the ballot for election. (See 1993 amendment.) 37 A.G. Op. 115 (1978).

Part 11
Judicial Standards Commission

Part Law Review Articles

Minimums of Judicial Standards, Wuerthner, 12 Mont. L. Rev. 1 (Spring 1951).

3-1-1101. Creation and composition of commission.

Compiler's Comments

1993 Amendment: Chapter 52 in (3), after "citizens", deleted "from different congressional districts"; and made minor changes in style. Amendment effective July 1, 1993.

Saving Clause: Section 12, Ch. 52, L. 1993, was a saving clause.

Applicability: Section 13, Ch. 52, L. 1993, provided: "[This act] applies to appointments made after [the effective date of this act]." Effective July 1, 1993.

3-1-1105. Confidential proceedings — rules for commission.

Compiler's Comments

1981 Amendment: Inserted "Except as provided in 3-1-1107 and 3-1-1121 through 3-1-1126" at the beginning of (1); combined (1) and (2) relating to confidentiality and privileged communications regarding proceedings and filed papers; and added a provision in (2) that the Judicial Standards Commission shall make rules for the enforcement of confidentiality consistent with this part.

Commissioner Correction: The exception clause added to subsection (1) by the 1981 amendment did not include section 8 of the amending session law chapter, which corresponds to 3-1-1126. The Code Commissioner included 3-1-1126 in the clause because it had been section 7 of the introduced bill, which was included in the clause; when section 7 was renumbered section 8 during the legislative process, the exception clause, by apparent oversight, was not changed accordingly.

Case Notes

Judicial Standards Commission Proceedings Not Violative of Constitutional Confidentiality Provisions: Records of the Judicial Standards Commission are confidential until the filing of a formal complaint. After a formal complaint is filed, certain papers, proceedings, and records of proceedings become accessible to the public. In order to protect the reputation of innocent judges wrongfully accused of misconduct, to maintain confidence in the judiciary by avoiding premature disclosure of alleged misconduct, and to encourage retirement as an alternative to costly lengthy formal proceedings and to protect Commission members from outside pressures, a complaint against a judicial officer is confidential until the Commission finds good cause to order a hearing, at which time the Legislature has determined that the public's right to know outweighs the individual judge's right to privacy. In this case, defendant argued that the Commission unlawfully provided copies of an investigation file to its members and the prosecutor, who in turn filed it as an exhibit during the formal hearing, making the matter a public record. The investigation file was never admitted into evidence during the hearing; however, it was included in the bound volume of prosecution exhibits. Defendant did not object at the hearing to inclusion of the file with other admitted exhibits, and thus waived any argument on appeal concerning a breach of privacy. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002).

Authority of Judicial Standards Commission: Where the Judicial Standards Commission adopted in its rules power to investigate complaints on the basis that a judge had engaged in "conduct prejudicial to the administration of justice that brings the judicial office into disrepute", the court held the Commission in so acting would exceed its authority, since the Montana Constitution and statute did not provide that such described conduct would be grounds for action by the Commission. Rather, the constitution requires the more serious complaint of "misconduct in office" to provide a basis for action by the Commission. State ex rel. Shea v. Judicial Standards Comm'n, 198 M 15, 643 P2d 210, 39 St. Rep. 521 (1982).

Necessity of Verified Complaint: The Judicial Standards Commission initiated an investigation upon receipt of a letter from a retired District Judge, contrary to its own rules and the statute (which, prior to a 1983 amendment requiring only a "written complaint") required that such investigations be initiated by a verified complaint. It argued that because the Montana Constitution prescribed its investigative authority and granted rulemaking power to implement its authority, the Legislature was without power to specify the procedure by which it exercised such authority. The court disagreed, finding that under Art. V, sec. 13(1), Mont. Const., the Legislature has broad powers relating to removal of public officers and that there can be no inhibition of the legislative power, irrespective of rulemaking authority granted to the Commission, to make suitable provision not in conflict with the constitutionally granted powers of the Commission, including the requirement that the Commission may act only upon a verified complaint. State ex rel. Shea v. Judicial Standards Comm'n, 198 M 15, 643 P2d 210, 39 St. Rep. 521 (1982).

3-1-1106. Investigation of judicial officers — complaint — hearing — recommendations.

Compiler's Comments

1991 Amendment: Near end of (3), before "retirement", inserted "disability". Amendment effective July 1, 1991.

1983 Amendment: In (1)(a) substituted first sentence, allowing Judicial Standards Commission to start an investigation of a judicial officer, for former text that read: "The commission or any citizen of the state may, upon good cause shown, initiate an investigation of any judicial officer in the state by filing a verified complaint with the commission."; inserted second sentence of (1)(a) relating to a verified complaint that must be signed before additional proceedings can be conducted; inserted (1)(b) relating to notice to the judicial officer; inserted (2)(b) allowing dismissal if the judicial officer promises to take satisfactory corrective action; and made minor changes in phraseology.

Case Notes

No Error in Failure to Grant Continuance of Formal Hearing: Defendant requested a continuance of a formal hearing before the Judicial Standards Commission because there were dispositive motions pending in District Court and because the prosecution's witness list, provided 2 weeks before trial, included 15 previously undisclosed witnesses. A continuance was denied, and the Supreme Court found no error. The witness list was provided to defendant within the time limit set at the scheduling conference. Further, there is nothing unusual about preparing for a hearing while dispositive motions are pending, and defendant's failure to do so

was not the fault of the Commission. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002).

Noninvestigatory, Work-Related Entry Into Judge's Chamber Not Considered Search: Smartt, a Justice of the Peace, left his office computer on after work hours. A county employee and another judge entered Smartt's chambers to shut down the computer so that a network backup could be performed and discovered pornographic images displayed on the computer screen. They reentered the chambers to note websites from the computer history file and took digital photographs of the long-term history of internet activity on Smartt's computer. The information was turned over to the FBI, and Smartt's computer was confiscated and searched. Smartt contended that the evidence seized from his chambers was obtained through an unlawful search, violated the right to privacy, and should be suppressed. The Supreme Court disagreed. Under St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002), the Supreme Court considers three factors when determining whether there has been an unlawful government intrusion into one's privacy: (1) whether the person has an actual expectation of privacy; (2) whether society is willing to recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion. When no reasonable expectation of privacy exists, there is neither a search nor seizure. Although the Montana Constitution affords broader protection than the federal constitution in cases involving searches of and seizure from private property, a person may not expect the same degree of privacy in public that is afforded in the privacy of one's home. In this case, entry into the judge's chambers was for a legitimate, noninvestigatory, work-related purpose. Irrespective of whether Smartt had any expectation of privacy with regard to the computer images, the nature of the intrusion did not rise to the level of a search, and denial of the motion to suppress the evidence was proper. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002), distinguishing Gryczan v. St., 283 M 433, 942 P2d 112 (1997). See also St. v. Scheetz, 286 M 41, 950 P2d 722 (1997).

Form of Complaint Not Critical to Investigation of Judicial Misconduct — Dismissal of Writ of Prohibition Proper When Judicial Standards Commission Acting Within Authority: A Justice of the Peace obtained a writ of prohibition barring further proceedings by the Judicial Standards Commission based on an unverified complaint. The complaint was subsequently verified, and the District Court dismissed the writ. The Justice of the Peace objected that his formal verified complaint was not submitted on the standardized form set forth in the Commission's rules, was drafted by the Commission's attorney, and did not identify the specific sections of the Canons of Judicial Ethics that were allegedly violated. The Justice of the Peace also maintained that the Commission violated its authority in investigating the complaint, so dismissal of the writ was in error. The Supreme Court disagreed. The form of a complaint is not critical to the Commission's fulfilling of its constitutional mandate, and nothing in policy, statute, or Commission rules was abrogated by the Commission's attorney by assisting in the drafting of the complaint. Further, a writ of prohibition is an extraordinary remedy available to enjoin a judicial entity from an inappropriate exercise of jurisdiction when no other plain, speedy, and adequate legal remedy exists. Thus, the District Court did not err in dismissing the writ because the Commission acted within its jurisdiction throughout the investigation. State ex rel. Smartt v. Judicial Standards Comm'n, 2002 MT 148, 310 M 295, 50 P3d 150 (2002).

Initial Notice of Unverified Complaint Signed by Commission Executive Secretary Not Violative of Statutory Notice Requirements: A Justice of the Peace received an initial notice, signed by the Judicial Standards Commission's executive secretary, that an unverified complaint of judicial misconduct had been received by the Commission. The Justice of the Peace contended that the initial notice was defective because it was not signed by the Commission members as required by this section. The Supreme Court disagreed. The statute requires that the Commission sign the notice to the judicial officer that a verified complaint has been received. Because the initial notice signed by the executive secretary in this case notified the Justice of the Peace of receipt of an unverified complaint, the statutory requirement was not violated. State ex rel. Smartt v. Judicial Standards Comm'n, 2002 MT 148, 310 M 295, 50 P3d 150 (2002).

Judicial Standards Commission Authority to Institute Investigation — Investigation Based on Report of Criminal Investigation Within Commission Authority: A written, unverified complaint was filed with the Judicial Standards Commission against a Justice of the Peace, alleging judicial misconduct. The Justice of the Peace obtained a writ of prohibition barring further proceedings based on an unverified complaint. Subsequently, a report was obtained from a Department of Justice investigation of criminal charges against the Justice of the Peace. The Justice of the Peace claimed that the Commission overstepped its authority by obtaining a copy of the report and further investigating the allegations when no complaint had been filed with the Commission regarding the allegations in the report. Under this section, a written complaint by

any Montana citizen may initiate an investigation of judicial misconduct, and only when the initial investigation indicates that additional proceedings are warranted must the complaining citizen sign a verified complaint. Further, Commission rules provide that a complaint is not a prerequisite to Commission action. The Commission may act on its own motion as well, so the Commission did not exceed its jurisdiction in obtaining a copy of the report by court order and undertaking its own investigation of the subsequently verified allegations. State ex rel. Smartt v. Judicial Standards Comm'n, 2002 MT 148, 310 M 295, 50 P3d 150 (2002).

Judicial Standards Commission Investigation of Justice of the Peace — Writ of Prohibition Properly Modified to Cure Ministerial Defects: A written, unverified complaint was filed with the Judicial Standards Commission against a Justice of the Peace, alleging judicial misconduct. The Justice of the Peace obtained a writ of prohibition barring further proceedings based on an unverified complaint. Subsequently, information was obtained from a Department of Justice investigation of criminal charges against the Justice of the Peace. The Commission sought to vacate the writ. By the time that the hearing was held, the complaint was verified, so the District Court modified the writ, allowing the Commission to proceed on the basis of the verified complaint. The Justice of the Peace appealed the modification that allowed the Commission to cure defects before commencing formal proceedings. The Supreme Court affirmed. The function of a writ of prohibition is to halt proceedings that are "without or in excess of the jurisdiction" of the entity exercising judicial functions. The writ here was to continue in force only until verified complaints were received. A procedural error, such as the failure to verify a complaint, will not be allowed to subvert the constitutional mandate of the Commission to investigate judicial misconduct. Because the complaint was verified by the time that the District Court considered modification of the writ, the court did not err in modifying the writ and allowing the Commission to proceed based on the verified complaint. State ex rel. Smartt v. Judicial Standards Comm'n, 2002 MT 148, 310 M 295, 50 P3d 150 (2002).

Authority of Judicial Standards Commission: Where the Judicial Standards Commission adopted in its rules power to investigate complaints on the basis that a judge had engaged in "conduct prejudicial to the administration of justice that brings the judicial office into disrepute", the court held the Commission in so acting would exceed its authority, since the Montana Constitution and statute did not provide that such described conduct would be grounds for action by the Commission. Rather, the constitution requires the more serious complaint of "misconduct in office" to provide a basis for action by the Commission. State ex rel. Shea v. Judicial Standards Comm'n, 198 M 15, 643 P2d 210, 39 St. Rep. 521 (1982).

Necessity of Verified Complaint: The Judicial Standards Commission initiated an investigation upon receipt of a letter from a retired District Judge, contrary to its own rules and the statute (which, prior to a 1983 amendment requiring only a "written complaint") required that such investigations be initiated by a verified complaint. It argued that because the Montana Constitution prescribed its investigative authority and granted rulemaking power to implement its authority, the Legislature was without power to specify the procedure by which it exercised such authority. The court disagreed, finding that under Art. V, sec. 13(1), Mont. Const., the Legislature has broad powers relating to removal of public officers and that there can be no inhibition of the legislative power, irrespective of rulemaking authority granted to the Commission, to make suitable provision not in conflict with the constitutionally granted powers of the Commission, including the requirement that the Commission may act only upon a verified complaint. State ex rel. Shea v. Judicial Standards Comm'n, 198 M 15, 643 P2d 210, 39 St. Rep. 521 (1982).

3-1-1107. Action by supreme court.

Compiler's Comments

1981 Amendment: Added subsection (2) requiring public accessibility to hearing and papers.

Case Notes

Conduct of Justice of the Peace Violative of Canons of Judicial Ethics — Costs Associated With Sanction Attributed to Justice of the Peace: The Supreme Court found clear and convincing evidence that a Justice of the Peace violated the Canons of Judicial Ethics by knowingly accessing sexually explicit images on a county computer and by engaging in inappropriate behavior with a person with outstanding warrants. The conduct had a negative effect on the public's perception of the judiciary, and the court held that the appropriate sanction was to suspend the Justice of the Peace from the performance of judicial duties without pay for the remainder of the term of office, and to assess the Justice of the Peace with the costs of the sanction proceedings. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002).

Judicial Standards Commission Proceedings Not Violative of Constitutional Confidentiality Provisions: Records of the Judicial Standards Commission are confidential until the filing of a formal complaint. After a formal complaint is filed, certain papers, proceedings, and records of proceedings become accessible to the public. In order to protect the reputation of innocent judges wrongfully accused of misconduct, to maintain confidence in the judiciary by avoiding premature disclosure of alleged misconduct, and to encourage retirement as an alternative to costly lengthy formal proceedings and to protect Commission members from outside pressures, a complaint against a judicial officer is confidential until the Commission finds good cause to order a hearing, at which time the Legislature has determined that the public's right to know outweighs the individual judge's right to privacy. In this case, defendant argued that the Commission unlawfully provided copies of an investigation file to its members and the prosecutor, who in turn filed it as an exhibit during the formal hearing, making the matter a public record. The investigation file was never admitted into evidence during the hearing; however, it was included in the bound volume of prosecution exhibits. Defendant did not object at the hearing to inclusion of the file with other admitted exhibits, and thus waived any argument on appeal concerning a breach of privacy. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002).

Standard of Review of Commission Proceedings: The proceedings of the Judicial Standards Commission are reviewed de novo by the Supreme Court. Recommendations of the Commission are not binding on the court; rather, the court will consider the evidence and exercise independent judgment. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002).

Collateral References

Abuse or misuse of contempt power as ground for removal or discipline of judge. 76 ALR 4th 982.

3-1-1109. Interim disqualification of judicial officer.

Compiler's Comments

1991 Amendment: In (1), after "from", substituted "serving" for "acting"; in (2) substituted sentence requiring judicial officer to be disqualified from serving as judicial officer pending review by Supreme Court when Commission files recommendation for removal or retirement with Supreme Court for "a formal proceeding before the commission for his removal or retirement"; and made minor changes in style. Amendment effective July 1, 1991.

3-1-1121. Public disclosure required.

Compiler's Comments

Codification Instruction: Section 9, Ch. 441, L. 1981, provided: "Sections 2 through 7 [3-1-1121 through 3-1-1126] are intended to be codified as an integral part of Title 3, chapter 1, part 11, and the provisions of Title 3, chapter 1, part 11, apply to sections 2 through 7." Sections 2 through 7 of the introduced bill are codified at 3-1-1121 through 3-1-1126. Section 3, Ch. 446, L. 1981, was added to the introduced bill, and sections 3 through 7 of the introduced bill were renumbered sections 4 through 8. The codification instruction was not amended to reflect that change. Section 8 was codified as 3-1-1126 because that was the apparent intent of the original bill.

Source: Sections 3-1-1121 through 3-1-1126 are partially based upon American Bar Association, Proposed Standards Relating to Judicial Discipline and Disability Nos. 1.1 through 9.4 (1977).

Case Notes

Judicial Standards Commission Proceedings Not Violative of Constitutional Confidentiality Provisions: Records of the Judicial Standards Commission are confidential until the filing of a formal complaint. After a formal complaint is filed, certain papers, proceedings, and records of proceedings become accessible to the public. In order to protect the reputation of innocent judges wrongfully accused of misconduct, to maintain confidence in the judiciary by avoiding premature disclosure of alleged misconduct, and to encourage retirement as an alternative to costly lengthy formal proceedings and to protect Commission members from outside pressures, a complaint against a judicial officer is confidential until the Commission finds good cause to order a hearing, at which time the Legislature has determined that the public's right to know outweighs the individual judge's right to privacy. In this case, defendant argued that the Commission unlawfully provided copies of an investigation file to its members and the prosecutor, who in turn filed it as an exhibit during the formal hearing, making the matter a public record. The investigation file was never admitted into evidence during the hearing; however, it was included in the bound volume of prosecution exhibits. Defendant did not object at the hearing to inclusion

of the file with other admitted exhibits, and thus waived any argument on appeal concerning a breach of privacy. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002).

3-1-1122. Judge's waiver of confidentiality — hearing made public.

Compiler's Comments

1991 Amendment: At beginning inserted references to disclosure under 3-1-1107, 3-1-1121, and 3-1-1123 through 3-1-1126 and inserted last sentence providing that public disclosure of information is not contingent on judge's waiver of confidentiality. Amendment effective July 1, 1991.

Case Notes

Judicial Standards Commission Proceedings Not Violative of Constitutional Confidentiality Provisions: Records of the Judicial Standards Commission are confidential until the filing of a formal complaint. After a formal complaint is filed, certain papers, proceedings, and records of proceedings become accessible to the public. In order to protect the reputation of innocent judges wrongfully accused of misconduct, to maintain confidence in the judiciary by avoiding premature disclosure of alleged misconduct, and to encourage retirement as an alternative to costly lengthy formal proceedings and to protect Commission members from outside pressures, a complaint against a judicial officer is confidential until the Commission finds good cause to order a hearing, at which time the Legislature has determined that the public's right to know outweighs the individual judge's right to privacy. In this case, defendant argued that the Commission unlawfully provided copies of an investigation file to its members and the prosecutor, who in turn filed it as an exhibit during the formal hearing, making the matter a public record. The investigation file was never admitted into evidence during the hearing; however, it was included in the bound volume of prosecution exhibits. Defendant did not object at the hearing to inclusion of the file with other admitted exhibits, and thus waived any argument on appeal concerning a breach of privacy. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002).

Constitutional Right to Equal Protection Not Violated by Confidentiality Provisions in Rule 13 Regulating Complaints Against Attorneys: Formal complaints against two attorneys were filed with the State Bar Commission on Practice, which recommended disciplinary actions against the attorneys. In their appeal, the attorneys contended that Rule 13 of the Rules on Lawyer Disciplinary Enforcement violated their rights to equal protection under the law, making a comparison with the constitutional provision in Art. VII, sec. 11, Mont. Const., and statutes concerning the Judicial Standards Commission under which a judge responding to a disciplinary complaint may waive confidentiality. The Supreme Court found the argument inscrutable and unworthy of consideration. The attorneys failed to establish that they were treated differently under the Rules on Lawyer Disciplinary Enforcement from than any other attorney facing disciplinary charges. In re Goldstein & Albers v. Comm'n on Practice, 2000 MT 8, 297 M 493, 995 P2d 923, 57 St. Rep. 31 (2000), following In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

3-1-1126. Commission report to legislature.

Compiler's Comments

1991 Amendment: Near beginning of (1), after "shall", inserted "as provided in 5-11-210" and after "legislature" deleted "each year the legislature meets in regular session". Amendment effective March 20, 1991.

Part 15
Courts of Limited Jurisdiction
Training and Certification of Judges

Part Compiler's Comments

Rules for Certification of Judges of Courts of Limited Jurisdiction: In an order dated August 31, 1994, the Supreme Court adopted the following rules:

"Rule 1. Scope of rules. A. DEFINITIONS. As used in these rules, the following definitions apply:

(1) "Commission" means the commission on courts of limited jurisdiction established by the supreme court.

(2) "Governing body" means:

(a) for a justice court:

(i) the board of county commissioners; or

(ii) the commissioners for the consolidated local government; and

(b) for a city court or municipal court:
(i) the city council; or
(ii) the commissioners for the consolidated local government.
(3) "Judge" means:
(a) a municipal court judge;
(b) a justice of the peace; or
(c) a city judge.

B. WHO MUST BE CERTIFIED. Pursuant to 3-1-1502 and 3-1-1503, a judge selected for a term of office on or after January 6, 1986, may not assume the functions of office unless he or she has filed a certificate of completion or a temporary certificate with the county clerk and recorder in that jurisdiction.

Rule 2. Certification of new judges. A. DUTIES OF COURT ADMINISTRATOR. Under the direction of the commission, the supreme court administrator shall:
(1) send governing bodies a letter containing information on certification of judges;
(2) send to each new judge an information packet containing:
(a) an application for temporary certification;
(b) a questionnaire on what books, references, and other materials are available in the judge's office;
(c) a checklist of materials needed by the judge;
(d) information on the next available training session;
(e) notification of options in case of failure to obtain a certificate of completion, including information on available study materials; and
(f) a copy of these rules;
(3) notify the Montana magistrates' association of the name and address of each new judge;
(4) notify the commission of the name and address of each new judge; and
(5) monitor the temporary certificate status of each new judge and report to the commission on the status of each application for a temporary certificate.

B. DUTIES OF NEW JUDGE. A new judge shall:
(1) return the completed request for a temporary certificate to the supreme court administrator;
(2) return the completed questionnaire to the supreme court administrator;
(3) apply to the supreme court administrator for enrollment in the next semiannual training session; and
(4) enroll with the supreme court administrator for testing for a certificate of completion.

C. DUTIES OF GOVERNING BODY. The governing body shall:
(1) immediately notify each newly elected or appointed judge of the requirement to contact the supreme court administrator's office;
(2) complete the notification of election or appointment and mail it to the supreme court administrator's office; and
(3) verify that all judges in its jurisdiction have filed a temporary certificate pursuant to 3-1-1503 or a certificate of completion pursuant to 3-1-1502.

Rule 3. Temporary certificate. A. APPLICATION.
(1) A judge shall apply in writing to the commission for a temporary certificate:
(a) immediately upon assuming office as a successor or new judge; or
(b) within 15 days of receipt of notification by the commission that a certificate of completion has expired or that a renewal will not be granted.
(2) The commission shall act promptly upon an application for a temporary certificate and may take action appropriate to the circumstances.

B. ISSUANCE.
(1) The commission may issue temporary certificates to judges under the terms and conditions set forth in Rule 3B(3).
(2) A temporary certificate may contain conditions considered appropriate by the commission. The certificate is effective for a period not to exceed 6 months and has the same effect as a certificate of completion.
(3) (a) The commission may issue a temporary certificate to a judge who:
(i) is appointed or elected for the first term of office following a general election and after the course of education and training has been held;
(ii) did not attend the required course of education and training because of personal illness, death in the family, or other good cause and was excused by the commission;
(iii) has failed to obtain a certificate of completion before assuming office;
(iv) has failed to obtain a renewal of the certificate of completion; or

(v) is eligible for other good cause.

(b) The commission may issue a temporary certificate to a judge who has received a waiver of training from the commission.

Rule 4. Education and training — judicial education policy — certificate of completion. (1) The commission shall prescribe an annual course of education and training that must be completed by all judges of courts of limited jurisdiction. The course of education and training must include the successful completion of a certification test pursuant to Rule 6, and such other testing as the commission shall authorize. Attendance is required at all training sessions pursuant to 3-10-203 and 3-11-204. Only presiding judges and their clerks in Montana courts of limited jurisdiction—justice, city and municipal courts—shall be allowed to attend training sessions.

(2) The Commission hereby establishes a "Judicial Education Policy" which shall address issues relating to implementation of education and training of judges, including but not limited to: special training for new judges or judges exhibiting deficiency in a particular subject matter, scheduling of training conferences; conference registration; testing; attendance requirements and penalties for violation thereof.

(3) The commission shall issue a certificate of completion to all judges who successfully complete the course of education and training.

(4) A judge must file with the clerk and recorder of that jurisdiction a certificate of completion:

(a) at the beginning of the judge's term of office; and

(b) after each general election; or

(c) every 4 years after the date of taking office.

Rule 5. Waiver.

A. WAIVER COMMITTEE. The commission shall annually name a three-member waiver committee. The committee shall recommend action to the commission on all applications from judges for waivers of annual training, and shall act on all applications for waivers of training for substitute judges.

B. WAIVER OF ANNUAL TRAINING.

(1) To obtain a waiver of attendance at a training conference, the judge must make written application to the commission, stating the reason why a waiver is requested. Except for requests for a waiver under B(2), the request for a waiver must be submitted to the Commission at least forty (40) days prior to the scheduled date the training conference will begin. A notice of the waiver committee's proposed recommendation to the commission will be sent to the applicant five (5) days prior to the commission's action thereon. If the applicant objects to the proposed recommendation, the applicant may appear at the next regular commission meeting and present his or her position to the commission. The commission shall consider the request for waiver and shall advise the judge in writing of its determination at least ten (10) days prior to the scheduled date the training conference will begin.

(2) The commission may grant a waiver of annual training because of illness, death in the family, or other good cause. Only one annual training session may be waived by virtue of attendance at an out-of-state training program.

(3) Any request for permission to leave a biannual training conference prior to its completion shall be presented to the commission and shall constitute an application for a waiver. Emergencies shall be addressed to the commission at the training conference for approval.

C. WAIVER OF TRAINING FOR SUBSTITUTE JUDGES.

(1) When a substitute judge is named to act for an absent judge or perform daily operations on an occasional basis pursuant to 3-10-231(2) through (5), the substitute judge is required to obtain a waiver of training from the waiver committee. A substitute judge must be of good moral character and must have good community support, a sense of community standards, and a basic knowledge of court procedure.

(2) The elected or appointed judge must complete and submit the request for waiver of training for the substitute judge. The prescribed forms may be obtained by writing to the commission.

(3) The waiver committee shall review each request for waiver of training and shall advise the judge of its decision. No more than five substitute judges in one jurisdiction may receive a waiver of training in 1 year.

(4) If the waiver committee does not approve the application for waiver of training for the substitute judge, the judge making the application may file a written request with the commission requesting a review of the matter by the commission. Upon receipt of the judge's written request for review, the commission shall consider the matter at the next regular meeting

and advise the judge of its decision. The judge making the request is encouraged to appear at the commission meeting where the matter is being considered.

Rule 6. Certification test.

A. PREPARATION. Beginning in November 1986 and every 4 years thereafter, the commission shall prepare a certification of completion test which shall be administered after the general election in conjunction with the training conference. This test must be used for all interim certification testing. The test must cover subjects commonly encountered by judges of courts of limited jurisdiction.

B. ADMINISTRATION. Under the supervision of the commission, the supreme court administrator shall monitor the integrity of the certification test, administer and grade the tests, and notify the judges of the test results. The commission shall establish what constitutes a passing grade.

C. OPTIONS IN CASE OF FAILURE.

(1) A judge who fails the certification test may request from the commission an opportunity to retake the test. The test may be retaken only once unless there is a showing to the commission of exceptional circumstance justifying an additional retest.

(2) Prior to retaking the certification test, the judge shall apply to the commission for a temporary certificate. The commission may grant a temporary certificate as provided in Rule 3B and may also require the judge to meet certain conditions prior to allowing the judge to retake the test. The judge may be required to review videos, receive special assistance, or complete an independent study of selected materials.

(3) Upon completion of the temporary certificate conditions, the commission may authorize the judge to retake the certification test.

(4) A certification test must be retaken within a period of time set by the commission, but in no event may it be taken sooner than 30 days or later than 6 months after failing the certification test.

Rule 7. Failure to obtain certification — notice.

(1) Upon the failure of a judge to obtain a certificate of completion or a temporary certificate and after the expiration of the period within which an application for a temporary certificate may be made, the judge is disqualified and there is a vacancy in the office.

(2) The commission shall send notice of the disqualification and vacancy to:

(a) the judge;

(b) the supreme court;

(c) the clerk and recorder of the judge's jurisdiction; and

(d) the governing body."

Commission on Courts of Limited Jurisdiction — Judicial Education Policy: In an order dated August 31, 1994, the Supreme Court adopted the following rules:

MONTANA SUPREME COURT
COMMISSION ON COURTS OF LIMITED JURISDICTION
JUDICIAL EDUCATION POLICY

WHEREAS, it is the desire of the Commission to establish uniform standards of attendance pursuant to 3-10-203 and 3-11-204; and

WHEREAS, it is the desire of the Commission to prescribe a course of education, training and testing pursuant to **Rule 4, COURTS OF LIMITED JURISDICTION TRAINING AND CERTIFICATION OF JUDGES**; and

WHEREAS, it is the desire of the Commission to promote accountability for the material covered during training conferences and provide an educational environment that is conducive to learning;

THE COMMISSION ON COURTS OF LIMITED JURISDICTION adopts the following policy for training of judges in courts of limited jurisdiction:

1. **NEW JUDGES** — Upon notification of election or appointment pursuant to 3-1-1503 or 13-15-405 MCA, the Court Administrator's Office shall without unnecessary delay, mail or deliver available training materials, together with instructions, to the elected or appointed judge.

2. **TRAINING CONFERENCES** — Pursuant to 3-10-203 and 3-11-204, the Commission will conduct two training conferences each year — spring and fall.

3. **TRAINING CONFERENCE SCHEDULING** — At each training conference judges will be notified of the dates and location of the next training conference to the extent that the date and location is known. Judges are responsible for calendaring training conferences.

4. **CONFERENCE REGISTRATION** — It is the duty of each judge to notify the Court Administrator's Office of a change of address for the court or judge. The Court Administrator's Office shall mail registration materials to each judge at least 45 days prior to the beginning of a conference. Registration materials shall include a registration form, "Tentative Agenda" identifying the beginning and ending of the conference, a room reservation form if provided by the hotel, and other appropriate information. Each judge shall: (1) complete the registration form, including questions relating to the court, (2) make appropriate arrangements with the city or county for payment of the registration fee, and (3) return the completed form together with the registration fee to the Court Administrator's Office by the deadline listed.

5. **HOTEL RESERVATIONS** — The conference facility will block a sufficient number of rooms and will set a deadline for making reservations. Each judge is responsible for making room reservations within the allotted time.

6. **NON SMOKING ENVIRONMENT** — Smoking is not permitted in classrooms, breakout rooms, break areas, hallways adjacent to any area used by judges, or during meals provided by the conference. Smoking is only allowed outside the conference facility, in a judge's private room, or areas specifically designated by the conference facility as smoking areas.

7. **BEGINNING OF CONFERENCE** — All judges shall be present when the conference begins unless a waiver has been granted by the Commission.

8. **SIGN IN/SIGN OUT** — Judges should plan their arrival to allow time to acquaint themselves with the layout of the conference facility and location of the classes. Judges are required to sign in at the conference registration table and pick up their conference folder during the times listed on the Tentative Agenda. Judges will also be required to sign out after the last session of the conference.

9. **DAILY SCHEDULE** — Judges are responsible for knowing and complying with the daily class schedule, including times scheduled for breaks and lunch. Attendance at every class in its entirety is mandatory unless excused by the Commission.

10. **BREAKS** — Classes will be scheduled with at least one (1) break each hour. Judges should promptly return to the classroom before the class is scheduled to begin. Judges should remain in the classroom for the **entire session** unless a physical condition requires a break more often.

11. **CERTIFICATES** — Conference certificates will be mailed to each judge after the conference is concluded. **Judges failing to attend all conference classes in their entirety, unless excused by the Commission, will not be given a conference certificate and will not receive credit for the conference.**

12. **TESTING** — In addition to the certification test as provided in Rule 6 Courts of Limited Jurisdiction Training and Certification of Judges, judges are subject to testing during all training conferences, depending upon the educational objectives and the material presented. Testing results, other than the certification test, will not be reported on a pass/fail basis, but will be used to determine if:

1) the material presented was adequately covered and understood by a judge(s),
2) a judge(s) would benefit from further instruction in any area of the law, and
3) an individual judge needs special assistance on a specific subject matter.

13. **VIOLATION OF POLICY** — Judges failing to attend a conference in its entirety, including late registration, failing to attend classes, late for classes or leaving classes early, shall be grounds for action by the Commission. Upon determination that a judge has violated the attendance policy, the Commission may: (1) withhold a certificate of completion, creating a violation of 3-10-203 or 3-11-204, (2) require a judge to appear before the Commission to explain a lack of attendance, (3) require a judge to attend, at his or her own expense, a State Bar CLE or other structured educational class as a makeup, (4) notify the city or county of the judge's violation of attendance policy, or (5) take other appropriate action after considering the circumstances of non-attendance.

14. **AMERICANS WITH DISABILITIES ACT (ADA)** — The Commission will make reasonable accommodations for any judge covered by the ADA with respect to training, certification, and participation at training conferences. Due to the logistics of planning a statewide conference, any judge claiming reasonable accommodations under the ADA should endeavor to do the following not less than 90 days prior to a conference:

1. Notify the Commission in writing of his or her request for reasonable accommodations at a training conference.

2. List with reasonable specificity what accommodations are requested.

Source: This part is based on McKinney's Consolidated Laws of New York Annotated, Book 29A, part 2, sec. 105, New York Uniform Justice Court Act.

3-1-1502. Training and certification of judges.

Compiler's Comments

1991 Amendment: Near beginning, after "term of office", deleted "commencing on or after January 6, 1986". Amendment effective April 2, 1991.

3-1-1503. Exception — temporary certificate.

Compiler's Comments

1991 Amendment: In (3)(a), after "elected", deleted "for his first term"; and inserted (4) regarding certification prior to appointee assuming office. Amendment effective April 2, 1991.

Part 16
District Court Council — Judiciary Branch Account

Part Compiler's Comments

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

3-1-1601. District court council — administration of state funding of district courts.

Compiler's Comments

Rights to Court Property: Section 58, Ch. 585, L. 2001, provided: "A district court that becomes state-funded under [this act] retains the rights to all personal property relating to the functions of the court. The property includes records, office equipment, computer equipment, supplies, contracts, books, papers, documents, maps, grant and earmarked account balances, vehicles, and all other similar property. However, the district court may not use or divert money in a fund or account for a purpose other than as provided by law. The county commission and the court administrator shall resolve any conflict as to the proper disposition of property. There is no appeal from the decision of the administrator and county commission regarding disposition of property under this section. This section does not apply to property owned by the federal government."

Guarantee Share: Section 61, Ch. 585, L. 2001, provided: "(1) (a) For fiscal year 2003, the district court council shall calculate each judicial district's fixed budget component and variable budget component. The council shall determine the statewide percentage that the statewide district court fixed budget component is to the statewide total district court budget. The council shall take that percentage of the total district court appropriation and allocate that percentage among each judicial district in proportion to each judicial district's fixed budget component of the total district court fixed budget component.

(b) The remainder of the district court appropriation after the allocations required by subsection (1)(a) is the variable budget. The variable budget must be allocated during the year among the judicial districts based upon caseload need and other factors as determined by the district court council.

(2) As used in this section:

(a) "fixed budget component" means a district court's costs that are not variable with caseload based on the fiscal year 1999 FTEs and estimated vacancy savings, plus estimated costs associated with the three judgeships created by Chapter 454, Laws of 1999, and related operating costs, including but not limited to salaries for permanent employees of the court and the costs of contracted professional services.

(b) "variable budget component" means a district court's costs that are variable with caseload, including but not limited to witness fees and necessary expenses, juror fees, and indigent defense costs."

Direction to District Court Council: Section 62, Ch. 585, L. 2001, provided: "The district court council provided for in [section 5] [3-1-1602] shall address any inequities in disbursements of district court expenses for involuntary commitment proceedings and youth court proceedings and shall present to the 58th legislature a proposal to enumerate specific expenses of those proceedings that are recommended to be designated as district court expenses in 3-5-901." Terminates June 30, 2003.

Effective Date: Section 63(2), Ch. 585, L. 2001, provided that this section is effective July 1, 2001.

3-1-1602. District court council — appointment — composition — duties — staggered terms — staff.

Compiler's Comments

Implementation of Staggered Terms: Section 56, Ch. 585, L. 2001, provided: "(1) The members of the district court council, other than the chief justice of the supreme court or the designee of the chief justice, must be elected or appointed as follows:

(a) one district court judge and juvenile probation officer to terms that begin July 1, 2001, and expire June 30, 2004;

(b) one district court judge and clerk of district court to terms that begin July 1, 2001, and expire June 30, 2003;

(c) two district court judges, a county commissioner, and a court reporter to terms that begin July 1, 2001, and expire June 30, 2002.

(2) After expiration of the original terms established by this section, the succeeding terms must be 3-year terms."

Effective Date: Section 63(2), Ch. 585, L. 2001, provided that this section is effective July 1, 2001.

3-1-1603. District court council vacancies.

Compiler's Comments

Effective Date: Section 63(2), Ch. 585, L. 2001, provided that this section is effective July 1, 2001.

3-1-1604. District court council meetings — quorum.

Compiler's Comments

Effective Date: Section 63(2), Ch. 585, L. 2001, provided that this section is effective July 1, 2001.

3-1-1605. No compensation — travel expenses.

Compiler's Comments

Effective Date: Section 63(2), Ch. 585, L. 2001, provided that this section is effective July 1, 2001.

3-1-1610. Judiciary branch account created.

Compiler's Comments

Funding Source: Section 10, Ch. 583, L. 2003, amended sec. 57, Ch. 585, L. 2001, to provide: "Section 57. Transition — transfer of county employees to state employment — preservation of rights. (1) District court employees who are employed by the county on June 30, 2002, and who are transferred to state employment by [this act] become state employees on July 1, 2002, except for purposes of application of the judiciary branch personnel plan, as provided in [section 63].

(2) The compensation of former county employees who become state employees under [this act] may not be impaired. This subsection does not preserve the right of any former county employee to any salary or compensation, including longevity benefits, that was payable while the employee was employed by the county and that was not accrued and payable as of June 30, 2002.

(3) An employee who is transferred from county employment to state employment under [this act] may elect to become a member of the state employee benefit plan on July 1, 2002, or remain on the employee's county benefit plan through the remainder of the plan year in effect on June 30, 2002. For an employee who elects to remain on a county benefit plan, the monthly state contribution toward insurance benefits must be transferred to the county benefit plan. Any benefit costs in excess of the state contribution must be paid by the employee.

(4) Accumulated sick and vacation leave and years of service with a county must be transferred ~~fully~~ to the state as of July 1, 2002~~, and become an obligation of the state at that time~~. *On January 1, 2004, and on January 1, 2005, the counties shall pay the state 12.5% of the sick leave accrual and 25% of vacation leave accrual for each employee who transferred to state employment on July 1, 2002, at the rate of pay as of June 30, 2002.* Any liability for accumulated compensatory time of employees who are transferred from county employment to state employment under [this act] is not transferred to the state and remains an obligation of the county that employed the employee prior to the transfer, subject to federal law and the county's personnel policies. *Upon termination from employment, sick leave must be paid out at one-fourth of its value as provided in 2-18-618(6).*

(5) The state becomes a successor employer with regard to any collective bargaining agreement existing on July 1, 2002, that prior to July 1, 2002, covered any employee transferred from county employment to state employment by [this act]. The responsibilities and obligations of the parties to an agreement to which the state becomes a successor employer must, as applied to a transferred employee, continue until the expiration date of the agreement.

(6) In the development of a plan of personnel administration for employees of the judicial branch, the supreme court may recognize an appropriate bargaining unit."

Effective Date: Section 12, Ch. 583, L. 2003, provided: "[This act] is effective July 1, 2003."

Retroactive Applicability: Section 13, Ch. 583, L. 2003, provided: "[Section 10] [not codified] applies retroactively, within the meaning of 1-2-109, to July 1, 2002."

CHAPTER 2
SUPREME COURT

Chapter Law Review Articles

Montana's Sentence Review Division: A Twenty Year Overview, Jordan, 49 Mont. L. Rev. 369 (Summer 1988).

The Montana Supreme Court in Politics, Lopach, 48 Mont. L. Rev. 267 (Summer 1987).

Civil Procedure (a Montana Supreme Court Survey), Williams, 45 Mont. L. Rev. 335 (Summer 1984).

Montana's Judicial System—A Blueprint for Modernization, Mason & Crowley, 29 Mont. L. Rev. 1 (Fall 1967).

Justices of the Supreme Court of the State of Montana, Callaway, 5 Mont. L. Rev. 34 (Spring 1944).

Chapter Collateral References

Rules of the Sentence Review Division of the Supreme Court of Montana, Lawyers Deskbook and Directory, p. 75, State Bar of Montana, 1997-98.

Supreme Court Rules, Lawyers Deskbook and Directory, p. 73, State Bar of Montana, 1997-98.

Court Unification in Montana, a Report to the 49th Legislature, Montana Legislative Council, December 1984.

Part 1
Supreme Court Justices

3-2-101. Number, election, and term of office.

Compiler's Comments

Provision Repealed: Section 1, Ch. 15, L. 1995, repealed sec. 5, Ch. 683, L. 1979, and sec. 1, Ch. 362, L. 1987. The effect of the repealer was to make permanent the provision setting the number of Supreme Court Associate Justices at six. Repealer effective January 27, 1995.

New Justices — How Selected: Section 2, Ch. 683, L. 1979, provided: "The associate justices created by [this act] shall be filled initially at the 1980 general election, and the individuals elected shall take office on the first Monday of January, 1981."

Effective Period — Amendment: Section 5, Ch. 683, L. 1979, provided: "This act is effective until the first Monday of January, 1989, at which time the number of associate justices authorized by this act shall revert to four. The code commissioner is directed to make appropriate changes in the Montana Code Annotated to reflect the intent of this section."

Section 1, Ch. 362, L. 1987, amended sec. 5, Ch. 683, L. 1979, to provide that the act is effective until the first Monday of January 1997.

Severability: Section 6, Ch. 683, L. 1979, is a severability section.

Collateral References

Courts *key* 41, et seq.; Judges *key* 2, 3.

21 C.J.S. Courts §§120, 134, 138; 48A C.J.S. Judges §§8, 9, 12, 13, 14, 19, 20.

3-2-102. Qualifications and residence.

Collateral References

Validity of age requirement for state public office. 90 ALR 3d 900.

Validity and construction of constitutional or statutory provision making legal knowledge or experience a condition of eligibility for judicial office. 71 ALR 3d 498.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period. 65 ALR 3d 1048.

3-2-104. Salaries — expenses.

Compiler's Comments

1995 Amendment: Chapter 455 at end of (1) substituted "2-16-403" for "2-16-404". Amendment effective April 14, 1995.

1989 Amendment: At end of (1) substituted "2-16-404" for "2-16-405". Amendment effective July 1, 1989.

1985 Amendment: Deleted (2) requiring Justices of the Supreme Court to forfeit a month's salary for failure to decide any matter within 120 days after submission for decision.

1981 Amendment: In (2) substituted requirement that Justices forfeit a month's salary for failure to decide a matter within 120 days for a provision that the State Auditor would not pay a Justice until receiving an affidavit that the Justice's workload was not delinquent.

Transition: Sec. 16, Ch. 528, L. 1979, provided: "A judicial officer, as defined in 1-1-202, who is occupying his judicial office on the effective date of this act shall continue to be paid expenses on the same basis as he is receiving them on the effective date of this act until the expiration of his term of office. All judicial officers who take office or begin a new term of office after the effective date of this act shall receive expenses as provided in this act."

Severability: Section 17, Ch. 528, L. 1979, was a severability section.

Case Notes

Time Limits on Judicial Decisions — Solely Within Judicial Sphere: Plaintiff contended 3-2-104 and 3-5-212, which imposed sanctions on judges if decisions were not reached or opinions were not written within the procedural constraints and time limits set by the statutes, were unconstitutional. (In 1985, 3-2-104 was amended and 3-5-212 was repealed, thus eliminating the sanctions.) On appeal, the Supreme Court held that under the separation of powers doctrine the legislative branch of government is without constitutional authority to limit the judicial branch of government in respect to when it shall hear or determine any cause of action within its lawful jurisdiction. The time limits within which judicial decisions must be rendered were held to be a sphere of activity so fundamental and necessary to a court that to divest it of its absolute control would be to make meaningless the very phrase "judicial power". Coate v. Omholt, 203 M 488, 662 P2d 591, 40 St. Rep. 586 (1983).

Impairment of Contract and Diminution of Salary — Preventing Legislative Meddling in Judicial Decisions: Plaintiff contended 3-2-104 and 3-5-212, which imposed sanctions on judges if decisions were not reached or opinions were not written within the procedural constraints and time limits set by the statutes, were unconstitutional. (In 1985, 3-2-104 was amended and 3-5-212 was repealed, thus eliminating the sanctions.) The penalty provisions of both statutes required a 1-month salary forfeiture in the event of a violation. Plaintiff contended the penalty violated the impairment of contract and diminution of judicial salary provisions of the Montana Constitution. Defendant contended that since the judiciary imposed the sanctions, the constitution was not violated. The constitutional prohibition against diminution of salaries is designed to prevent lawmakers from exerting control over the judiciary. Even if the court were to allow the indirect violation by allowing the Legislature to mandate a scheme administered by the courts, the statutes would violate the impairment of contract prohibition. Public employment gives rise to certain obligations protected by the contract clause of the constitution. Promised compensation is one such protected right. Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation. Coate v. Omholt, 203 M 488, 662 P2d 591, 40 St. Rep. 586 (1983).

Collateral References

Judges *key* 22.

48A C.J.S. Judges §§81, 84.

Part 2
Supreme Court Jurisdiction

Part Case Notes

Jurisdiction Required Before Judgment Effective: It is fundamental that a court rendering a decision in a particular case have jurisdiction over the parties. When the judgment roll on its face shows that the court was without jurisdiction to render the judgment, its pronouncement is in fact no judgment and cannot be enforced. No right can be derived from it. All proceedings founded upon it are invalid and ineffective for any purpose. Ciotti v. Hoover, 237 M 462, 774 P2d 406, 46 St. Rep. 969 (1989), following Apple v. Edwards, 123 M 135, 211 P2d 138 (1949).

Part Law Review Articles

Developing Theories of State Jurisdiction Over Indians: The Dominance of the Preemption Analysis, Lynaugh, 38 Mont. L. Rev. 63 (Winter 1977).

Administrative Procedures in Montana: A View After Four Years With the Administrative Procedure Act, McCrory, 38 Mont. L. Rev. 1, 17, et seq. (Winter 1977).

State and Tribal Courts in Montana: The Jurisdictional Relationship, Parker, 33 Mont. L. Rev. 277 (Summer 1972).

The Effect of Lack of Jurisdiction, Slaight, 16 Mont. L. Rev. 54 (Spring 1955).

3-2-201. Types of jurisdiction.

Case Notes

Supreme Court — Acquisition of Appellate Jurisdiction: Time limits for filing an appeal are mandatory and jurisdictional. An appellant has a duty to perfect an appeal in the manner and within the time limits provided by law. Absent such compliance, the Montana Supreme Court does not acquire jurisdiction to entertain and determine an appeal. Price v. Zunchich, 188 M 230, 612 P2d 1296, 37 St. Rep. 1058 (1980), following Snyder v. Gommenginger, 183 M 375, 600 P2d 171 (1979).

Federal Courts — Reviewability of Montana Decisions: The U.S. District Court has no power to review the judgments of Montana courts. A litigant has no constitutional right to a correct result. Osburnsen v. Heller, 34 St. Rep. 193 (D.C. Mont. 1977) (apparently not reported in Federal Supplement).

Collateral References

Courts *key* 232.

21 C.J.S. Courts §§415, 416.

4 Am. Jur. 2d Appellate Review §§77 through 81; 5 Am. Jur. 2d Appellate Review §§826, 839 through 841, 844, 855.

Appeal as remedy for delay in bringing accused to trial or to retrial after reversal. 58 ALR 1515.

Review of ruling of trial court upon plea in abatement because of exclusion of eligible class or classes of persons from jury list. 52 ALR 927.

De minimis non curat lex as ground for not correcting judgment. 44 ALR 183.

Waiver of constitutional question by submitting cause to appellate court having no jurisdiction over such question. 2 ALR 1363.

3-2-202. Original jurisdiction — contest of ballot issue.

Compiler's Comments

1987 Amendment: In (1), at beginning, inserted exception clause relating to subsection (3); and inserted (3) relating to timing and basis for contest of a ballot issue.

Preamble: The preamble to Ch. 540, L. 1987, which amended this section, read: "WHEREAS, Article II, section 1, of the Montana Constitution recognizes that all political power is vested in and derived from the people and that all government of right originates with the people, is founded on their will only, and is instituted solely for the good of the whole; and

WHEREAS, the right of the people to make statutory changes by initiative is retained in Article III, section 4, of the Montana Constitution; and

WHEREAS, the right of the people to alter their Constitution by initiative is retained in Article XIV, section 9, of the Montana Constitution."

Case Notes

Negligent Homicide Charges After DUI Guilty Plea — Supervisory Control to Avoid Double Jeopardy Trial: If the District Court's conclusion that the Justice's Court plea of guilty to DUI did not bar subsequent prosecution of two negligent homicide charges arising out of the same auto accident as the DUI charge is proved, on appeal, to be incorrect, the defendant will have been subjected to prosecution even though double jeopardy entitled him to avoid prosecution altogether. Thus, it is clear that an appeal would not be an adequate remedy, and the defendant's application to the Supreme Court for a writ of supervisory control presented legal issues appropriate for the Supreme Court's consideration and would be accepted and decided. State ex rel. Booth v. District Court, 1998 MT 344, 292 M 371, 972 P2d 325, 55 St. Rep. 1395 (1998), followed in Montanans for the Coal Trust v. St., 2000 MT 13, 298 M 69, 996 P2d 856, 57 St. Rep. 73 (2000).

Factors Necessary for Acceptance of Original Jurisdiction: Once standing to bring an action is established, the question shifts to whether the action meets the necessary factors for the Supreme Court to accept original jurisdiction. Assumption of original jurisdiction is proper when: (1) constitutional issues of major statewide importance are involved; (2) the case involves purely legal questions of statutory and constitutional construction; and (3) urgency and emergency factors exist, making the normal appeal process inadequate. Butte-Silver Bow Local Gov't v. St., 235 M 398, 768 P2d 327, 46 St. Rep. 87 (1989), followed in State ex rel. Gould v.

Cooney, 253 M 90, 831 P2d 593, 49 St. Rep. 410 (1992), and Montanans for the Coal Trust v. St., 2000 MT 13, 298 M 69, 996 P2d 856, 57 St. Rep. 73 (2000). See also State ex rel. Greely v. Water Court, 214 M 143, 691 P2d 833 (1984).

Factors in Determining Original Jurisdiction: The three major factors necessary for a valid exercise of Supreme Court original jurisdiction are where: (1) constitutional issues of major statewide importance are involved; (2) the questions involved are purely legal questions of statutory or constitutional construction; and (3) urgency and emergency factors exist, making the normal appeal process inadequate. White v. St., 233 M 81, 759 P2d 971, 45 St. Rep. 1310 (1988).

Certified Question — Interspousal Tort Immunity Abolished: In an original proceeding for declaratory judgment on two certified questions from U.S. District Court, the Supreme Court held that it abolished the defense of interspousal tort immunity in Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986), because historical reasons for that immunity were no longer valid. Therefore, that doctrine did not bar claim of wife-passenger against her husband-driver for negligence in operation of motor vehicle. Noone v. Fink, 222 M 273, 721 P2d 1275, 43 St. Rep. 1258 (1986).

Declaratory Judgment on Requiring Prepayment of Jury Fees by Party Demanding Jury: The Supreme Court took original jurisdiction of, and heard, a petition for a declaratory judgment that it was unconstitutional to require prepayment, by a party requesting a civil jury trial, of each day's jury fees at or before the end of the prior day. The requirement was contained in Rule 14F, M.J.C.R.Civ.P. (Title 25, ch. 22). There was a justiciable controversy of statewide impact in that the rule applied to all justice courts; delay could abridge vital constitutional rights of litigants; the purpose of the declaratory judgment would serve the office of a writ, and the court has jurisdiction to issue, hear, and determine writs; and it would promote judicial economy to accept jurisdiction rather than force piecemeal litigation on the constitutionality of the rule. The court said that the prepayment requirement was contained in the rule and 3-15-203, which provided that "In civil actions, the jurors' fees must be paid by the party demanding the jury and taxed as costs against the losing party", and declared both the statute and rule unconstitutional. Hammer v. Justice Court, 222 M 35, 720 P2d 281, 43 St. Rep. 1040 (1986).

Supreme Court Original Jurisdiction Over Declaratory Action Concerning Statewide Water Adjudication: The Supreme Court had power to determine an action for declaratory judgment involving the constitutionality of the requirement in 85-2-234 that final water decrees state "the amount of water, rate, and volume, included in the right". The issue affects all rights in the statewide adjudication process. Determination of the issue by the Supreme Court: (1) will provide guidance to the water court; (2) is in the interests of judicial economy; and (3) would serve the public policy of the state by expediting the determination of existing water rights. McDonald v. St., 220 M 519, 722 P2d 598, 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

Citizen Taxpayer — Standing to Challenge Revenue Bonds: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Plaintiff, in his complaint, alleged that he was a citizen, resident, elector, and taxpayer. Prior cases held that in order to establish standing to sue a governmental entity: (1) the issue for review must represent a case or controversy; (2) the complaining party must allege past, present, or threatened injury to a property or civil rights; and (3) the alleged injury must be distinguishable from injury to the public generally, but need not be exclusive to the complaining party. The Supreme Court added a further exception. The court stated that it would recognize the standing of a taxpayer, without more, to question the constitutional validity of a tax or use of tax money where the issue or issues presented directly affect the constitutional validity of the state or its political subdivisions acting to collect the tax, issue bonds, or use the proceeds thereof. The court said it would accept original jurisdiction of such suits when special circumstances exist, presenting issues of urgent or emergency nature and requiring speedy determination. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984), followed in Montanans for the Coal Trust v. St., 2000 MT 13, 298 M 69, 996 P2d 856, 57 St. Rep. 73 (2000).

Original Jurisdiction — Declaratory Judgments: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. The bonds would be financed by coal severance taxes to provide proceeds for development of state water resources. The Supreme Court accepted original jurisdiction of the declaratory judgment action. The court relied on Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971), and the transcripts of the 1972 Constitutional Convention proceedings to determine that the original

jurisdiction of the court as contained in the 1889 Montana Constitution was intended to be continued in the 1972 Montana Constitution. The court held that it does have original jurisdiction to accept declaratory judgment proceedings when the issues have impact of major importance on a statewide basis or upon a major segment of the state and when the purpose of the declaratory judgment proceedings will serve the office of a writ provided by law in accordance with Art. VII, sec. 2(1), Mont. Const. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984), followed in Ingraham v. Champion Int'l, 243 M 42, 793 P2d 769, 47 St. Rep. 650 (1990).

Voters' Standing to Challenge Restriction on Judge Running for Office: Sections 3-1-607 and 3-1-608 forbid what Art. VII, sec. 10, Mont. Const., allows in that they require a Supreme Court Justice or Chief Justice or a District Court Judge to resign if he becomes a candidate for any elective office, while Art. VII, sec. 10, Mont. Const., provides that such a person does not have to resign if he runs for another judicial office. Standing to challenge the constitutionality of 3-1-607 and 3-1-608 existed where a petition for declaratory judgment was brought by registered voters and the two statutes adversely affected the election process contemplated by the constitution. The registered voters had standing to assert the public interest clearly intended by Art. VII, sec. 10, Mont. Const., to assert the integrity and supremacy of the constitution, and to assert the public interest in challenging the legality of legislative action that allegedly flies in the face of the constitution. The Comm. for an Effective Judiciary v. St., 209 M 105, 679 P2d 1223, 41 St. Rep. 581 (1984). See also Butte-Silver Bow Local Gov't v. St., 235 M 398, 768 P2d 327, 46 St. Rep. 87 (1989).

Supervisory Control to Grant Venue Change Wrongly Denied Below: If, upon presentation of a matter to the Montana Supreme Court by means of a writ, it is apparent from the record that a relator will be deprived of a fundamental right, both justice and judicial economy require the court to then resolve the issue in favor of relator. Court's assumption of jurisdiction upon a petition for a Writ of Supervisory Control in which the issue was whether District Court abused its discretion in denying motion for a change of venue was not premature, and the writ was granted. State ex rel. Coburn v. Bennett, 202 M 20, 655 P2d 502, 39 St. Rep. 2300 (1982), followed, as to the grant of a writ to preserve a fundamental right, in Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998).

Interlocutory Review of Interrogatories Rulings — Untimely Requests: Application for a Writ of Supervisory Control seeking reversal of the lower court's order denying applicant's objections to interrogatories was untimely and in violation of lower court's order (which constituted a ground for refusing to accept jurisdiction) where it was not made until 40 days after the time set by the lower court for answering the interrogatories. State ex rel. Guarantee Ins. Co. v. District Court, 194 M 64, 634 P2d 648, 38 St. Rep. 1682 (1981).

Interlocutory Review of Interrogatories Rulings — Exhaustion of Remedies: Applicant for a Writ of Supervisory Control seeking reversal of the lower court's order denying applicant's objections to interrogatories failed to exhaust its remedies in the lower court where it did not apply there for a protective order under Rule 26(c), M.R.Civ.P., or for an order under Rule 37(a)(4), M.R.Civ.P., assessing costs and attorney fees against its opponent should the lower court order be reversed on appeal. State ex rel. Guarantee Ins. Co. v. District Court, 194 M 64, 634 P2d 648, 38 St. Rep. 1682 (1981).

Interlocutory Review of Interrogatories Rulings — Judicial Policy: Policy considerations supported refusal of the Supreme Court to accept jurisdiction over a petition for an extraordinary writ to review denial of objections to interrogatories propounded to a party that did not exhaust its remedies below and that made untimely application for the writ. A Supreme Court policy of interjecting itself into interlocutory review of lower court rulings on interrogatories and objections thereto would make it difficult for the lower courts to control day-to-day trial administration, open a Pandora's box of abuses, defeat the goal of speedy, inexpensive, and just discovery of the facts upon which each party's right of action depends, and might bury the Supreme Court in a paper blizzard of applications for supervisory control to review lower court rulings on pretrial discovery. State ex rel. Guarantee Ins. Co. v. District Court, 194 M 64, 634 P2d 648, 38 St. Rep. 1682 (1981), followed in Preston v. District Court, 282 M 200, 936 P2d 814, 54 St. Rep. 312 (1997).

Closure of Voir Dire Examination to Public and Press Vacated: At the commencement of Gene Austad's trial, the District Court directed that the individual voir dire examination of prospective jurors be closed to the press and public. The Great Falls Tribune filed an original proceeding in the Supreme Court seeking a Writ of Supervisory Control. The Supreme Court directed the District Court to allow the press and public to attend the voir dire examination. The court found that there is nothing in subjecting the prospective jurors to an open and public voir dire examination that would deny or impair Austad's right to a speedy trial. The Montana

Constitution imposes a stricter standard in order to authorize closure of a trial than does the United States Constitution. Great Falls Tribune v. District Court, 186 M 433, 608 P2d 116, 37 St. Rep. 502 (1980).

Writ of Supervisory Control Denied — Remedy by Appeal Adequate: Review by Writ of Supervisory Control of the decision of a District Court that resulted in an estimated tax loss of over $2 million and that also will result in appeals to the District Courts of 25 counties was denied since the decision of the District Court had been appealed to the Supreme Court and was ready to be set for the next court calendar. The remedy by appeal was adequate, precluding review by supervisory control. Dept. of Revenue v. St. Tax Appeal Bd., 185 M 172, 605 P2d 170, 37 St. Rep. 24 (1980).

Writ of Supervisory Control — Lower Court Order to Seek: The Writ of Supervisory Control was denied even though petitioner was ordered by the lower court to seek the Writ to determine jurisdiction in a child custody case. State ex rel. Jennings v. District Court, 178 M 187, 582 P2d 1260, 35 St. Rep. 1264 (1978).

Habeas Corpus — Exhaustion of Remedies — Procedures — Interstate Corrections: Petition for a Writ of Habeas Corpus was denied prisoner convicted in Montana but imprisoned in Nevada because state remedies had not been exhausted. Evans v. Wolff, 427 F. Supp. 400, 34 St. Rep. 190 (D.C. Mont. 1977).

Declaratory Judgment: Determination of legal rights concerning election of delegates and implementation of state Constitutional Convention was properly decided in declaratory judgment action by Supreme Court under its original jurisdiction in aid of its appellate jurisdiction. Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971).

Injunction:

Supreme Court declined jurisdiction in action for injunction to restrain county officials from drawing or issuing certain warrants where numerous questions of fact were present that would require the taking of testimony and submission of other evidence. Porter v. Thielen, 124 M 607, 214 P2d 743 (1951).

This section does not authorize the vacation or suspension of a prohibitory injunction order pending an appeal from it. Maloney v. King, 26 M 487, 68 P 1012 (1902).

Writ of Prohibition: The Writ of Prohibition may be issued to end litigation and save expense. State ex rel. Adami v. Lewis & Clark County, 124 M 282, 220 P2d 1052 (1950).

Collateral References

20 Am. Jur. 2d Courts §§72 through 74.

Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR 4th 112.

Summary judgment in mandamus or prohibition cases. 3 ALR 3d 675.

3-2-203. Appellate jurisdiction.

Collateral References

4 Am. Jur. 2d Appellate Review §77, et seq.; 5 Am. Jur. 2d Appellate Review §840, et seq.

3-2-204. Powers and duties of court on appeals.

Case Notes

Generally . . . 424
Jurisdiction and Forum . . . 425
Time Limits . . . 427
Standards of Review . . . 427
Substantial Justice . . . 429
Questions of Law . . . 429
Law of the Case . . . 429
Verdicts . . . 430
Final Disposition . . . 431
Remand . . . 432
Equity Cases . . . 433
Particular Proceedings . . . 436

GENERALLY

Writ of Supervisory Control Inappropriate in Appealing Department of Corrections' Decision Regarding Good Time Allowance — Writ of Habeas Corpus Granted: Inmate Eisenman applied to the Supreme Court for a writ of supervisory control and moved to proceed in forma pauperis,

requesting that the court order the Department of Corrections to direct the reduction of his sentence for good time served. Supervisory control is an extraordinary remedy that is appropriate only when a District Court is proceeding upon a mistake of law that, if not corrected, would cause significant injustice and when the remedy by appeal is inadequate. The Supreme Court held that a writ of supervisory control was inappropriate in this case because the court's power to issue that writ extends only to inferior courts, not to other governmental agencies. Eisenman's claims were more appropriately asserted by a writ of habeas corpus because habeas corpus relief is available to every imprisoned person. The state claimed that a writ of habeas corpus was not appropriate either because Eisenman failed to plead that he would be entitled to release if he received the good time credits as requested. However, under Peyton v. Rowe, 391 US 54 (1968), and Garlotte v. Fordice, 515 US 39 (1995), immediate physical release is not the only remedy available under a writ of habeas corpus, so it was not premature to consider a habeas corpus petition prior to Eisenman's release. The Supreme Court thus considered Eisenman's application for writ of supervisory control to be a petition for writ of habeas corpus and proceeded to consider the good time issue on that basis. Eisenman v. St., 2000 MT 170, 300 M 322, 5 P3d 542, 57 St. Rep. 704 (2000).

Closing Argument Seeking Punitive Damages — Not Prejudicial: In his closing argument, the plaintiff's attorney urged the jury to award the plaintiff the amount requested so that the defendant would not continue to engage in the same kind of activity in the future. The defendant argued that the plaintiff's attorney's statements sought punitive damages that were not an issue in the case and therefore prejudiced the defendant. The Supreme Court held that the statement was not so prejudicial as to deny the defendant a fair trial and that there was no evidence that the verdict was inflated in any way. Kalanick v. Burlington N. RR Co., 242 M 45, 788 P2d 901, 47 St. Rep. 532 (1990).

Accusation of District Court Judge Misconduct First Raised on Appeal — Supreme Court Not to Consider: In reviewing a child custody modification determination, the Supreme Court refused to consider an affidavit submitted to the Supreme Court alleging an improper ex parte communication between the District Court Judge and a person interested in the proceeding. Appellant had made no motion for a mistrial or to remove the District Court Judge from the case, nor had appellant mentioned the alleged misconduct on the record. In re Marriage of Stout, 216 M 342, 701 P2d 729, 42 St. Rep. 856 (1985).

Judicial Notice of Maps and Descriptions on Appeal: In a dispute over control of an irrigation district's headgate, the Supreme Court permitted submission on appeal of government survey descriptions and maps that had not been introduced as evidence at trial. The court reasoned: first, that the commission comments to Rule 201, Montana Rules of Evidence, indicate that published maps or charts are included within the Rule's scope; and second, that maps and descriptions are acceptable articles of evidence by which to show a water right in the adjudication process. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985), distinguished in Frank v. Harding, 1998 MT 215, 290 M 448, 965 P2d 254, 55 St. Rep. 903 (1998).

Stipulation of Facts: Where the facts set forth in the opinion were stipulated and no objections made to their sufficiency or correctness, the Supreme Court is in as advantageous a position to do justice in the cause as was the trial court. No presumption obtains in such a case as to the correctness of the trial court's decision since Supreme Court is empowered to review the record completely. Pluhar v. Guderjahn, 134 M 46, 328 P2d 129 (1958).

Constitutionality: This section does not purport to impose on the Supreme Court any additional jurisdiction and hence is not unconstitutional. Finlen v. Heinze, 32 M 354, 80 P 918 (1905).

JURISDICTION AND FORUM

Out-of-Time Appeal in Criminal Matters — Exclusive Jurisdiction With Supreme Court: Under 46-20-101, the only method for review in criminal cases is by notice of appeal. Time limits for filing an appeal are mandatory and jurisdictional. If a defendant takes no action to perfect an appeal within 90 days of judgment, the District Court loses its jurisdiction and the appeal is out-of-time. However, an out-of-time appeal is a remedy that may be available to a criminal defendant who, through no fault of the defendant, misses a deadline for filing an appeal. Although Rule 21(b), M.R.App.P. (Title 25, ch. 21), precludes an out-of-time appeal in a civil case, the Supreme Court is not precluded from addressing a motion for an out-of-time appeal in a criminal case. Further, a District Court lacks jurisdiction to grant an out-of-time appeal. The Supreme Court has exclusive jurisdiction to grant a motion for an out-of-time appeal, and the motion is considered an original proceeding subject to the provisions of Rule 17, M.R.App.P.

Upon a showing that the failure to timely notice a criminal appeal was excusable under the circumstances, the Supreme Court may conclude that an out-of-time appeal is the appropriate remedy pursuant to Rule 21(b), M.R.App.P. In that event, the matter will be remanded to the District Court with instructions to vacate and reenter judgment to afford the defendant a second opportunity to act within the statutory timeframes for filing notice of appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002).

Involuntary Satisfaction of Judgment — Request for Stay of Execution Not Required: Following entry and satisfaction of judgment in District Court, the parties were aware of a contemplated appeal, but no stay of execution was requested or supersedeas bond posted. After plaintiff acquired title to the disputed property pursuant to the judgment, defendant filed a notice of appeal and lis pendens, effectively preserving the status quo pending appeal. Plaintiff moved to dismiss, contending that by voluntarily satisfying the judgment, defendants waived their right to appeal. Applying Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996), the Supreme Court held that the parties' course of conduct illustrated the involuntary, rather than voluntary nature of the satisfaction of judgment. Because satisfaction was involuntary, the right to appeal was not waived. Further, under Rule 7, M.R.App.P. (Title 25, ch. 21), a party may request a stay of execution, but the request is not mandatory, even though a party choosing not to seek a stay runs the risk of having the appeal become moot. Plaintiff's motion to dismiss was denied. Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999).

Power of Supreme Court to Consider District Court Proceedings Held Without Jurisdiction: After a default judgment was entered against Hardman for injuries caused to Maulding in a car accident, Hardman moved on May 22 to set aside the default, and the District Court scheduled a hearing for July 16. At the hearing, Maulding raised the timeliness of the hearing, contending that when Rule 60(c), M.R.Civ.P. (Title 25, ch. 20), was read with Rules 59(d) and 59(g), M.R.Civ.P., the District Court had to rule on the motion within 45 days or it was considered denied. The District Court took that issue under advisement and heard testimony on the motion to set aside the default. Maulding argued on appeal that there was no evidence for the Supreme Court to consider on the issue of the default because the evidence taken by the trial court was taken at a hearing that was held without jurisdiction. The Supreme Court held that because those proceedings affect the substantial rights of the parties, consideration of the evidence developed at the hearing was within its powers under this section. Maulding v. Hardman, 257 M 18, 847 P2d 292, 50 St. Rep. 141 (1993).

Involuntary Satisfaction of Judgment — Appeal Not Rendered Moot: If a judgment is satisfied by an involuntary payment or performance, the appeal from the judgment is not thereby rendered moot. First Nat'l Bank in Eureka v. Giles, 225 M 467, 733 P2d 357, 43 St. Rep. 1326 (1987), overruling Gallatin Trust & Sav. Bank v. Henke, 154 M 170, 461 P2d 448 (1969), and In re Black's Estate, 32 M 51, 79 P 554 (1905), and overruled, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996). Turner was followed in Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999).

Notice of Appeal Divests Trial Court of Jurisdiction to Amend Judgment: After respondent moved to amend the judgment of the District Court, appellant filed a notice of appeal. The filing of the notice of appeal deprived the trial court of jurisdiction to amend the judgment. However, under 3-2-204, the Supreme Court can return jurisdiction to the trial court. United Farm Agency v. Blome, 198 M 435, 646 P2d 1205, 39 St. Rep. 1115 (1982).

Supreme Court as Final Authority: The Supreme Court of Montana is the final authority on the legal weight to be given a presumptive instruction under Montana law, but it is not the final authority on the interpretation which a jury could have given to the instruction. Sandstrom v. Mont., 442 US 510, 99 S.Ct. 2450 (1979).

Federal Courts — Reviewability of Montana Decisions: The U.S. District Court has no power to review the judgments of Montana courts. A litigant has no constitutional right to a correct result. Osburnsen v. Heller, 34 St. Rep. 193 (D.C. Mont. 1977) (apparently not reported in Federal Supplement).

Motion for Rehearing: Motion for rehearing will be denied if the questions involved should first be presented to the trial court by appropriate supplemental or amended pleadings. Atlantic-Pacific Oil Co. of Mont. v. Gas Dev. Co., 105 M 1, 69 P2d 750 (1937).

TIME LIMITS

Discovery of Documents — Time Allowance on Remand: Husband failed to comply with court's order allowing shorter time for him to respond to interrogatories, and wife had complained of insufficient time to examine one of his tax returns, which contained information regarding a piece of property over which there was a dispute as to whether it should be included in the marital estate for property disposition purposes. Since the Supreme Court was returning the case to the District Court for reconsideration of the marital estate assets, the Supreme Court directed that wife be allowed to pursue examination of the disputed piece of property. In re the Marriage of Hill v. Hill, 197 M 451, 643 P2d 582, 39 St. Rep. 723 (1982).

Mootness Found in Six-Year-Old Case — Limited Power of Supreme Court: The defendant in a 1974 case was charged with and convicted of abuse of a school teacher under 20-4-303. The fine levied was paid in 1976, about the time the defendant's appeal was submitted to the Supreme Court. Noting the long time lapse and the lapse of power in the court to order the return of the fine, the court held that the question was moot because any action it could take would have no effect on the parties. St. v. Warden, 191 M 520, 625 P2d 543, 38 St. Rep. 437 (1981).

STANDARDS OF REVIEW

Statutes Presumed Constitutional — Burden of Proof — Standard of Review: In deciding whether certain statutes violated the mandates of the Montana Constitution and The Enabling Act regarding use of school trust lands, the Supreme Court eschewed standards of review suggested by both parties, holding that the proper standard was whether the District Court's conclusions of law were correct. Statutes are presumed to be constitutional, and the Supreme Court will avoid an unconstitutional interpretation if possible. A party challenging the constitutionality of a statute has the burden of proving it unconstitutional beyond a reasonable doubt, and any doubt will be resolved in favor of the statute. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following Steer, Inc. v. Dept. of Revenue, 245 M 470, 803 P2d 601, 47 St. Rep. 2199 (1990), St. v. Martel, 273 M 143, 902 P2d 14, 52 St. Rep. 873 (1995), Davis v. Union Pac. RR Co., 282 M 233, 937 P2d 27, 54 St. Rep. 328 (1997), and St. v. Nye, 283 M 505, 943 P2d 96, 54 St. Rep. 766 (1997).

Standard of Review of Grant or Denial of New Trial — Jury or Bailiff Misconduct: In the two most recent cases in which jury or bailiff misconduct was the basis for granting or denying a new trial, the Supreme Court stated that the standard is that the decision is within the sound discretion of the trial judge, whose decision will not be disturbed absent a showing of manifest abuse of that discretion. The Supreme Court reaffirmed this standard and overruled those cases with a different standard. Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995).

Motion for Mistrial — Evidence of Erroneous Ruling Required: The Supreme Court cited Schmoyer v. Bourdeau, 148 M 340, 420 P2d 316 (1966), in holding that in order to reverse a lower court ruling on a motion for mistrial, evidence must be presented that is clear, convincing, and practically free from doubt that the trial court's ruling was erroneous. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988).

Standard of Review in Pro Se Appeal: The Supreme Court's powers of appellate review are the same whether or not a defendant appealing from a criminal conviction is represented by counsel on the appeal. St. v. Green, 212 M 20, 685 P2d 370, 41 St. Rep. 1562 (1984).

Evidence Sufficient to Support Verdict — Jury to Weigh Evidence — Presumption of Correctness: In judging whether there is evidence sufficient to support a verdict, the Supreme Court recognizes that the jury is in the best position to weigh the evidence and consider the credibility of witnesses. Thus in examining the sufficiency of the evidence, review will be made in a light most favorable to the prevailing party, presuming that the findings of the District Court are correct. Rock Springs Corp. v. Pierre, 189 M 137, 615 P2d 206, 37 St. Rep. 1378 (1980).

Substantial Evidence to Support Verdict — Evidence to Support Contrary Findings Not Proper Consideration: The plaintiff offered evidence that a leaking pipe caused damage to a house. The defendant introduced evidence tending to show that the damage was caused by either melting snow or because of improper construction. The jury found that the evidence presented by the defendant was more credible. On appeal, the Supreme Court found that there was substantial evidence on which the jury could base its verdict. It is not the Supreme Court's function to determine if there is sufficient evidence to support contrary findings. Judgment affirmed. Cissel v. W. Plumbing & Heating, 188 M 149, 612 P2d 206, 37 St. Rep. 966 (1980).

Clear Preponderance of Evidence: The husband brought an action to enforce the property settlement. The wife sought modification. The property settlement provided that the wife was to

provide an accounting for all sums paid. The trial Judge found that the wife had made an adequate accounting. The wife testified that she made what she thought was an adequate accounting, and the husband testified that the accounting he received was not sufficient. On appeal, the Supreme Court said that it will not substitute its judgment for that of the trier of fact but rather will only consider whether substantial credible evidence supports the findings and conclusions. Those findings will not be overturned by the court unless there is a clear preponderance of the evidence against them. The court will view the evidence in a light most favorable to the prevailing party, recognizing that substantial evidence may be weak or conflicting with other evidence, yet still support the findings. The findings are affirmed since there is not a clear preponderance of evidence against the findings. Phennicie v. Phennicie, 185 M 120, 604 P2d 787, 36 St. Rep. 2378 (1979).

Standard of Review in Workers' Compensation Cases — Conflicting Evidence: Conflicting evidence was given in this case claiming death benefits under the Workers' Compensation Act. One set of facts showed that death was caused by strenuous physical activity on the job prior to decedent's death, and the other testimony showed that decedent did nothing strenuous or unusual and that his activities on the job had no causal relationship to his death. The Workers' Compensation Court found the latter testimony more credible and entered findings accordingly. Where findings are based on conflicting evidence, the reviewing court's function is confined to determining whether there is substantial evidence supporting such findings. Following Jensen v. Zook Bros. Constr. Co., 178 M 59, 582 P2d 1191 (1978), substantial evidence supporting the findings existed here. It is not the court's function to determine whether there is sufficient evidence to support contrary findings. Stamatis v. Bechtel Power Corp., 184 M 64, 601 P2d 403, 36 St. Rep. 1866 (1979).

Substantial Though Conflicting Evidence: The Supreme Court's function in reviewing findings of fact in a civil action tried by the court without a jury is not to substitute its judgment in place of the trier of facts, but rather it is confined to determining whether there is substantial credible evidence to support the findings of fact and conclusions of law. Although conflicts may exist in the evidence presented, it is the duty and function of the Judge to resolve such conflicts. His findings will not be disturbed on appeal where they are based on substantial though conflicting evidence. Olson v. Westfork Properties, 171 M 154, 557 P2d 821 (1976).

Substantial Evidence:

Review of evidence is limited to determining whether there is substantial evidence to support trial court's findings of fact and whether such findings are sufficient to support conclusions of law. Keller v. Martin, 153 M 9, 452 P2d 422 (1969). See also McCalif Grower Supplies, Inc. v. Reed, 272 M 254, 900 P2d 880, 52 St. Rep. 659 (1995).

Function of Supreme Court on review is to determine whether there is substantial evidence to support findings of fact and conclusions of law. Peery v. Higgins, 152 M 140, 447 P2d 481 (1968).

Preponderance of the Evidence Against Findings: The Supreme Court may examine the evidence and determine a question of fact for itself, but it cannot overturn the findings of the court unless there is a decided preponderance of the evidence against them. Favero v. Wynacht, 140 M 358, 371 P2d 858 (1962); Sanders v. Sanders, 124 M 595, 229 P2d 164 (1951); Sanders v. Lucas, 111 M 599, 111 P2d 1041 (1941); Cook v. Hudson, 110 M 263, 103 P2d 137 (1940); State ex rel. Nagle v. Naughton, 103 M 306, 63 P2d 123 (1936); Stephenson v. Rainbow Flying Serv., Inc., 99 M 241, 42 P2d 735 (1935); Shepherd & Pierson Co. v. Baker, 81 M 185, 262 P 887 (1927); Scott v. Prescott, 69 M 540, 223 P 490 (1924); Kummrow v. Bank of Fergus County, 66 M 434, 214 P 1098 (1923); Leigland v. Rundle Land & Abstract Co., 64 M 154, 208 P 1075 (1922); Nolan v. Benninghoff, 64 M 68, 208 P 905 (1922); Stettheimer v. Butte, 60 M 111, 198 P 455 (1921); Walsh v. Hoskins, 53 M 198, 162 P 960 (1917); Gibson v. Morris St. Bank, 49 M 60, 140 P 76 (1914); O'Neil v. O'Neil, 43 M 505, 117 P 889 (1911); Murray v. Butte-Monitor Tunnel Min. Co., 41 M 449, 110 P 497 (1910); Copper Mtn. Min. & Smelting Co. v. Corbin Consol. Copper & Silver Min. Co., 39 M 487, 104 P 540 (1909); Watkins v. Watkins, 39 M 367, 102 P 860 (1909); Delmoe v. Long, 35 M 139, 88 P 778 (1907); Finlen v. Heinze, 32 M 354, 80 P 918 (1905); Bordeaux v. Bordeaux, 32 M 159, 80 P 6 (1905); Hays v. Buzard, 31 M 74, 77 P 423 (1904).

Material Evidence: On appeal it is the duty of the Supreme Court to review and determine all questions of law and of fact arising from the proof produced; but the court is powerless to do this unless the material evidence is embodied in the record. Yellowstone Nat'l Bank v. McCullough, 51 M 590, 154 P 919 (1916).

DeNovo Review: The Supreme Court will not undertake to try a case de novo and determine it as does the District Court. Pope v. Alexander, 36 M 82, 92 P 203 (1907).

SUBSTANTIAL JUSTICE

Denial of Substantial Justice Below: Though objective urged for the first time on appeal will not normally be considered, the Supreme Court has the duty to determine whether parties were denied substantial justice below and can consider, within its sound discretion, whether the lower court deprived a party of a fair and impartial trial, even if an objection based on the mandate of a statute or an established precedent should have been made and was not. McAlpine v. Midland Elec. Co., 194 M 154, 634 P2d 1166, 38 St. Rep. 1577 (1981).

QUESTIONS OF LAW

Questions of Law: The provision that the Supreme Court in granting a new trial must in its decision "pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case" is not binding. State ex rel. La France Copper Co. v. District Court, 40 M 206, 105 P 721 (1909), distinguished in State ex rel. USF&G Co. v. District Court, 77 M 594, 251 P 1061 (1926).

LAW OF THE CASE

Issue of Department of Labor and Industry Jurisdiction Raised in Two Separate Hearings — Collateral Estoppel Applicable — Due Process Rights Not Implicated When Party Fails to Pursue Available Remedies: The Workers' Compensation Court concluded that the Department of Labor and Industry should have allowed plaintiff to raise the argument that State Fund had improperly canceled plaintiff's policy for nonpayment of a premium as a defense to the claim by the Uninsured Employers' Fund for assessments and penalties. The court said that the issue was not barred by collateral estoppel because an order from a first hearing only determined whether the Department had subject matter jurisdiction over contract disputes between an insurance carrier and its policyholder (a determination that plaintiff did not appeal) and did not address the issue raised in a second hearing, which was whether the Department had jurisdiction to determine coverage in a proceeding seeking a penalty and indemnification. The court held that collateral estoppel did not apply because the issues in the two hearings were not identical. The court went on to hold that the Department did have jurisdiction, through its quasi-judicial power, to resolve the dispute regarding whether State Fund had rightfully canceled the policy. The Supreme Court disagreed. In the first case, a hearings officer determined that the Department did not have subject matter jurisdiction over the contractual dispute between plaintiff and State Fund, noting that proper adjudication would be in the District Court. The Department only has jurisdiction granted to it by statute, and the adjudication of insurance contracts does not fall within its jurisdiction. Plaintiff's failure to appeal the issue from the first hearing precluded it from arguing that the Department did have jurisdiction over the insurance contract dispute regarding a penalty and indemnification in the second hearing, so relitigation of the jurisdiction question in the second proceeding was barred by collateral estoppel. Further, it was error to give the Department jurisdiction to adjudicate the insurance contract dispute pursuant to its general quasi-judicial powers because an administrative agency may not assume jurisdiction without express delegation by the Legislature and there is no statutory delegation of authority to the Department to resolve contract disputes. Rather, regulation of insurance contracts is governed by the Insurance Commissioner and the relevant statutes relating to insurance disputes. The Department cannot and should not be adjudicating disputes between insurance companies and employers. The Workers' Compensation Court's conclusion that plaintiff was denied due process when it was prevented from presenting evidence relating to the insurance contract between itself and State Fund was also erroneous. Plaintiff had the opportunity to appeal the initial Department order to the Workers' Compensation Court, but failed to do so. Plaintiff also had the opportunity to pursue its remedies against State Fund in District Court, but again failed to do so. There is no denial of due process when a party fails to pursue the remedies provided. Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 M 40, 23 P3d 193 (2001).

DUI Suspension or Revocation Clarified — Law of Case Doctrine and Collateral Estoppel Inapplicable — Contempt Order Refused: Sanders was arrested for a second DUI in a 5-year period and filed an action in District Court seeking review of the facts of the arrest. The District Court and the Supreme Court upheld the arrest and noted that a 6-month suspension of Sanders' license would take place. Later, after the Department of Justice refused to reinstate the license after the 6-month period expired because 61-8-402 applied and required a revocation of Sanders' license for 1 year, Sanders brought a contempt action in the District Court asking that the Department be held in contempt for failure to reinstate his license after expiration of the

6-month period. Sanders argued that the 6-month period had become the law of the case and that the failure of the Department to follow that law was a contempt of the District Court. After reviewing the records of the District Court and its own record in the previous DUI action, the Supreme Court held that the law of the case doctrine was inapplicable. Citing Haines Pipeline Constr., Inc. v. Mont. Power Co., 265 M 282, 876 P2d 632 (1994), and Scott v. Scott, 283 M 169, 939 P2d 998 (1997), the Supreme Court explained that the law of the case doctrine applies only to the rulings of a court that are necessary to the decision and, in the case of the District Court's and Supreme Court's prior ruling in Sanders' DUI conviction, a determination that only a 6-month suspension was required under 61-8-402 was not necessary to either the District Court's or the Supreme Court's prior ruling. Those rulings, the Supreme Court said, concerned only whether the arresting officer had probable cause for the arrest. Thus, the Supreme Court held, the reference to a 6-month suspension in the previous opinions was dicta, there was no law of the case determined concerning the law governing license suspension or revocation, and therefore there could be no contempt for failure to reinstate Sanders' license. The Supreme Court also held that collateral estoppel was likewise inapplicable to require the Department to reinstate the license because collateral estoppel applies only to previously litigated issues and the period of license suspension or revocation of Sanders' license had not been previously litigated. Sanders v. St., 1998 MT 62, 288 M 143, 955 P2d 1356, 55 St. Rep. 272 (1998).

Change of Law From Time of Trial to Time of Appellate Review: Brockie argued that the Supreme Court's decision in Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994), striking down part of 27-1-703 pertaining to liability of nonparties as unconstitutional, should be applied retroactively to his case. The Supreme Court held that the general rule is that a change of law between the law applied at the trial and the time of appeal requires the appellate court to apply the changed law unless to do so would result in a manifest injustice. Brockie v. Omo Constr., Inc., 268 M 519, 887 P2d 167, 51 St. Rep. 1322 (1994).

Relitigation of Previously Resolved Issue Barred on Appeal: Under the doctrine of law of the case, a prior Montana Supreme Court decision resolving a particular issue between the same parties in the same case is binding and cannot be relitigated in a subsequent appeal. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993), followed in St. v. Pendergrass, 281 M 129, 932 P2d 1056, 54 St. Rep. 94 (1997). Pendergrass was reversed on other grounds in Chandler v. Mahoney, 2000 MT 294, 302 M 309, 18 P3d 312, 57 St. Rep. 1247 (2000). See also St. v. Van Dyken, 242 M 415, 791 P2d 1350 (1990).

Amending on Remand Judgment Upheld on First Appeal — Law of Case — Abuse of Discretion: In an original judgment of October 31, 1979, plaintiffs were given the alternative of either repairing a damaged irrigation ditch or paying damages of $5,500. The case was appealed to the Supreme Court, and in Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981), the court found substantial evidence to support the District Court's findings. This became the law of the case. The case was remanded for a determination of attorney fees to be awarded to defendant. On remand, the District Court amended its conclusions and findings to omit the alternative allowing plaintiffs to repair the ditch and awarded damages without the submission of any additional evidence. On appeal, the Supreme Court found this to be an abuse of discretion, as none of the exceptions found in Rules 52(b), 60(a), or 60(b), M.R.Civ.P., applied. The court abused its discretion in not holding a hearing to determine if either alternative of the original judgment had been complied with. Marta v. Smith, 200 M 414, 650 P2d 1387, 39 St. Rep. 1839 (1982).

Law of Case Not Reviewable on Second Appeal: An action was brought to impose a constructive trust and to compel a company to deed certain land to an estate. On an appeal, the Supreme Court held that a sufficient case of adverse possession had been presented to warrant submission to the jury. The cause was reversed and remanded for a new trial. On this second appeal, the defendants alleged error in the failure to instruct the jury on the defenses of laches and estoppel. The Supreme Court noted that those issues had been decided on the first appeal and it was not error for the instructions to be refused at the second trial. The law of the case stated on the first appeal was binding on the trial court and also on the Supreme Court itself in the second appeal. Cremer v. Cremer Rodeo Land and Livestock Co., 192 M 208, 627 P2d 1199, 38 St. Rep. 574 (1981).

VERDICTS

Inadequacy of Verdict: A verdict as to the amount of damages awarded by the jury will be set aside because of inadequacy as well as for being excessive. Coombes v. Letcher, 104 M 371, 66 P2d 769 (1937).

FINAL DISPOSITION

Determination of Factual Issues Not Addressed by Findings of Fact and Conclusions of Law — Remand: When a District Court has issued findings and conclusions and when potential factual issues may still exist, those matters are best left for determination by the trier of fact on remand. Norwood v. Serv. Distrib., Inc., 2000 MT 4, 297 M 473, 994 P2d 25, 57 St. Rep. 8 (2000), following Alley v. Butte & W. Min. Co., 77 M 477, 251 P 517 (1926).

Summary Judgment — No Motion: The Supreme Court has the power to order summary judgment for appellant although motion for summary judgment was not made by the appellant to the District Court. Treasure St. Indus., Inc. v. Welch, 173 M 403, 567 P2d 947 (1977).

Generally:

Where no cause appears why a new trial or the taking of further evidence should be ordered, it is the court's duty to determine the same finally. Fey v. A. A. Oil Corp., 129 M 300, 285 P2d 578 (1955).

Under this section the Supreme Court is authorized in reviewing the decrees in equity cases, where all of the facts were presented on an appeal and showed that the cause was ripe for an ultimate decision, to make such disposition of the case as the court below ought to have made. Bond v. Birk, 126 M 250, 247 P2d 199 (1952).

In an equity case on appeal the court reviews all questions of fact arising upon the evidence presented and determines such questions of fact as well as the questions of law, unless for good cause a new trial or the taking of further evidence is ordered in the court below. Hart v. Barron, 122 M 350, 204 P2d 797 (1949).

Where the defendant relied upon the inconsistent defenses, the judgment in favor of defendant will nevertheless be affirmed where the evidence shows establishment of his right on either theory. Dahlberg v. Lannen, 84 M 68, 274 P 151 (1929), distinguished in Shidu v. Hollenback, 133 M 265, 322 P2d 325 (1958).

Where there is no substantial conflict in the evidence, the function of the trial court is to determine the law applicable to the evidence viewed as an agreed statement of facts, and on appeal the Supreme Court is in as favorable a position as the trial court to make such determination. Dunn v. Beck, 80 M 414, 260 P 1047 (1927).

The Supreme Court will, in a proper case, where the same matter has been before it on a previous appeal and discrepancies appear in the court's computations, make final and independent disposition of the case with due regard for the findings of the trial court. In re Connolly's Estate, 79 M 445, 257 P 418 (1927).

On appeal the Supreme Court must review all questions of law and of fact and may, where all the facts are presented, determine the case finally for the purpose of putting an end to further litigation. State ex rel. USF&G Co. v. District Court, 77 M 594, 251 P 1061 (1926).

Under this section the Supreme Court has the power, on reversal of the judgment appealed from, to direct entry of the proper judgment in favor of appellant. Alley v. Butte & W. Min. Co., 77 M 477, 251 P 517 (1926), followed in Norwood v. Serv. Distrib., Inc., 2000 MT 4, 297 M 473, 994 P2d 25, 57 St. Rep. 8 (2000).

Where plaintiff failed to produce sufficient evidence to sustain a judgment, the cause will not be remanded for a new trial but with direction to dismiss the complaint. Bresee v. Smith, 73 M 312, 237 P 492 (1925).

On appeal where there is little or no conflict in the evidence, which in itself is unsatisfactory in character and furnishes no substantial basis for the findings of the trial court, the Supreme Court will not hesitate to set them aside and finally determine the rights of the parties. Gray v. Grant, 62 M 452, 206 P 410 (1922).

Where in an equity case the decree was founded upon incompatible theories, the Supreme Court will dispose of the cause on its merits. Lowry v. Carrier, 55 M 392, 177 P 756 (1918).

Where on appeal in an equity case the evidence introduced at the trial is all contained in the record and presents no substantial conflict but the decree was based upon an erroneous interpretation of the evidence, the Supreme Court will order such modification as will render a retrial unnecessary. Bielenberg v. Eyre, 44 M 397, 120 P 243 (1912).

Where the plaintiff should have been nonsuited or a directed verdict should have been entered and the proper motion was made and denied, the Supreme Court will usually direct a final disposition of the cause. Wertz v. Lamb, 43 M 477, 117 P 89 (1911).

It is the duty of the parties to introduce all their testimony in the trial court in order to enable the appellate tribunal to expedite the case. Stevens v. Trafton, 36 M 520, 93 P 810 (1908).

Where the Supreme Court, on appeal in an equity case, reverses the judgment but no cause appears why a new trial or the taking of further testimony should be ordered, it will enter a

judgment finally determining the cause. N. Real Estate Loan & Title Co. v. Billings Loan & Trust Co., 36 M 356, 93 P 40 (1907).

The Supreme Court may dispose of the merits of the appeal upon a review of the evidence alone. Pew v. Johnson, 35 M 173, 88 P 770 (1907).

REMAND

Power of Trial Court on Remand — No Provision Regarding Effect of Failure to Deny in Rules of Appellate Procedure: In 1993, Brown filed a petition for a writ of habeas corpus, arguing that prison officials had miscalculated his parole eligibility date. The Supreme Court denied that petition. In 1996, Brown filed a 42 U.S.C. 1983 complaint in District Court seeking to address alleged deprivations of his rights by prison officials under federal law, but the complaint was dismissed for failure to state a claim. The District Court concluded that the issues raised in the complaint were the same as those raised in the 1993 writ and were thus barred by collateral estoppel. Brown appealed, and in an unpublished opinion (Brown v. St., No. 96-651), the Supreme Court remanded, concluding that the District Court had mischaracterized the issues in the 1993 writ and that three of the claims were not barred by collateral estoppel. On remand, after an unexplained delay of 4 years, the District Court dismissed Brown's remaining claims, holding that they were not cognizable under federal law. Brown appealed again, arguing that the District Court erred by granting judgment to the state without first holding a hearing and asserting that under Rule 8(d), M.R.Civ.P. (Title 25, ch. 20), the state's failure to respond to the issue in its brief constituted an admission that Brown was correct on the issue. However, Brown misapplied Rule 8(d) to these proceedings. The Montana Rules of Appellate Procedure do not contain a similar provision regarding the effect of failure to deny. Further, the remand order did not require the District Court to hold a hearing. On remand, the trial court is free to make any order or decision in further progress of the case that is not inconsistent with the appellate court's decision. The District Court was affirmed. Brown v. St., 2002 MT 58, 309 M 106, 46 P3d 42 (2002).

Introduction of New Issues on Remand: In a condemnation case, the city offered proof that a private water company had received a rate increase and entered into litigation with the Public Service Commission during the interim between appeal and remand. The lower court correctly held that the evidence was inadmissible because its admission would change in part the law of the case as established on appeal. In order to comply with the order of remand, the District Court can only consider the specific issues remanded and no others. Missoula v. Mtn. Water Co., 236 M 442, 771 P2d 103, 46 St. Rep. 494 (1989).

Supreme Court Mandate to Be Followed:

In applying the rule (that a lower court has no discretion to alter a particular Supreme Court judgment) to demands for relief on a second appeal, the Supreme Court adopted the reasoning in Idanha v. Consumers Power, Inc., 509 P2d 1226 (Or. Ct. App. 1973), that relief from asserted changed conditions or rights allegedly accruing or injuries allegedly occurring pending or following appeal can be had, if at all, only by resort to an original proceeding by which appropriate relief may be sought. Therefore, the discretion of the District Court on remand from the Supreme Court extends only to the entry of the proper judgment. Carey v. Wallner, 229 M 57, 744 P2d 881, 44 St. Rep. 1778 (1987), distinguished in Slater v. Cent. Plumbing & Heating Co., 1999 MT 257, 297 M 7, 993 P2d 654, 56 St. Rep. 1023 (1999).

Section 3-2-204 gives the Supreme Court power to remand a case to a lower court accompanied by instructions that direct further action be taken by it in accordance with those instructions. A lower court cannot ignore an appellate court's mandate in disposing of a case after it has been returned to the lower court. State ex rel. Olson v. District Court, 184 M 346, 602 P2d 1002, 36 St. Rep. 2086 (1979); In re Marriage of Sarsfield, 215 M 123, 695 P2d 473, 42 St. Rep. 231 (1985).

On the remand of the cause after appeal, it is the duty of the lower court to comply with the mandate of the Supreme Court and to obey the directions therein. The trial court commits error if it fails to follow the directions of the Supreme Court. In re Stoian's Estate, 138 M 384, 357 P2d 41 (1960), followed in St. v. Owens, 230 M 135, 748 P2d 473, 45 St. Rep. 89 (1988).

Modification of Judgment — Recalculation of Damages Based on When Interest to Accrue: The jury set the date on which interest on damages would begin to accrue as October 16, the expected date of harvest according to the jury form. Defendant argued that the determination was nonsensical because it put the date of expected harvest after the date in October on which the replacement crop was actually harvested. In modifying the judgment, the Supreme Court found no appearance of jury passion or prejudice in reaching the verdict and remanded for

recalculation of damages using October 2 as the expected date of harvest. Vandalia Ranch, Inc. v. Farmers Union & Oil Supply Co., 221 M 253, 718 P2d 647, 43 St. Rep. 790 (1986).

Discretion to Receive Additional Evidence — Damages on Remand:

When the Supreme Court remanded for a redetermination of amount of damages arising from loss on sale of a business, without direction or restriction on method to be utilized by District Court, it was the trial court's discretion whether the record before it was sufficient for this purpose or whether additional evidence was required. Lovely v. Burroughs Corp., 169 M 454, 548 P2d 610 (1976).

Where the trial court, after hearing an action on its merits, erroneously determined that the complaint did not state a cause of action and the evidence clearly showed that plaintiff was entitled to recover, necessitating reversal of the judgment and remanding the cause for further proceedings, the court may, if necessary, hear further evidence to determine the amount of damages to which plaintiff is entitled. Schneider v. Nelson, 111 M 377, 110 P2d 972 (1940).

New Findings: When testimony given at trial did not conform to trial court's findings of fact concerning property valuation in divorce case, the case was remanded to trial court for hearing to establish proper division of property and alimony for support of the defendant. Whitman v. Whitman, 164 M 124, 519 P2d 966 (1974).

Remand for New Trial:

Court abused discretion in dismissing action for failure of plaintiff to prosecute case returned by Supreme Court to lower court for new trial where trial court failed to set trial for next jury term as per order of Supreme Court. Jangula v. U.S. Rubber Co., 149 M 241, 425 P2d 319 (1967).

In a case in which the successful party neither made a cross-assignment of error on the trial court's action in rejecting an offer of proof which should have been admitted nor perfected a cross-appeal, the case was remanded for a new trial. Phelps v. Union Cent. Life Ins. Co., 105 M 195, 71 P2d 887 (1937).

While the Supreme Court may, in equity cases where a judgment cannot be sustained under the evidence, direct the entry of a proper judgment, it will not do so where the evidence is meager and confused and where the determinative finding of the court presented an entirely new element not included in the pleadings or proof but will remand the cause for a new trial. Horst v. Staley, 101 M 543, 54 P2d 876 (1936).

Modification of Judgment: Where in an action for services rendered, the plaintiff was properly entitled to recover but the trial court erred in refusing to limit recovery for the services, the judgment will not be reversed and a new trial ordered, but the cause will be remanded with instruction to modify the judgment. Callan v. Hample, 73 M 321, 236 P 550 (1925).

EQUITY CASES

Claim of Resulting or Constructive Trust Barred by Judicial Estoppel and Clean Hands Doctrine: The parents created a family corporation and made their four children equal, sole shareholders through transfers and gifts. When two medical malpractice suits were filed against the father, he claimed that he had no right to or control over the corporation's assets. In a separate action, two sisters instituted a shareholder derivative action and petitioned for judicial review of their brother's fiduciary duties. The brother called a special meeting to issue additional stock to himself and to transfer property back to the parents, but the sisters objected and the brother was enjoined from doing so. The parents then claimed that the property was held in a resulting or constructive trust, and the District Court ordered that the assets and stock be conveyed to the parents. The sisters appealed, and the Supreme Court reversed. Both the sisters and the plaintiffs in the medical malpractice action relied to their detriment on the father's judicial declaration that he had no right to or control over the corporate assets, and the father was thus barred by judicial estoppel and the clean hands doctrine from raising equitable claims that a resulting or constructive trust existed. Judicial estoppel binds a party to that party's judicial declarations and precludes the party from taking a position inconsistent with the previous declaration in a subsequent action or proceeding. The clean hands doctrine provides that a party must not expect relief in equity unless the party comes into court with clean hands. The evidence here showed that the parents knowingly transferred assets to the family corporation to circumvent creditors and avoid estate taxes, and the Supreme Court will not aid a party whose claim had its inception in the party's wrongdoing, whether the victim of the wrongdoing is the other party or a third party. Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001).

Elements of Judicial Estoppel: The doctrine of judicial estoppel binds a party to that party's judicial declarations and precludes the party from taking a position inconsistent with the previous declaration in a subsequent action or proceeding. Although judicial estoppel may be

regarded as a form of estoppel, it is not strictly one of estoppel, but partakes rather of positive rules of procedure based on manifest justice and, to a greater or lesser degree, on considerations of the orderliness, regularity, and expedition of litigation. Those elements that are generally essential to the operation of equitable estoppel, such as reliance, injury, and prejudice to the individual, may not enter to the same extent into judicial estoppel. A party claiming that judicial estoppel bars another party from relitigating an issue must show that: (1) the estopped party had knowledge of the facts at the time that the original position was taken; (2) the estopped party succeeded in maintaining the original position; (3) the present position is inconsistent with the original position; and (4) the original position misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party. Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001). See also Rowland v. Klies, 223 M 360, 726 P2d 310 (1986), Fiedler v. Fiedler, 266 M 133, 879 P2d 675 (1994), and In re George Trust, 1999 MT 223, 296 M 56, 986 P2d 427 (1999).

Grant of Equitable Relief From Forfeiture — Conditions: Defendant defaulted on a contract to operate a coal mine. The District Court granted summary judgment, finding no genuine issue of material fact regarding defendant's unlawful detainer. Defendant sought equitable relief pursuant to 28-1-104. The Supreme Court may, under appropriate circumstances, equitably relieve a party from the harsh effects of a forfeiture. Circumstances warranting equitable relief must not only meet the statutory requirements of tendering full compensation within a reasonable time after service of notice of default and not acting in a grossly negligent, willful, or fraudulent manner, but the party seeking relief must also assert facts that appeal to the conscience of the court of equity. Mere financial inability is not sufficient to appeal to the court's conscience. In this case, defendant's request for equitable relief was deficient because it did not meet statutory and common-law criteria, so the grant of summary judgment was affirmed. Glacier Park Co. v. Mtn., Inc., 285 M 420, 949 P2d 229, 54 St. Rep. 1222 (1997), following Kovacich v. Metals Bank & Trust Co., 139 M 449, 365 P2d 639 (1961), distinguishing Parrott v. Heller, 171 M 212, 557 P2d 819 (1976), and followed in Weter v. Archambault, 2002 MT 336, 313 M 284, 61 P3d 771 (2002).

Supreme Court Clarifies That Standard of Review for Estate Cases at Equity Is the "Clearly Erroneous" Test: In reviewing a lower court's decision that a will could be admitted to probate because it was not the product of undue influence, the Supreme Court stated that the standard of review in estate cases at equity was inconsistent and contradictory. Under the statute, the test has tended to be whether substantial credible evidence supports the lower court's findings, while under the rule, the test has been whether the lower court's findings are clearly erroneous. The Supreme Court held that nothing in the statute precludes the use of the "clearly erroneous" test, while the rule, by its terms, mandates its use. Therefore, with respect to estate cases at equity, the standard of review would be the "clearly erroneous" test. In re Estate of Tipp, 281 M 120, 933 P2d 182, 54 St. Rep. 90 (1997).

Case Subject to Landlord-Tenant Law Does Not Lie in Equity: The Supreme Court held that the dispute between the parties was subject to the legal remedies provided by landlord-tenant law and therefore could not be heard in equity. The Supreme Court went on to state that it was unable to look at the lower court's order as an equitable ruling and could not apply the more deferential standard of review that was applied to equitable rulings. Eagle Watch Inv., Inc. v. Smith, 278 M 187, 924 P2d 257, 53 St. Rep. 757 (1996).

General Equity Powers: A court sitting in equity is empowered to determine all questions involving the case and to do complete justice. This includes the power to fashion an equitable result, to determine any other equities connected with the main subject of the suit, and to grant all relief necessary to the entire adjustment of the subject. Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608, 46 St. Rep. 1661 (1989), followed in Nimmick v. Hart, 248 M 1, 808 P2d 481, 48 St. Rep. 293 (1991).

Review of Fact Questions:

In an equity case the trial court is required to review all questions of fact arising upon the evidence presented in the record, whether or not specifications of error are made, and determine those questions as well as questions of law. Rennie v. Nistler, 226 M 412, 735 P2d 1124, 44 St. Rep. 764 (1987).

The rule that questions of fact may be reviewed on appeal in equity cases provides some protection to the losing party in a case in which the trial court has adopted verbatim the prevailing party's proposed findings and conclusions. Sawyer-Adecor Int'l, Inc. v. Anglin, 198 M 440, 646 P2d 1194, 39 St. Rep. 1118 (1982), followed in Daniels v. Thomas, Dean & Hoskins, Inc., 246 M 125, 804 P2d 359, 47 St. Rep. 2293 (1990).

Breach of Contract Action Sounding in Equity — Mutuality of Consent: Although an action for breach of contract to lend money is usually an action at law, the case sounded in equity where borrower argued that the contract was illusory and thus void because it lacked mutuality and that the lender's interpretation of the contract rendered the contract unconscionable and required the contract to be voided or reformed, and the lender raised the equitable defenses of estoppel, waiver, and laches. Shimsky v. Valley Credit Union, 208 M 186, 676 P2d 1308, 41 St. Rep. 258 (1984).

Equity Theory Raised Below but Not Argued at Length Until Appeal: The broad standard of review used in equitable cases was needed where appellant had raised two legal theories below but essentially argued only the first, the court and respondent had concentrated on the first, appellant conceded on the first theory on appeal and argued the second theory, an equitable one, at length, and the lower court's memo in support of its dismissal of the action related only to the first theory. Shimsky v. Valley Credit Union, 208 M 186, 676 P2d 1308, 41 St. Rep. 258 (1984).

Standards for Review of Findings of Fact:

In equitable causes where issues are close, a degree of deference will be accorded the findings of the trial court since it is in a better position to make decisions of fact. Rule 52(a), M.R.Civ.P., requires findings of fact made by the District Court to be upheld unless they are clearly erroneous, but the rule does not make any distinction between equitable causes and cases at law; thus the Supreme Court in reviewing an action of an equitable nature must look to 3-2-204(5) and independently review all questions of fact as well as questions of law. In causes where the issues are not close, the standard for this review is to uphold the District Court on questions of fact unless there is a decided preponderance of the evidence against its findings. Rase v. Castle Mtn. Ranch, Inc., 193 M 209, 631 P2d 680, 38 St. Rep. 992 (1981).

Supreme Court in an equity case not only has the function of reviewing law involved but also reviews evidence to the extent of determining whether findings of fact by the trial court are supported by substantial evidence. White v. Nollmeyer, 151 M 387, 443 P2d 873 (1968). See also Mitchell v. Boyer, 237 M 434, 774 P2d 384, 46 St. Rep. 928 (1989).

The Supreme Court in reviewing an equity case will review the law therein and also will review the evidence to that extent necessary to ascertain whether the findings of fact by the trial court are substantially supported and sufficient to support the conclusions of law derived therefrom. Bender v. Bender, 144 M 470, 397 P2d 957 (1965).

In an equity case it is proper for the appellate court to pry into the factual issues of the case, and the decision must hinge on factual observations unless the case is returned to the lower court for further proceedings. Jenson v. Olson, 144 M 224, 395 P2d 465 (1964).

The Supreme Court in reviewing equity cases will hesitate to overturn findings of the trial court based upon substantial conflicting evidence which would justify an inference in favor of either side of the controversy. Bouma v. Bynum Irrigation District, 139 M 360, 364 P2d 47 (1961).

In entering upon a review of the evidence on appeal in an equity case, the Supreme Court indulges the presumption that the judgment of the trial court is correct and will draw every legitimate inference therefrom to support the presumption. Havre Irrigation Co. v. Majerus, 132 M 410, 318 P2d 1076 (1957), followed in Meridian Minerals Co. v. Nicor Minerals, Inc., 228 M 274, 742 P2d 456, 44 St. Rep. 1516 (1987), and distinguished in Eagle Watch Inv., Inc. v. Smith, 278 M 187, 924 P2d 257, 53 St. Rep. 757 (1996).

The Supreme Court is without original jurisdiction to decide a question of fact depending upon conflicting evidence not passed upon by the trial court. Hoppin v. Lang, 81 M 330, 263 P 421 (1928).

The Supreme Court in an equity case is not bound by any finding of the trial court even though unchallenged but may, upon examination of the evidence, determine a question of fact for itself and overturn such finding if there is a decided preponderance of the evidence against it. Stanton v. Occidental Life Ins. Co., 81 M 44, 261 P 620 (1927).

The Supreme Court on appeal in equity cases must review and determine all questions of fact, due allowance being made for the more advantageous position occupied by the trial Judge in passing upon the credibility of the witnesses, as well as questions of law, unless for good cause shown a new trial should be ordered. Giebler v. Giebler, 69 M 347, 222 P 436 (1924); Barnard Realty Co. v. Butte, 55 M 384, 177 P 402 (1918).

Review on Record Only: Where judgment was rendered against the appellant in a proceeding to quiet title and for an accounting of rents and profits from real property and appellant subsequently appealed to the Supreme Court, the Supreme Court would not consider depositions taken in a different action and submitted by the appellant but not made a part of the record in the case before the court. In appeals from equitable proceedings, the Supreme Court may not

consider evidence extraneous to the record. Downs v. Smyk, 185 M 16, 604 P2d 307, 36 St. Rep. 2300 (1979), followed in In re Marriage of Scott, 246 M 10, 803 P2d 620, 47 St. Rep. 2237 (1990), and in In re George Trust, 253 M 341, 834 P2d 1378, 49 St. Rep. 424 (1992). See also Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Contradictory Evidence: There was sufficient evidence to support the trial court's findings, conclusion, and judgment when contradictions appeared in the evidence. Hagfeldt v. Mahaffey, 176 M 16, 575 P2d 915 (1978).

Laches: The plaintiff's claim of a resulting trust in real property, raised after a period of 24 years and after the principal parties are dead, warrants the application of the doctrine of laches. Adair v. Capital Inv. Co., 165 M 26, 525 P2d 548 (1974).

Evidence in Supreme Court: In equity cases and matters of an equitable nature where questions of fact are presented for review, the testimony must be presented by question and answer; if not so presented, the appellant is not entitled to have the evidence considered for any purpose, and in such circumstances, if it does consider it, the appellate court will place greater reliance upon the court's findings than would otherwise be necessary. Stephenson v. Rainbow Flying Serv., Inc., 99 M 241, 42 P2d 735 (1935); Sec. St. Bank v. McIntyre, 71 M 186, 228 P 618 (1924).

PARTICULAR PROCEEDINGS

Water Rights Question Not Raised in Complaint or Pretrial Order and Waived at Trial Properly Excluded: Plaintiff requested the District Court to refer determination of his water rights to the Water Court. However, he did not raise the water rights question in his complaint; the District Court specifically excepted the issue from trial; the issue was not raised in the pretrial order; and the issue was expressly waived by plaintiff at the start of the trial. His request was properly denied. The Supreme Court will not hold the District Court in error for a procedure in which plaintiff acquiesced at trial. Boylan v. Van Dyke, 247 M 259, 806 P2d 1024, 48 St. Rep. 188 (1991).

Custody Petition Withdrawn at Trial Nonappealable: Father's counsel withdrew at trial the portion of father's petition seeking sole custody. Because the custody motion was excised from the petition at hearing, the issue constituted new grounds and could not be asserted on appeal. In re Marriage of West, 233 M 47, 758 P2d 282, 45 St. Rep. 1281 (1988).

Nature of District Court Order — Mandamus — Action at Law: When the order of the District Court commands a school district to perform a duty that devolves upon it by operation of law, its nature is that of mandamus. Mandamus is an action at law. Therefore, 3-2-204 does not apply. The District Court findings are to be reviewed on appeal under Rule 52(a). In re the "A" Family, 184 M 145, 602 P2d 157, 36 St. Rep. 1898 (1979).

Specific Performance: Where District Court decree ordering conveyance of property contained directions as to distribution of the sale price that could be construed as at variance from its findings as to ownership, Supreme Court could modify decree so as to distribute money in accordance with the findings. Morris v. Monk, 158 M 163, 489 P2d 1029 (1971).

Probate Proceedings: Supreme Court reversed where evidence did not support court finding that will was drafted at direction of decedent and that he was aware of its contents when he signed. Erickson v. Erickson, 152 M 179, 448 P2d 144 (1968).

Nuisance Cases: Supreme Court will not hesitate to set aside lower court finding that nuisance exists where there is no substantial evidence on which to base finding. Kasala v. Kalispell Pee Wee Baseball League, 151 M 109, 439 P2d 65, 32 ALR 3d 1120 (1968).

Declaratory Judgment Action: In an action for a declaratory judgment that an act was unconstitutional and for an injunction against enforcement thereof, the Supreme Court had the duty to review all questions of fact, but there was a presumption that the trial court's findings were correct. Garden Spot Mkt., Inc. v. Byrne, 141 M 382, 378 P2d 220 (1963).

Divorce and Separate Maintenance Cases:

In separate maintenance action by wife, Supreme Court had the right and duty to review the facts, but this power or duty did not necessarily require the overturning of the findings made by the trial Judge. Reynolds v. Reynolds, 132 M 303, 317 P2d 856 (1957).

Where a decree of divorce must be reversed, it is the duty of the Supreme Court to determine the questions of law and fact presented by the record. It may consider written evidence that was erroneously excluded by the trial court but incorporated in the record as properly before it. Bordeaux v. Bordeaux, 43 M 102, 115 P 25 (1911).

Quiet Title Actions: The Supreme Court may direct that a proper judgment be entered in any case. Thus in a quiet title action the judgment may be modified to conform with the findings. Warren v. Warren, 127 M 259, 261 P2d 364 (1953).

Foreclosure Proceedings: Where in a mechanics' lien (now construction lien) foreclosure suit judgment was entered against one improperly made a party defendant, the Supreme Court has authority under this section to correct the error by directing entry of proper judgment. Arnold v. Genzberger, 96 M 358, 31 P2d 296 (1934).

Probate Proceedings: The Supreme Court has power under this section to weigh the evidence (though it mainly consists of depositions) to determine heirship and to reverse the judgment if the findings are found to be against the weight of evidence. In re Colbert's Estate, 51 M 455, 153 P 1022 (1915).

Collateral References

Appeal and Error *key* 987, et seq., and particular titles having review lines; 1100, et seq.

4 C.J.S. Appeal and Error §§395, 396; 5 C.J.S. Appeal and Error §§860 through 1017; 21 C.J.S. Courts §§217, 218, 220 through 222, 224.

Consideration by appellate court, in passing on sufficiency of evidence, of inadmissible hearsay evidence introduced without objection. 79 ALR 2d 915.

Scope of review upon appeal from consent judgment. 69 ALR 2d 765.

Appellate court's power to increase amount of verdict or judgment over either party's refusal or failure to consent to addition. 56 ALR 2d 255.

Power of appellate court to remit portion of verdict or judgment covering period barred by Statute of Limitations. 26 ALR 2d 956.

Reversal of judgment as to joint tort-feasor as requiring reversal as to other tort-feasor. 143 ALR 7.

Necessity of setting aside or reversing entire money judgment because of error in allowing certain items, where the verdict or judgment purports to specify the amounts allowed respectively for the proper and improper items. 135 ALR 1186.

Award of costs by appellate court as affected by subsequent proceedings or course of the action in the lower court. 116 ALR 1152.

Reduction by appellate court of punishment imposed by trial court. 89 ALR 295; 29 ALR 313.

Validity of judgment entered on bond without notice and hearing. 86 ALR 308.

Order of restitution of fine or penalty paid in criminal proceedings on reversal of judgment. 26 ALR 1533.

Grant of new trial by appellate court because of inability to perfect records for appeal. 13 ALR 107.

Power to enter judgment nunc pro tunc after death of party pending appeal or Writ of Error. 3 ALR 1416.

Appellate Court Delay in Montana, Joint Subcommittee on the Judiciary Report to the 48th Legislature, Montana Legislative Council, 1982.

3-2-205. Injunctions.

Case Notes

Criteria Met for Supreme Court Jurisdiction of Death Row Petition for Injunctive Relief: Pursuant to the version of 46-19-103 that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended 46-19-103 by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford then filed an original proceeding with the Montana Supreme Court, asserting that the state impermissibly truncated his ability to fully appeal his death sentence by removing hanging as a means of execution and that the state should be permanently enjoined from executing him under the current version of 49-19-103. After examining the applicable statutory criteria, the Supreme Court accepted jurisdiction of the petition for writ of injunction because: (1) the state was clearly a party to the action; (2) the public had an interest in establishing and maintaining the validity of state actions in a proceeding that attempted to curtail the state's ability to enact, amend, and enforce state legislation; and (3) Langford's imminent execution constituted sufficient emergency circumstances to render due consideration in the trial court and appeal to the Supreme Court an inadequate remedy. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

Original Action in Supreme Court:

The Supreme Court has the power to issue a Writ of Injunction in a case wherein public interests are involved. State ex rel. Fisher v. School District, 97 M 358, 34 P2d 522 (1934).

To authorize the Supreme Court to issue the Writ of Injunction in the exercise of its original equity jurisdiction, as distinguished from its power to grant the Writ to preserve the subject of the action pending appeal, the rights of the "public" must be involved. State ex rel. Helena v. Helena Waterworks Co., 43 M 169, 115 P 200 (1911).

Under the constitutional grant of original jurisdiction to the Supreme Court, where the facts stated in an application for the Writ of Injunction present a case affecting the interests of the whole people of the state, the court has jurisdiction to issue the Writ. State ex rel. Clarke v. Moran, 24 M 433, 63 P 390 (1900).

Injunction Pending Appeal: The Supreme Court has inherent power to preserve the subject of litigation and the status of the parties pending an appeal. Finlen v. Heinze, 27 M 107, 69 P 829, 70 P 517 (1902).

Final Judgment:

The Supreme Court is without authority to grant an order modifying or vacating a perpetual injunction pending appeal from a judgment embracing it. Maloney v. King, 26 M 492, 68 P 1014 (1902).

This section does not have reference to staying the operation or effect of injunction orders. It has to do only with interlocutory orders of the District Court or Judge and not with final judgments. Maloney v. King, 26 M 492, 68 P 1014 (1902). See Finlen v. Heinze, 27 M 107, 69 P 829, 70 P 517 (1902).

Temporary Restraining Order: An order vacating a temporary restraining order is an order dissolving an injunction from which an appeal lies, and the Supreme Court could continue the injunction order in force pending an appeal from the order of the District Judge dissolving the injunction. Bennett Bros. Co. v. Congdon, 20 M 208, 50 P 556 (1897).

Collateral References

Appeal and Error *key* 456.

4 C.J.S. Appeal and Error §§395, 396, 408 through 439.

3-2-211. Concurrence of majority — for what necessary.

Case Notes

Supreme Court Equally Divided on Sufficiency of Notice of Appeal — Judgment Appealed From Affirmed: When the Supreme Court was equally divided on the issue of whether a defendant's notice of appeal was legally sufficient, three justices having voted that the notice was sufficient, three justices having voted that it was not sufficient, and one justice having abstained, the court ruled that there had not been a determination by the majority of the court that the notice was sufficient and that therefore the court did not have jurisdiction to hear the appeal. Doll v. Major Muffler Centers, Inc., 208 M 401, 687 P2d 48, 41 St. Rep. 429 (1984).

3-2-212. Powers of justices individually — certiorari and habeas corpus.

Case Notes

Time Bar on Writ of Certiorari to Review Contempt Proceedings: In a case of first impression, the Supreme Court was asked to establish a timeframe within which a petition for review of a contempt order must be filed. The issue was whether the time limitation should come from Title 25, which includes the Montana Rules of Civil Procedure and the Montana Rules of Appellate Procedure, or from Title 27, which prescribes the various statutes of limitation for the commencement of actions. The court noted that there is no appeal, as such, from an order of contempt in a civil proceeding and that the exclusive method of review of civil contempt orders (with certain exceptions) is through a writ of certiorari or writ of review. That review is generally limited to jurisdictional questions and whether evidence supports the contempt. Therefore, the issue of timeliness for filing a petition for a writ of certiorari or review is not a statute of limitations issue, and to mechanically characterize those writs for the review of contempt proceedings as original proceedings governed by the 5-year statute of limitations in 27-2-231 would be to deny the basic nature of appellate review. Further, petitions for writs of certiorari to review contempt proceedings are fundamentally different from other original proceedings commenced in the Supreme Court and from petitions for writs of supervisory control, which do not so much involve appellate review of and a decision on the underlying proceedings as they involve the court dealing with discreet questions of law during the pendency of the underlying proceedings. Because the timeframe in which to file petitions for writs of certiorari to review

contempt proceedings is a procedural issue analogous to the procedure for filing a notice of appeal, the Supreme Court held that Rule 72, M.R.Civ.P. (Title 25, ch. 20), Rule 1, M.R.App.P. (Title 25, ch. 21), Rule 17, M.R.App.P., and 27-25-103 require that the timeframe for those petitions be determined by the Montana Rules of Appellate Procedure. Specifically, pursuant to Rule 5, M.R.App.P., a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding. This may not be construed to limit the Supreme Court's power to grant writs of supervisory control or to consider applications for other types of original proceedings. The Supreme Court chose not to establish a precedent that allows contempt proceedings to be delayed until the underlying cause is resolved. Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), overruling Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in 27-25-102.

Denial of Bond Pending Appeal — Method of Supreme Court Review — Jurisdiction: After conviction for negligent homicide and on related charges, Ingraham moved the District Court to continue bond pending appeal. The District Court denied the motion, finding that Ingraham was a danger to the community and therefore did not meet the requirements of 46-9-107. Ingraham then moved the Supreme Court, pursuant to Rule 22, M.R.App.P. (Title 25, ch. 21), to continue bond pending appeal or, in the alternative, to accept appeal of the District Court's order denying bond, pursuant to Rule 1, M.R.App.P., and 46-20-104. The Attorney General moved to dismiss, contending that there was no provision in law for appeal from a District Court order denying bond pending appeal and that Ingraham should have brought an original habeas corpus proceeding. The Supreme Court agreed with the Attorney General and dismissed Ingraham's motion or appeal, holding that Ingraham should have brought a petition for a writ of habeas corpus pursuant to 46-22-103. Ingraham then filed a petition for a writ of habeas corpus, which was filed with Justice Trieweiler pursuant to this section. Justice Trieweiler granted the petition to the extent necessary for the District Court to hold an evidentiary hearing as provided by statute, under the theory that the District Court was the more appropriate court for the hearing than was the Supreme Court. The Attorney General opposed the order by applying to the full Supreme Court for a writ of supervisory control, arguing, contrary to the state's previous position, that 46-22-103 does not really apply to persons convicted in a criminal case and that the more appropriate procedure was an original proceeding "in the nature of habeas corpus" before the full Supreme Court. The application for a writ of supervisory control was denied, was treated by the Supreme Court as a late-filed response to Ingraham's petition for a writ of habeas corpus, and was referred to Justice Trieweiler. Justice Trieweiler determined that it was inappropriate for him alone to determine the form of review of the District Court's denial of bond. Justice Trieweiler also determined that: (1) Ingraham had no constitutional right to bond pending appeal; (2) Ingraham did have a right to the proper exercise of the District Court's discretion in the application of 46-9-107; and (3) that right was a substantial right for the purposes of 46-20-104. For these reasons, Justice Trieweiler vacated his previous order granting Ingraham's petition for a writ of habeas corpus and referred the matter to the full Supreme Court for review of the District Court's order denying bond pending appeal. St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Custody of Petitioner Required: An application for a Writ of Habeas Corpus will be dismissed if it appears that the petitioner is not "held in actual custody". In re O'Brien, 29 M 530, 75 P 196 (1904).

Law Review Articles

The Increasing Use of the Power of Contempt, Hilts, 32 Mont. L. Rev. 183 (Summer 1971).

Collateral References

Contempt *key* 67; Habeas Corpus *key* 47(1), 67.

17 C.J.S. Contempt §140; 39 C.J.S. Habeas Corpus §§136 through 146; 39A C.J.S. Habeas Corpus §210.

46 Am. Jur. 2d Judges §21, et seq.

Part 3
Sessions of the Supreme Court

3-2-301. Who shall preside.

Collateral References
Courts *key* 47, 101, 102.
21 C.J.S. Courts §§1, 183.

3-2-302. Quorum.

Collateral References
Courts *key* 47, 101, 102.
21 C.J.S. Courts §§1, 183.

3-2-303. Terms of supreme court.

Collateral References
Courts *key* 63, et seq.
21 C.J.S. Courts §§147 through 150.
20 Am. Jur. 2d Courts §§20, 21.

3-2-304. Physical facilities.

Compiler's Comments
1981 Amendment: In (1), substituted "a majority" for "any two justices"; and in (2), inserted "only" before "out of", deleted "any" before "funds", deleted "not otherwise" before "appropriated", and inserted "to the supreme court" at the end.

Case Notes
Assistants to Court: Where the State has failed to make provision for necessary assistants to the Supreme Court, the court may select and appoint them and make the compensation due them for their services a charge against the State as a liquidated claim. State ex rel. Schneider v. Cunningham, 39 M 165, 101 P 962 (1909).

Collateral References
Courts *key* 72 through 74.
21 C.J.S. Courts §§164, 166.
20 Am. Jur. 2d Courts §18.

Part 4
Clerk of the Supreme Court

3-2-402. Duties — electronic filing and storage of court records.

Compiler's Comments
1995 Amendment: Chapter 174 inserted (2) allowing electronic filing or storage of documents; and made minor changes in style.

3-2-403. Fees.

Compiler's Comments
1985 Amendment: Near beginning after "collect" deleted "in advance"; in (1) substituted "$75" for "$20" and after "appellant", deleted "and $10 payable by the respondent at the time of his appearance"; in (2) substituted "$75" for "$20"; in (3) substituted "good standing" for "admission"; in (4) substituted "preparing" for "making transcripts or", "documents on file" for "papers or records", and "page" for "folio"; deleted former (5) that read: "for comparing any document requiring a certificate, 5 cents per folio"; and in (5) substituted "certified copy" for "certificate".

3-2-404. Disposition of fees.

Compiler's Comments
1997 Amendment: Chapter 287 after exception clause substituted "all fees" for "three-fourths of all fees" and after "fund" deleted "and the remaining one-fourth of the fees shall be paid to the public employees' retirement division of the department of administration to be credited to the Montana judges' retirement system account"; and made minor changes in style. Amendment effective July 1, 1997.

1981 Amendment: Inserted "Except as otherwise provided by law" at the beginning of the section; substituted "and the remaining one-fourth of the fees" for "one-fourth of all fees collected by him" after "general fund" near the middle of the section.

3-2-406. Deputy clerk.

Case Notes

Failure to Take Oath — Discharge at Will: Plaintiff served in the capacity of deputy clerk of the Supreme Court for 20 years. He ran for the Clerk of Court position but was defeated. The newly elected Clerk terminated plaintiff and appointed a new deputy. Plaintiff contended he was unlawfully discharged. Plaintiff was not appointed in writing as required by 2-16-205, nor did he subscribe, take, or file an oath of office as required by 3-2-406. When an officer's term is not definite, his appointment is at will. Section 2-16-213 provides that the term of the deputy clerk is at the pleasure of the appointing power. Under 2-16-501, an office becomes vacant upon refusal or neglect to file the official oath within the time prescribed. The court held that upon plaintiff's failure to file an oath of office, his term of office terminated and the Clerk of Court could at any time fill the vacancy by appointment. Conboy v. St., 214 M 492, 693 P2d 547, 42 St. Rep. 120 (1985).

Part 5
Marshal of the Supreme Court

3-2-501. Appointment of marshal and other employees.

Compiler's Comments

2001 Amendment: Chapter 585 inserted (2) designating marshal and other employees appointed under this section as state employees; and made minor changes in style. Amendment effective July 1, 2002.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

Case Notes

Assistants to Court: Where the State has failed to make provision for necessary assistants to the Supreme Court, the court may select and appoint them and make the compensation due them for their services a charge against the State as a liquidated claim. State ex rel. Schneider v. Cunningham, 39 M 165, 101 P 962 (1909).

Collateral References

Courts *key* 58.

21 C.J.S. Courts §142.

3-2-503. Accounts of marshal.

Compiler's Comments

1995 Amendment: Chapter 325 at end of section substituted "state treasurer" for "state auditor". Amendment effective July 1, 1995.

Part 6
Form and Reporting of Decisions

3-2-601. Decisions to be in writing.

Case Notes

Concurring Opinion Not Controlling: Although a special concurring opinion is often insightful and scholarly, it is not the holding of the Supreme Court. It is not accorded the same precedential value as the majority opinion and does not control. Simmons v. Jenkins, 230 M 429, 750 P2d 1067, 45 St. Rep. 328 (1988).

Collateral References

Courts *key* 106.

21 C.J.S. Courts §§218, 220, 221.

20 Am. Jur. 2d Courts §§37, 39.

3-2-602. Justices to report decisions.

Case Notes

Decisions Not to Be Copyrighted: Anything contained in an opinion prepared and published by the court cannot be copyrighted. State ex rel. Helena Allied Printing Council v. Mitchell, 105 M 326, 74 P2d 417 (1937).

When Court Acts as Public Board of Awards: In considering bids and awarding a contract, the members of the Supreme Court in letting such contract act not as a court but as a board of awards and as such are subject to all the statutory provisions relating to public boards of like nature. State ex rel. Helena Allied Printing Council v. Mitchell, 105 M 326, 74 P2d 417 (1937).

Collateral References

Reports *key* 3.
77 C.J.S. Reports §12.

3-2-603. Duties of reporters.

Compiler's Comments

1997 Amendment: Chapter 28 deleted (2) and (3) that read: "(2) Reports of all cases shall be furnished to the West Publishing Company for inclusion in its publication, the Pacific Reporter, and to any other private printing or duplicating concern requesting the reports for publication.

(3) The department of administration, on request of the supreme court, shall contract with a publishing house to publish volumes of reports. The style, size, and format of the reports shall be determined by the justices. The department of administration shall prepare and issue a call for bids and, in accordance with the terms and specifications of the call, contract with the lowest and best bidder. The contract shall provide that the copies of the reports purchased by state or local governmental agencies of Montana, including the reports purchased by the supreme court pursuant to 3-2-604, shall be sold to them by the publisher at the cost of publication"; and made minor changes in style.

1981 Amendment: Added the last sentence of (3) requiring the contract to provide that copies of reports for government agencies be purchased at cost.

Collateral References

Reports *key* 2.

3-2-604. Distribution of reports.

Compiler's Comments

1997 Amendment: Chapter 28 in (1), in introductory clause after "purchase", deleted "up to 221 copies from the publisher" and after "distribute" substituted "each volume" for "them at no charge and in the following manner:

(a) to the state library for distribution, five copies;

(b) to the library of congress, four copies;

(c) to the university of Montana-Missoula law library, two copies"; at end of (1)(a), after "judge", deleted "and county attorney, one copy"; deleted former (1)(f) through (1)(h) that read: "(f) to the attorney general, 11 copies;

(g) to other institutions, publishers, authors, and libraries with which the state law librarian has established a system of exchange for materials of comparable value, up to 50 copies; and

(h) to the university of Montana-Missoula up to 50 copies to be used by the law librarian of the university for the purpose of exchanges for materials of comparable value with libraries, universities, and institutions of higher education in other states"; in (2), near beginning after "distributed", substituted "pursuant to subsection (1)" for "to state, district, and other officers in the state"; and made minor changes in style.

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula".

1981 Amendment: Changed "secretary of state" to "supreme court" and "300 copies" to "up to 221 copies" in the first sentence of (1); inserted "at no charge" in the second sentence of (1); deleted the law library of each state and territory, the judges of the United States district courts in the western states, the clerk of district courts in Montana, and state offices from list receiving copies in (1); inserted five copies to the state library, two copies to the University of Montana law library, 11 copies to the attorney general in (1); decreased from five to four the number of copies to the library of congress; inserted "for materials of comparable value, up to 50 copies" and changed "literary and scientific" to "other" before institutions in (1)(g); inserted "for materials of comparable value" and "libraries" in (1)(h); deleted receipt requirement from (2); and made changes in phraseology.

Collateral References

Reports *key* 5.
77 C.J.S. Reports §9.

3-2-605. Responsibilities of supreme court for security of data and information.

Compiler's Comments

2003 Amendment: Chapter 114 in first sentence after "data" deleted "and information technology resources"; and made minor changes in style. Amendment effective October 1, 2003.

Part 7
Adoption of Rules of Civil Procedure

3-2-701. Power of court over rules.

Case Notes

Rulemaking Power Over Lower Court Procedure: The Supreme Court is authorized to promulgate rules of practice and procedure for all other courts. Uniform Rule II is binding on the practice before all District Courts in the state, and it was proper to dismiss a complaint on defendant's motion to dismiss under Rule 12(b), M.R.Civ.P., when plaintiff failed to comply with the procedure required by the Supreme Court Uniform Rule II and Missoula County District Court Local Rule 4 on a motion to dismiss. McLaughlin v. Hart, 213 M 216, 690 P2d 431, 41 St. Rep. 2059 (1984).

3-2-704. Local rules.

Compiler's Comments

1993 Amendment: Chapter 10 near beginning deleted reference to Supreme Court; and made minor changes in style.

Case Notes

Local Rule as Conflicting With Montana Rules of Civil Procedure: Local court Rule 3 of Park County District Court states in part that a party opposing a motion has 10 days after the filing and service of the moving party's brief to serve and file a reply brief. When applied to a motion for summary judgment, local Rule 3 conflicts with Rule 56(c), M.R.Civ.P. Whenever a local rule conflicts with Montana Rules of Civil Procedure, the local rule must be set aside. Krusemark v. Hansen, 186 M 174, 606 P2d 1082, 37 St. Rep. 304 (1980).

3-2-714. Civil legal assistance for indigent victims of domestic violence account.

Compiler's Comments

2001 Amendment: Chapter 585 in (1) at end of second sentence substituted "25-1-201(3)(a) and (6)" for "25-1-201(4)(a) and (11)". Amendment effective July 1, 2002.

The amendments to this section in sec. 6, Ch. 574, L. 2001, were rendered void by sec. 255(3), Ch. 574, L. 2001, a coordination section.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

Effective Date: Section 3, Ch. 386, L. 1999, provided that this section is effective July 1, 1999.

CHAPTER 5
DISTRICT COURTS

Chapter Case Notes

Rulemaking Power Over Lower Court Procedure: The Supreme Court is authorized to promulgate rules of practice and procedure for all other courts. Uniform Rule II is binding on the practice before all District Courts in the state, and it was proper to dismiss a complaint on defendant's motion to dismiss under Rule 12(b), M.R.Civ.P., when plaintiff failed to comply with the procedure required by the Supreme Court Uniform Rule II and Missoula County District Court Local Rule 4 on a motion to dismiss. McLaughlin v. Hart, 213 M 216, 690 P2d 431, 41 St. Rep. 2059 (1984).

District Court's Power to Order Payment of Expenditures Beyond Budget: District Court's fiscal year budget was overrun, and this stopped or threatened to stop the efficient and orderly administration of justice and court business, creating an emergency. As a court of competent jurisdiction, the District Court may issue orders for the payment of out-of-budget expenditures that are reasonable and necessary. Compliance with the orders by the members of the Board of County Commissioners or by any other officer in the exercise of his official duties is within the exception to personal liability of the officers provided in 7-6-2323 (now repealed). The officers may pass on the propriety of the claims but may not deny them on the basis that they are outside

the budget if the court has duly ordered them paid. State ex rel. District Court v. Whitaker, 210 M 363, 681 P2d 1097, 41 St. Rep. 1104 (1984).

Chapter Law Review Articles

Civil Procedure (a Montana Supreme Court Survey), Williams, 45 Mont. L. Rev. 335 (Summer 1984).

The Transferee Judge—The Unsung Hero of Multidistrict Litigation, McDermott, 35 Mont. L. Rev. 15 (Winter 1974).

Montana's Judicial System—A Blueprint for Modernization, Mason & Crowley, 29 Mont. L. Rev. 1 (Fall 1967).

Chapter Collateral References

Montana Local District Court Rules, Lawyers Deskbook and Directory, p. 110, State Bar of Montana, 1997-98.

The District Courts, Indigent Defense, and Prosecutorial Services in Montana, Report of the Joint Subcommittee on the Judiciary to the 48th Legislature, Montana Legislative Council, 1982.

Part 1
Definition of Districts and Assignment of Judges

Part Compiler's Comments

Study of Redistricting of State Judicial Districts: Section 1, Ch. 338, L. 1999, provided: "Study of necessity of redistricting state judicial districts. (1) The legislative council is requested to designate an appropriate legislative interim committee to study the issue of whether the state's judicial districts should be redistricted. The committee shall report the results of its study to the 57th regular session of the legislature. If the committee determines that redistricting is necessary based on the factors listed in subsection (2), the committee shall prepare for introduction in the 57th regular session of the legislature legislation redistricting the state's judicial districts.

(2) Factors to be considered by the committee shall include but not be limited to:

(a) the population of the districts as determined by the latest estimates prepared and issued by the United States bureau of the census and made available to the census and economic information center of the Montana department of commerce;

(b) each district's case load;

(c) the relative proportions of civil, criminal, juvenile, and family law cases in each district's case load;

(d) the extent to which special masters, alternative dispute resolution techniques, and other measures have been used in the districts;

(e) the distances between county seats in existing districts and any districts that may be proposed by the committee;

(f) the impact on counties of any changes proposed in the districts; and

(g) other factors that the committee determines to be significant to the determination of whether the state's judicial districts should be redistricted.

(3) For the purposes of this study, subcommittees of the committee must include, to the extent allowed by law, judges, county commissioners, and other affected parties.

(4) The legislative council may accept gifts, grants, donations, and other funding to assist in this study."

3-5-101. Judicial districts defined.

Compiler's Comments

1999 Amendment: Chapter 454 in introductory clause increased number of judicial districts from 21 to 22; in (13) after "Yellowstone" deleted references to Stillwater, Carbon, and Big Horn Counties; inserted (22) establishing the 22nd district; and made minor changes in style. Amendment effective July 1, 1999.

Applicability: Section 4, Ch. 454, L. 1999, provided: "(1) The additional judge for the 11th judicial district and the judge for the new 22nd judicial district must be appointed pursuant to the provisions of Title 3, chapter 1, part 10, to take office in January 2000. There must be an election for the offices at the general election to be held in November 2000 for 6-year terms to begin in January 2001.

(2) The additional judge for the 20th judicial district must be elected at the general election to be held in November 2000 and shall take office in January 2001."

1991 Amendment: In introductory clause increased number of districts from 20 to 21; in (4) deleted Ravalli County; inserted (21) establishing 21st Judicial District in Ravalli County; and made minor changes in style.

Preamble: The preamble attached to Ch. 642, L. 1991, provided: "WHEREAS, demographics have changed dramatically in Montana in the last decade; and

WHEREAS, census data that is currently available will be the most reliable data available for reapportioning judicial districts for the next decade; and

WHEREAS, the number of filings in some district courts has grown at a greater rate than the number of filings in other district courts; and

WHEREAS, the cost of the court system is an issue of increasing importance in Montana."

Applicability: Section 2, Ch. 642, L. 1991, provided: "The judge for the 21st judicial district must be elected at the general election to be held in November 1992 and shall take office on January 1, 1993."

1983 Amendment: Increased number of judicial districts from 19 to 20; moved Prairie County from 16th district to 7th; moved Chouteau County from 8th to 12th; moved Blaine County from 12th to 17th; moved Treasure County from 13th to 16th; and moved Lake and Sanders Counties from 4th to 20th. Section 5, Ch. 293, L. 1983, provided that the amendments are effective January 7, 1985, unless early elections are held, in which case the necessary portions of the amendments are effective January 2, 1984.

Attorney General's Opinions

Time for Election of Newly Created District Court Judgeships: Subsection (1) of 13-1-104 sets forth the schedule for general elections to be held in even-numbered years and lists those offices for which such an election is to be held, including the office of District Court Judge. Subsection (2) of 13-1-104 provides the schedule for holding general elections in odd-numbered years, and its list of officers to be elected does not include District Court Judges but does include "any other officers specified by law for election in odd-numbered years". Chapter 293, L. 1983, increased the number of judgeships in several judicial districts and provided that the new judgeships could be initially filled at either the 1983 or 1984 general election. The provision of Ch. 293, L. 1983, allowing election of judges in an odd-numbered year is not in conflict with 13-1-104 because, while subsection (1) would appear to require elections in even-numbered years, Ch. 293, L. 1983, contains specific authority for District Court Judges to be elected in odd-numbered years and thus the clause "any other officers specified by law for election in odd-numbered years" of subsection (2) is applicable. Further, 13-1-107(2) which sets forth the time for holding a primary election in an odd-numbered year is the law applicable to any odd-numbered year primary election held under Ch. 293, L. 1983. 40 A.G. Op. 13 (1983).

Length of Term of Newly Created Judgeships to Be Six Years: Chapter 293, L. 1983, increased the number of judgeships in several judicial districts and provided that the new judgeships could be initially filled at either the 1983 or 1984 general election. According to Art. VII, sec. 7(2), Mont. Const., and 3-5-203, the length of term of a District Court Judge is 6 years. In response to the question of the length of term of judges elected to positions created by Ch. 293, L. 1983, the Attorney General ruled that the term was 6 years because: (1) neither the constitutional provision nor the governing statute was altered by Ch. 293, L. 1983; (2) a provision in the original draft of the bill that altered the length of the term was deleted from the final version of the bill; and (3) assuming that the first election for new judgeships is compared to the filling of vacancies in office, it would be arbitrary to choose 1989, the year contained in the deleted provision of the original bill, as the year in which the terms of the new "vacant" offices expire. 40 A.G. Op. 13 (1983).

Collateral References

Courts *key* 42, 45; Criminal Law *key* 90.

21 C.J.S. Courts §§124, 127, 128, 131, 136.

20 Am. Jur. 2d Courts §§4, 5.

3-5-102. Number of judges.

Compiler's Comments

2001 Amendment: Chapter 497 in (1) inserted 21st district; in (2) deleted 8th district; in (3) inserted 8th district; and made minor changes in style. Amendment effective January 1, 2002.

Initial Election of New Judges: Section 3, Ch. 497, L. 2001, provided: "The additional judges for the 8th and 21st judicial districts must be elected at the general election to be held in November 2002 and shall take office in January 2003."

1999 Amendment: Chapter 454 in (1) after "7th" deleted "11th" and after "18th" inserted "and 20th"; in (2) after "8th" inserted "and 11th"; and made minor changes in style. Amendment effective July 1, 1999.

Applicability: Section 4, Ch. 454, L. 1999, provided: "(1) The additional judge for the 11th judicial district and the judge for the new 22nd judicial district must be appointed pursuant to the provisions of Title 3, chapter 1, part 10, to take office in January 2000. There must be an election for the offices at the general election to be held in November 2000 for 6-year terms to begin in January 2001.

(2) The additional judge for the 20th judicial district must be elected at the general election to be held in November 2000 and shall take office in January 2001."

1983 Amendment: Increased the number of judges in the 1st district from two to three; in the 7th district from one to two; and in the 13th district from four to five.

Section 3, Ch. 293, L. 1983, provided: "Selection of new judges. (1) Except as provided in subsection (2), the judgeships created by this act [Ch. 293] shall be initially filled at the 1984 general election, and the individuals elected shall take office on the first Monday of January, 1985.

(2) A judgeship created by this act [Ch. 293] may be initially filled at the 1983 general election if a majority of the county commissioners in each county within the judicial district where the judge will be elected agree to conduct the election. The individual elected shall take office on the first Monday of January, 1984." Section 5, Ch. 293, L. 1983, provided that the amendments to this section are effective January 7, 1985, unless early elections are held, in which case necessary portions of the amendments are effective January 2, 1984.

New Judge — How Selected: Section 2, Ch. 542, L. 1979, provided: "The judgeship created by this act shall be filled initially at the 1980 general election, and the individual elected shall take office on the first Monday of January, 1981." Chapter 542 added a fourth judge to the 4th Judicial District.

Attorney General's Opinions

Time for Election of Newly Created District Court Judgeships: Subsection (1) of 13-1-104 sets forth the schedule for general elections to be held in even-numbered years and lists those offices for which such an election is to be held, including the office of District Court Judge. Subsection (2) of 13-1-104 provides the schedule for holding general elections in odd-numbered years, and its list of officers to be elected does not include District Court Judges but does include "any other officers specified by law for election in odd-numbered years". Chapter 293, L. 1983, increased the number of judgeships in several judicial districts and provided that the new judgeships could be initially filled at either the 1983 or 1984 general election. The provision of Ch. 293, L. 1983, allowing election of judges in an odd-numbered year is not in conflict with 13-1-104 because, while subsection (1) would appear to require elections in even-numbered years, Ch. 293, L. 1983, contains specific authority for District Court Judges to be elected in odd-numbered years and thus the clause "any other officers specified by law for election in odd-numbered years" of subsection (2) is applicable. Further, 13-1-107(2) which sets forth the time for holding a primary election in an odd-numbered year is the law applicable to any odd-numbered year primary election held under Ch. 293, L. 1983. 40 A.G. Op. 13 (1983).

Length of Term of Newly Created Judgeships to Be Six Years: Chapter 293, L. 1983, increased the number of judgeships in several judicial districts and provided that the new judgeships could be initially filled at either the 1983 or 1984 general election. According to Art. VII, sec. 7(2), Mont. Const., and 3-5-203, the length of term of a District Court Judge is 6 years. In response to the question of the length of term of judges elected to positions created by Ch. 293, L. 1983, the Attorney General ruled that the term was 6 years because: (1) neither the constitutional provision nor the governing statute was altered by Ch. 293, L. 1983; (2) a provision in the original draft of the bill that altered the length of the term was deleted from the final version of the bill; and (3) assuming that the first election for new judgeships is compared to the filling of vacancies in office, it would be arbitrary to choose 1989, the year contained in the deleted provision of the original bill, as the year in which the terms of the new "vacant" offices expire. 40 A.G. Op. 13 (1983).

Collateral References

Courts *key* 41, et seq.; Criminal Law *key* 90(2); Judges *key* 1, et seq.

22 C.J.S. Criminal Law §125; 48A C.J.S. Judges §§7, 8.

3-5-111. District courts presided over by judges of other districts.

Compiler's Comments

1995 Amendment: Chapter 110 deleted former second sentence that read: "Upon the request of the governor, it is his duty to do so" and inserted second sentence that read: "A district judge shall hold the district court in a county of another district if so requested by the chief justice" and in third sentence substituted "The judge holding the court in the other district has the same power as within the judge's own district" for "In either case the judge holding the court has the same power either in court or chambers as a judge thereof"; and made minor changes in style. Amendment effective March 10, 1995.

Case Notes

Authority of Judge: A Judge called in under the provisions of section 93-901, R.C.M. 1947 (superseded by Sup. Ct. Rules, 34 St. Rep. 26), had the authority to draw additional jurors from jury box No. 3 for the remainder of the term under the provisions of section 93-1510, R.C.M. 1947 (now repealed). St. v. Hay, 120 M 573, 194 P2d 232 (1948).

Place of Holding Court: This section contemplates that the invited Judge shall go into the district to which he is invited for that purpose; he has no power, while in his own district, to try on the merits and finally dispose of causes arising in another county. Eustance v. Francis, 52 M 295, 157 P 573 (1916).

Constitutional Authority: This section does not enlarge the authority given by the Montana Constitution and is in accordance therewith. Farleigh v. Kelly, 24 M 369, 62 P 495 (1900).

Collateral References

Judges *key* 29.

48A C.J.S. Judges §§69, 70, 73, 74.

3-5-112. Authority of chief justice.

Compiler's Comments

1995 Amendment: Chapter 110 at beginning of (1) inserted "The chief justice may by written order assign a district judge to hold court in a county of another district"; in (1)(a), after "district court", inserted "in another district" and after "judge" substituted "of the other district or acting for the other district" for "or judges thereof or by a district judge requested by such judge or judges to hold such court"; in (1)(b), after "court", substituted "in the other district" for "in any county" and after "promptness" deleted "the governor may, upon application of any interested person, by an order in writing, require some district judge to hold court in said county for such time as may be specified in the order"; inserted (2) providing that a District Judge assigned to another district shall hold court for the time specified in the order; and made minor changes in style. Amendment effective March 10, 1995.

Case Notes

Authority of Governor:

If a Judge declines to properly perform his official duties, relief must be had from the Supreme Court rather than from the executive power of the state. (See 1995 amendment.) State ex rel. Bennett v. Bonner, 123 M 414, 214 P2d 747 (1950).

Where there is a duly qualified and acting Judge in district, Governor is without power to order Judges of another district into various counties to assume judicial powers. (See 1995 amendment.) State ex rel. Bennett v. Bonner, 123 M 414, 214 P2d 747 (1950).

Constitutionality: This section was held valid, upon original application by the State for a Writ of Supervisory Control, to review an order of a District Judge declining to assume jurisdiction of a cause over which he had been called by the Acting Governor to preside. (See 1995 amendment.) State ex rel. Smith v. District Court, 116 M 251, 151 P2d 500 (1944), explained in State ex rel. Bennett v. Bonner, 123 M 414, 214 P2d 747 (1950).

3-5-113. Judges pro tempore — special masters — scope of authority in criminal and civil cases.

Compiler's Comments

2001 Amendment: Chapter 473 in (1) inserted reference to 3-20-102; and made minor changes in style. Amendment effective on occurrence of contingency.

Preamble: The preamble attached to Ch. 473, L. 2001, provided: "WHEREAS, the Legislature finds that there are a large number of asbestos-related claims by Montana citizens that are primarily within the venue of the 19th Judicial District; and

WHEREAS, the large number of asbestos-related claims will impede the ability of the single District Court Judge in the 19th Judicial District to handle the normal case load of the District and will raise several potential conflicts of interest; and

WHEREAS, it is imperative that asbestos-related claims be dealt with expeditiously in order to allow Montana citizens with life-threatening illnesses to receive a speedy resolution of their claims; and

WHEREAS, Article VII, section 1, of the Montana Constitution allows additional courts to be provided by law."

1995 Amendment: Chapter 394 in (1)(a), near beginning, in two places in (1)(b), and in (1)(c) inserted "or special master"; in (1)(c), after "rendered", inserted "in a civil case"; inserted (2) providing for the conduct of preliminary, nondispositive proceedings in criminal actions before a judge pro tempore or special master; and made minor changes in style. Amendment effective April 12, 1995.

1987 Amendment: Near end of (1), after "attorneys of record", substituted "appointed" and "approved" and after "court" inserted "as provided in 3-5-115"; inserted (2) stating the judge's power and relating to applicable evidentiary and procedural rules; in (3), before "court", inserted "district"; and made minor change in phraseology.

Collateral References

Judges *key* 13, et seq.

48A C.J.S. Judges §162, et seq.

3-5-114. Qualifications.

Compiler's Comments

2003 Amendment: Chapter 389 inserted (3) and (4) allowing a justice of the peace for a justice's court established as a court of record and a municipal court judge to act as a judge pro tempore; and made minor changes in style. Amendment effective July 1, 2003.

Grandfather Clause: Section 13, Ch. 389, L. 2003, provided: "An incumbent justice of the peace on [the effective date of this act] [effective July, 1, 2003], in a county in which a justice's court established as a court of record is established, who meets the minimum education requirements for a justice of the peace is eligible to run for the justice of the peace for a justice's court established as a court of record in that county at the next and subsequent elections held for the justice of the peace for the justice's court established as a court of record unless the justice of the peace has a break in service."

Saving Clause: Section 14, Ch. 389, L. 2003, was a saving clause.

3-5-115. Agreement, petition, and appointment of judge pro tempore — waiver of jury trial.

Compiler's Comments

2001 Amendment: Chapter 473 in (1) at beginning of second sentence and in (2) at beginning inserted exception clause; inserted (3) requiring supreme court to appoint asbestos claims judge pursuant to 3-20-102; and made minor changes in style. Amendment effective on occurrence of contingency.

Preamble: The preamble attached to Ch. 473, L. 2001, provided: "WHEREAS, the Legislature finds that there are a large number of asbestos-related claims by Montana citizens that are primarily within the venue of the 19th Judicial District; and

WHEREAS, the large number of asbestos-related claims will impede the ability of the single District Court Judge in the 19th Judicial District to handle the normal case load of the District and will raise several potential conflicts of interest; and

WHEREAS, it is imperative that asbestos-related claims be dealt with expeditiously in order to allow Montana citizens with life-threatening illnesses to receive a speedy resolution of their claims; and

WHEREAS, Article VII, section 1, of the Montana Constitution allows additional courts to be provided by law."

3-5-116. Compensation — expenses.

Compiler's Comments

1995 Amendment: Chapter 394 in (1) and (2) inserted "or special master"; and made minor changes in style.

3-5-122. Judge pro tempore or special master in criminal cases — appointment.

Compiler's Comments

Effective Date: Section 7, Ch. 394, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 12, 1995.

3-5-124. Standing masters — reference — powers.

Compiler's Comments

Effective Date: Section 6, Ch. 167, L. 1999, provided: "[This act] is effective July 1, 1999."

3-5-125. Standing masters — proceedings — meetings — witnesses — statements of account.

Compiler's Comments

Effective Date: Section 6, Ch. 167, L. 1999, provided: "[This act] is effective July 1, 1999."

3-5-126. Standing masters — findings of fact and conclusions of law — orders — contents and filing — review — stipulations as to findings.

Compiler's Comments

Effective Date: Section 6, Ch. 167, L. 1999, provided: "[This act] is effective July 1, 1999."

Part 2
District Court Judges

Part Case Notes

District Court Power to Set Court Staff Salaries — Emergency or Failure of Established Methods Only: A District Judge had no inherent authority to enter an ex parte order establishing salaries for court staff involved in collective bargaining negotiations. The Supreme Court cited State ex rel. Hillis v. Sullivan, 48 M 320, 137 P 392 (1913), in holding that the inherent judicial power to compel funding should only be used when an emergency arises or when the established methods for providing funding have failed. Butte-Silver Bow Local Gov't v. Olsen, 228 M 77, 743 P2d 564, 44 St. Rep. 1356 (1987). See also Monaco v. Lake County, 1998 MT 243, 291 M 141, 967 P2d 367, 55 St. Rep. 1011 (1998).

Appointment of Defeated District Judge: Judge Sykes, a retired judge who was defeated for reelection, was appointed by the Chief Justice to hear several cases. A party to one of the cases appealed the appointment of a defeated judge. The court held that Judge Sykes is a member of the "pool" of retired judges and can be called in by the Chief Justice to preside under the provisions of Art. VII, sec. 6, Mont. Const. Section 3-5-201, which requires District Judges to be elected, does not overcome the constitutional power given to the Chief Justice. Judge Sykes was not appointed pursuant to 19-5-103, and it is therefore not applicable. State ex rel. Welch v. District Court, 209 M 397, 680 P2d 327, 41 St. Rep. 783 (1984).

Judge's Reappointment to Finish Case Started Before Retirement: That trial Judge retired prior to his issuance of orders in the case at issue did not make the orders void. Under the recent decision in State ex rel. Wilcox & Bradley v. District Court, 41 St. Rep. 397 (1984), the trial Judge had authority to perform all functions of an active District Judge, including the issuance of final orders and judgments. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984). (Annotator's Note: The District Court's records indicate that the Judge retired after beginning work on the case and was reappointed to finish the case.)

Retired Judges Eligible for Assignment for Temporary Service: The term "other judges" in subsection (3) of Art. VII, sec. 6, Mont. Const., includes retired judges. That subsection empowers the Chief Justice of the Supreme Court, upon request of a District Judge, to assign retired judges for temporary service to any judicial district or county in Montana. Further, that provision is a constitutional grant of power exclusive of any statutory grant by the Legislature. State ex rel. Wilcox v. District Court, 208 M 351, 678 P2d 209, 41 St. Rep. 397 (1984); followed in St. v. Holmes, 212 M 526, 687 P2d 662, 41 St. Rep. 1535 (1984).

Impairment of Contract and Diminution of Salary — Preventing Legislative Meddling in Judicial Decisions: Plaintiff contended 3-2-104 and 3-5-212, which imposed sanctions on judges if decisions were not reached or opinions were not written within the procedural constraints and time limits set by the statutes, were unconstitutional. (In 1985, 3-2-104 was amended and 3-5-212 was repealed, thus eliminating the sanctions.) The penalty provisions of both statutes required a 1-month salary forfeiture in the event of a violation. Plaintiff contended the penalty violated the impairment of contract and diminution of judicial salary provisions of the Montana Constitution. Defendant contended that since the judiciary imposed the sanctions, the

constitution was not violated. The constitutional prohibition against diminution of salaries is designed to prevent lawmakers from exerting control over the judiciary. Even if the court were to allow the indirect violation by allowing the Legislature to mandate a scheme administered by the courts, the statutes would violate the impairment of contract prohibition. Public employment gives rise to certain obligations protected by the contract clause of the constitution. Promised compensation is one such protected right. Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation. Coate v. Omholt, 203 M 488, 662 P2d 591, 40 St. Rep. 586 (1983).

Time Limits on Judicial Decisions — Solely Within Judicial Sphere: Plaintiff contended 3-2-104 and 3-5-212, which imposed sanctions on judges if decisions were not reached or opinions were not written within the procedural constraints and time limits set by the statutes, were unconstitutional. (In 1985, 3-2-104 was amended and 3-5-212 was repealed, thus eliminating the sanctions.) On appeal, the Supreme Court held that under the separation of powers doctrine the legislative branch of government is without constitutional authority to limit the judicial branch of government in respect to when it shall hear or determine any cause of action within its lawful jurisdiction. The time limits within which judicial decisions must be rendered were held to be a sphere of activity so fundamental and necessary to a court that to divest it of its absolute control would be to make meaningless the very phrase "judicial power". Coate v. Omholt, 203 M 488, 662 P2d 591, 40 St. Rep. 586 (1983).

3-5-201. Election and oath of office.

Compiler's Comments

1987 Amendment: In (1), after "district court", inserted "except judges pro tempore"; and at beginning of (2) inserted exception clause.

3-5-202. Qualifications and residence.

Compiler's Comments

1989 Amendment: In (3), near end after "must reside", deleted "in a county seat".

Collateral References

Judges *key* 3, 4.

48A C.J.S. Judges §§15 through 19.

Validity of age requirement for state public office. 90 ALR 3d 900.

Validity and construction of constitutional or statutory provision making legal knowledge or experience a condition of eligibility for judicial office. 71 ALR 3d 498.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period. 65 ALR 3d 1048.

3-5-203. Term of office.

Attorney General's Opinions

Length of Term of Newly Created Judgeships to Be Six Years: Chapter 293, L. 1983, increased the number of judgeships in several judicial districts and provided that the new judgeships could be initially filled at either the 1983 or 1984 general election. According to Art. VII, sec. 7(2), Mont. Const., and this section, the length of term of a District Court Judge is 6 years. In response to the question of the length of term of judges elected to positions created by Ch. 293, L. 1983, the Attorney General ruled that the term was 6 years because: (1) neither the constitutional provision nor the governing statute was altered by Ch. 293, L. 1983; (2) a provision in the original draft of the bill that altered the length of the term was deleted from the final version of the bill; and (3) assuming that the first election for new judgeships is compared to the filling of vacancies in office, it would be arbitrary to choose 1989, the year contained in the deleted provision of the original bill, as the year in which the terms of the new "vacant" offices expire. 40 A.G. Op. 13 (1983).

Collateral References

Judges *key* 7.

48A C.J.S. Judges §§21 through 24, 27.

3-5-211. Salaries and expenses of district court judges.

Compiler's Comments

1999 Amendment: Chapter 51 deleted former (1) that read: "(1) Subject to subsection (2), the annual salary of each district judge is as follows:

(a) $63,178;

(b) $64,979 beginning July 1, 1995;

(c) $67,513 beginning January 1, 1996"; in (1) near beginning of first sentence after "June 30" deleted "1996, and prior to June 30", near end of third sentence after "July 1" substituted "of the year following the year in which the survey is conducted" for "1997" and after "average" inserted "salary", and deleted former fourth sentence that read: "In each year following the year in which a survey is conducted, the average salary is the new salary for the position"; and made minor changes in style. Amendment effective March 15, 1999.

1995 Amendment: Chapter 455 in (1) inserted "subject to subsection (2)" and substituted salary schedule for former salary schedule (see 1995 Session Law for text); inserted (2) requiring Department of Administration to conduct salary survey; and made minor changes in style. Amendment effective April 14, 1995.

1991 Amendment: Substituted salaries in (1)(a), (1)(b), (1)(c), and (1)(d) for "$52,178 for the fiscal year beginning July 1, 1989, and $55,178 for each fiscal year thereafter". Amendment effective July 1, 1991.

Preamble to 1991 Amendment: The preamble attached to Ch. 656, L. 1991, provided: "WHEREAS, the salaries of Montana Supreme Court Justices and District Court Judges have failed to rise over the last decade to a point that threatens the long-term ability of the judiciary to retain and attract the best qualified candidates for judicial offices; and

WHEREAS, the salaries of both Supreme Court Justices and District Court Judges in Montana are ranked 50th in the nation; and

WHEREAS, the salaries of Supreme Court Justices and District Court Judges in Montana and neighboring states are:

STATE	CHIEF JUSTICE	DISTRICT JUSTICE	JUDGE
Montana	$57,722	$56,452	$55,178
North Dakota	70,243	68,342	62,969
Wyoming	72,000	72,000	68,750
*Idaho	76,201	74,701	70,014
South Dakota	66,700	64,700	60,423
Washington	89,300	89,300	80,500
*Effective July 1, 1991			
AVERAGE:	$72,028	$70,916	$66,306; and

WHEREAS, the ranking between Montana and other states has seriously declined in the past decade from a ranking of 38th in the United States in 1977 to 50th for the last 5 years; and

WHEREAS, the Legislature is committed to an equitable system for setting salaries, based on comparable worth and related levels of responsibility.

THEREFORE, it is the purpose of this legislation to allow Montana Supreme Court Justices and District Court Judges to receive salaries comparable to the average salary of justices and judges in other western states."

1989 Amendment: At end of (1) increased District Judge salary from $49,178 to $52,178 for the fiscal year beginning July 1, 1989, and to $55,178 for each fiscal year thereafter. Amendment effective July 1, 1989.

1985 Amendment: In (1) increased the annual salary of a District Judge to $49,178 and deleted former (1)(a) and (1)(b) which specified a salary of $46,758 for fiscal year 1984 and $47,693 for fiscal years thereafter.

1983 Amendment: In (1)(a), increased the salary of a District Judge for fiscal year 1983 to $46,758 from that authorized for fiscal year 1981, $42,273; and in (1)(b) increased the salary of a District Judge for fiscal years after 1983 to $47,693 from that authorized for fiscal years after 1981, $45,841.

1981 Amendment: In (1)(a), changed "1979" to "1981", "1980" to "1982", and increased the salary from $37,000 to $42,273; and in (1)(b), changed "1980" to "1982", and increased the salary from $39,000 to $45,841.

Transition: Section 16, Ch. 528, L. 1979, provided: "A judicial officer, as defined in 1-1-202, who is occupying his judicial office on the effective date of this act shall continue to be paid expenses on the same basis as he is receiving them on the effective date of this act until the expiration of his term of office. All judicial officers who take office or begin a new term of office after the effective date of this act shall receive expenses as provided in this act."

Severability: Section 17, Ch. 528, L. 1979, was a severability section.

Case Notes

Judge's Reappointment to Finish Case Started Before Retirement: That trial Judge retired prior to his issuance of orders in the case at issue did not make the orders void. Under the recent decision in State ex rel. Wilcox & Bradley v. District Court, 41 St. Rep. 397 (1984), the trial Judge had authority to perform all functions of an active District Judge, including the issuance of final orders and judgments. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984). (Annotator's Note: The District Court's records indicate that the Judge retired after beginning work on the case and was reappointed to finish the case.)

Attorney General's Opinions

Compensation of Judges Other Than Annual Salary Improper: District Court Judges may not receive a fee for writing, research, and lecturing under programs funded by the Board of Crime Control. 35 A.G. Op. 32 (1973).

Collateral References

Judges *key* 22.
48A C.J.S. Judges §§77 through 80, 84.

3-5-213. Expenses when out of district.

Collateral References

Judges *key* 22(10).
48A C.J.S. Judges §§77 through 80, 84.

3-5-215. Expenses when not in county of residence.

Case Notes

Judge as Witness: A District Judge whose district is composed of more than one county and who, while at the county seat of a county in his district other than that of his residence on judicial business, is called as a witness in a cause and remains there for the purpose of giving his testimony is entitled to witness fees. Bullard v. Zimmerman, 88 M 271, 292 P 730 (1930).

Collateral References

Judges *key* 22(10).
48A C.J.S. Judges §§76, 85.

Part 3
District Court Jurisdiction

Part Case Notes

Guidelines for Determining Whether Indian Tribe Has Waived Sovereign Immunity in Contract — Inapplicability of Statute of Frauds to Question of Subject Matter Jurisdiction: Plaintiff contended that he signed a 7-year contract with the Crow Tribe to provide consulting services and to act as a program manager for the planning and construction of a power plant on tribal property and that the tribe breached the contract and failed to pay him. The tribe moved to dismiss on grounds that the District Court lacked personal and subject matter jurisdiction because of the tribe's sovereign immunity. The District Court denied the motion but reserved the right to readdress the issue of subject matter jurisdiction. Following further discovery, neither party could produce a signed copy of the alleged contract. The District Court concluded that because the alleged contract was for employment for more than 1 year, the statute of frauds applied and noted that although plaintiff's performance would normally create an exception to the statute of frauds pursuant to the court's equitable powers, to exercise that power in this case would circumvent the tribe's sovereign immunity in contravention of federal law. The District Court further concluded that although there was an express agreement that was partially performed and that the agreement contained a waiver of tribal immunity from suit in state court, as indicated by affidavits submitted by plaintiff and the tribal presiding officer, because of the fact that a signed copy of the contract was not produced, there was insufficient evidence to overcome the presumption against waiver of tribal immunity, so the action was dismissed for lack of jurisdiction. Plaintiff appealed, and the Supreme Court reversed. The Montana statute of frauds in 28-2-903 limits the enforceability of certain contracts but does not affect a District Court's subject matter jurisdiction, so a District Court need not consider the statute of frauds when determining subject matter jurisdiction; furthermore, the court does not need to invoke its equitable powers to find jurisdiction. Rather, the question facing the District Court was whether the tribe clearly and unequivocally waived its sovereign immunity. The Supreme Court found that plaintiff's complaint alleged sufficient facts that, if true, would vest the District Court with

subject matter jurisdiction. The tribe produced no evidence to refute the affidavits or to controvert the recollections of the affiants. Absent any factual issue to resolve, the Supreme Court concluded that plaintiff presented undisputed evidence proving the establishment of a contract that included an unequivocal waiver of sovereign immunity, so dismissal of the complaint by the District Court on jurisdictional grounds constituted reversible error. Bradley v. Crow Tribe of Indians, 2003 MT 82, 315 M 75, 67 P3d 306 (2003).

District Court Jurisdiction to Decide Constructive Fraud Based on Pleadings and Final Pretrial Order: Plaintiffs filed a claim for misrepresentation and failure to disclose concerning the sale of an irrigation system. Defendants contended that plaintiffs did not notify them by pleadings or evidence at trial that plaintiffs were claiming that a false impression was created regarding the condition of the field at pivot three, arguing that the complaint concerned defects and misrepresentations related to the irrigation system, not to the land, and that the District Court thus lacked jurisdiction to enter judgment on the issue of the land rather than the irrigation system. A District Court does not have jurisdiction to grant relief outside of the issues presented by the pleadings unless the parties stipulate that other questions be considered or the pleadings are amended to conform to the proof. However, in this case, the pleadings and the final pretrial order, which cited misrepresentation of or failure to disclose problems with both the deficient irrigation system and the erosion of the river bank near pivot three, gave defendants sufficient notice of the disputed issues to vest the District Court with issue jurisdiction. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Entry of Judgment by Court of General Jurisdiction in Foreclosure Action Affirmed — Collateral Attack Precluded: Glickman contended that the District Court acted outside or in excess of its jurisdiction by decreeing that the purchaser of Glickman's property at a Sheriff's foreclosure sale be "let into possession". A judgment entered by a court lacking subject matter jurisdiction is subject to attack at any time. A collateral attack on a judgment is possible only if the judgment is void on its face and if it appears affirmatively from the judgment roll that the court did not have jurisdiction or committed an act in excess of jurisdiction. Absent any authority that a court of general jurisdiction may not enter a judgment in a foreclosure sale, the Supreme Court held that the District Court did not act outside or in excess of its jurisdiction by decreeing that the purchaser of the property at a Sheriff's foreclosure sale be "let into possession". Further, Glickman's failure to allege any statutory causes of action in his original petition precluded him from bringing an independent action under the residual clause of Rule 60(b), M.R.Civ.P. (Title 25, ch. 20). Glickman v. Whitefish Credit Union Ass'n, 1998 MT 8, 287 M 161, 951 P2d 1388, 55 St. Rep. 27 (1998).

Nature of National Guard Service — State Court Jurisdiction: Members of the National Guard serve a dual responsibility, both to the State of Montana and to the United States of America. While Guard units consist of members enlisted in the United States Army, they are also a Montana military unit consisting of Montana citizens. The District Court improperly dismissed a suit brought by members of the Montana Army National Guard on grounds that the court did not have jurisdiction, absent proof that the members were on federal active duty as opposed to state active duty. The case was remanded for further findings. Grove v. Mont. Army Nat'l Guard, 264 M 498, 872 P2d 791, 51 St. Rep. 366 (1994), distinguishing Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986).

Presentation of Issue in Pleadings Necessary for Jurisdiction — Jurisdiction Upheld: Logan was discharged from her job at Metra and later obtained employment with the Yellowstone County Sheriff's office, where she suffered a repetitive motion injury. She sued Yellowstone County, claiming that the county breached her employment contract. The county moved for summary judgment, and the District Court dismissed the action. The Supreme Court held that despite Logan's claims that the District Court had no jurisdiction to dismiss because the county moved for summary judgment, the motion for summary judgment on all issues put squarely before the District Court the issue of whether the complaint should be dismissed. The Supreme Court held that the District Court did not exceed the requested relief when it dismissed the complaint. Logan v. Yellowstone County, 263 M 218, 868 P2d 565, 51 St. Rep. 22 (1994).

State Court Jurisdiction of ERISA Actions:

In a case brought to enforce a contract between an employer and a labor organization, state courts have concurrent jurisdiction with federal courts but must apply federal substantive law in exercising that jurisdiction. A state court may rely on state contract law as long as it effectuates the policy underlying federal labor legislation. Audit Serv., Inc. v. Frontier-West, Inc., 252 M 142, 827 P2d 1242, 49 St. Rep. 186 (1992), citing Kemmis v. McGoldrick, 706 F2d 993 (9th Cir. 1983).

Title 29 U.S.C. 1132(e) establishes state court jurisdiction over actions brought to recover benefits under an insurance policy covered by the Employee Retirement Income Security Act of 1974. Bauer v. Kar Prod., Inc., 230 M 422, 749 P2d 1385, 45 St. Rep. 322 (1988).

Jurisdiction Required Before Judgment Effective: It is fundamental that a court rendering a decision in a particular case have jurisdiction over the parties. When the judgment roll on its face shows that the court was without jurisdiction to render the judgment, its pronouncement is in fact no judgment and cannot be enforced. No right can be derived from it. All proceedings founded upon it are invalid and ineffective for any purpose. Ciotti v. Hoover, 237 M 462, 774 P2d 406, 46 St. Rep. 969 (1989), following Apple v. Edwards, 123 M 135, 211 P2d 138 (1949).

Judgment on Matters Outside Pleadings Void: A judgment or final order adjudging matters outside the issues raised by the pleadings is void as to the matters outside the pleadings. In re Custody of C.S.F., 232 M 204, 755 P2d 578, 45 St. Rep. 992 (1988), following Welch v. All Persons, 78 M 370, 254 P 179 (1927).

Jurisdiction of State Court to Order Arbitration Under Federal Arbitration Law: Under the U.S. Supreme Court decision set out in Southland Corp. v. Keating, 465 US 1, 79 L Ed 2d 1, 104 S Ct 852 (1984), a state court clearly has jurisdiction to order arbitration under the federal arbitration law, 9 U.S.C. 1, et seq. Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298, 43 St. Rep. 1532 (1986).

No Jurisdiction Over Issues Not Presented in Pleadings: Where the plaintiff church was granted a tax exemption by the Department of Revenue for some but not all of the plaintiff's real property and brought a quiet title action to determine its ownership and the tax-exempt status of that portion of the property for which it had not been granted an exemption, the District Court erred in removing the exemption originally granted by the Department of Revenue. Under the rationale of Heller v. Osburnsen, 162 M 182, 510 P2d 13 (1973), and Nat'l Sur. Corp. v. Kruse, 121 M 202, 192 P2d 317 (1948), the District Court had jurisdiction only over those issues raised in the pleadings, and the exempt status of lots 10 through 16 was not at issue in the case. Consequently, the District Court had no jurisdiction to remove the tax-exempt status for those lots belonging to the plaintiff. Old Fashion Baptist Church v. Dept. of Revenue, 206 M 451, 671 P2d 625, 40 St. Rep. 1774 (1983).

Labor Management Relations Act of 1947: State courts have concurrent jurisdiction with federal courts to hear cases brought under section 301(a) of the Labor Management Relations Act of 1947 (29 U.S.C. §185(a)). Audit Serv., Inc. v. Clark Bros. Contractors, 198 M 274, 645 P2d 953, 39 St. Rep. 928 (1982).

Same Day Filing of Appeal and Motion for Rehearing: The filing of an appeal to the Supreme Court stays proceedings in the lower court, thereby removing jurisdiction to proceed further in the matter from the lower court; thus, the Supreme Court denied the motion to dismiss the appeal, which was based on the fact that the notice of appeal and movant's motion for rehearing were filed on the same day. Green v. C.R. Anthony Co., 194 M 102, 634 P2d 629, 38 St. Rep. 1638 (1981).

Loss of District Court Jurisdiction Upon Filing Notice of Appeal — Findings and Conclusions Improperly Amended: In an action for damages resulting from the defendants' breach of contract by failing to complete the construction of a road for the plaintiff, the trial court committed reversible error in attempting to amend its findings of fact and conclusions of law after the defendants filed a notice of appeal. Since 1954 it has been the rule in Montana that when a notice of appeal is filed, personal and subject matter jurisdiction passes from the District Court to the Supreme Court. When the District Court amended its findings and conclusions after filing of the notice of appeal, it did so without jurisdiction and the amendments were therefore void. Julian v. Buckley, 191 M 487, 625 P2d 526, 38 St. Rep. 128 (1981). See also St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Part Law Review Articles

Involuntary Commitment of the Mentally Ill, Troland, 38 Mont. L. Rev. 307, 322 (Summer 1977).

Developing Theories of State Jurisdiction Over Indians: The Dominance of the Preemption Analysis, Lynaugh, 38 Mont. L. Rev. 63 (Winter 1977).

Administrative Procedures in Montana: A View After Four Years With the Administrative Procedure Act, McCrory, 38 Mont. L. Rev. 1, 17, et seq. (Winter 1977).

The Uniform Marriage and Divorce Act: New Statutory Solutions to Old Problems, Townsend, 37 Mont. L. Rev. 119 (Winter 1976).

State and Tribal Courts in Montana: The Jurisdictional Relationship, Parker, 33 Mont. L. Rev. 277 (Summer 1972).

The Increasing Use of the Power of Contempt, Hilts, 32 Mont. L. Rev. 183 (Summer 1971).
The Effect of Lack of Jurisdiction, Slaight, 16 Mont. L. Rev. 54 (Spring 1955).

3-5-301. Kinds of jurisdiction.

Collateral References

Courts *key* 143, 185.
21 C.J.S. Courts §§238, 240 through 243, 249, 273.

3-5-302. Original jurisdiction.

Compiler's Comments

1987 Amendment: In (1), at beginning, inserted exception clause relating to subsection (6); and inserted (6) relating to ballot issue contests.

Preamble: The preamble to Ch. 540, L. 1987, which amended this section, read: "WHEREAS, Article II, section 1, of the Montana Constitution recognizes that all political power is vested in and derived from the people and that all government of right originates with the people, is founded on their will only, and is instituted solely for the good of the whole; and

WHEREAS, the right of the people to make statutory changes by initiative is retained in Article III, section 4, of the Montana Constitution; and

WHEREAS, the right of the people to alter their Constitution by initiative is retained in Article XIV, section 9, of the Montana Constitution."

1985 Amendment: At end of (2)(a) inserted "or misdemeanor offense charged in district court"; in (2)(b) after "felony" inserted "or misdemeanor"; and in (2)(c) substituted "felony or misdemeanor case tried in district court" for "felony case".

1981 Amendment: Inserted (2) relating to concurrent misdemeanor jurisdiction.

Case Notes

Generally 455
Original Civil Jurisdiction 460
Felonies 464
Original Misdemeanor Jurisdiction 464
Concurrent Misdemeanor Jurisdiction 465
Equity 465
Writs and Special Actions 466

GENERALLY

Error in Montana Court's Declination of Jurisdiction to Washington Court — Inconvenient Forum: Following several incidents of partner abuse over the years, the mother moved to Washington state and then requested that the Montana court decline jurisdiction as an inconvenient forum in order to allow the Washington court to assume jurisdiction. The request was denied, and the mother appealed. Under the Uniform Child Custody Jurisdiction Act, a Montana court has jurisdiction to make child custody determinations if Montana is the child's home state, as defined in 40-7-103, and Montana will continue to have exclusive continuing jurisdiction unless the Montana court declines to exercise its jurisdiction. In this case, the parties conceded that Montana was the home state. Jurisdiction may be declined at any time if the Montana court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum to make custody determinations. The factors in 40-7-108 must be considered when evaluating a motion to decline jurisdiction, and the Act places domestic violence at the top of the list of factors to be considered. Although this factor alone is not dispositive, the Supreme Court held that, given the high propensity for recidivism in domestic violence, when a court finds that partner abuse or child abuse has occurred or that a party has fled Montana to avoid further violence or abuse, the court is authorized to consider whether the party and the child might be better protected if further custody proceedings are held in another state. Here, the District Court abused its discretion by failing to consider which forum would best protect the mother and children. The Supreme Court then went on to discuss the other statutory factors and concluded that the protection of the parties, the years that the children have resided in Washington, the significant distance between the courts, the parties' disparate financial circumstances, the location of evidence and convenience of witnesses, and the familiarity factors all supported the Montana court declining jurisdiction. None of the jurisdictional factors mitigated against declination, and no factor outweighed the concern for safety raised by the history of domestic violence. Thus, the Supreme Court ordered the District Court to decline

jurisdiction as an inconvenient forum and arrange to transfer the case to Washington. In re Marriage of Stoneman v. Drollinger, 2003 MT 25, 314 M 139, 64 P3d 997 (2003).

Standard of Review of District Court Jurisdictional Questions: Whether a District Court has jurisdiction to rule on a matter is a question of law that the Supreme Court will review to determine whether the District Court had authority to act. A court exceeds jurisdiction through acts that exceed the defined power of the court, whether the power is defined by constitutional provisions, express statutes, or court rules. In re Marriage of Richards, 2001 MT 183, 306 M 212, 31 P3d 1002 (2001), following Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389 (2000), and Gen. Constructors, Inc. v. Chewculator, Inc., 2001 MT 54, 304 M 319, 21 P3d 604 (2001).

Lack of District Court Jurisdiction Over Breach of Contract Dispute Regarding Work Performed Within Indian Reservation: The District Court held that it lacked subject matter jurisdiction over a breach of contract dispute between two Montana corporations and a non-Indian minority shareholder of one of the corporations for work performed within the boundaries of the Flathead Indian Reservation, concluding that the tribal court had sole jurisdiction to hear all commercial disputes arising on the reservation involving a tribal defendant and that any allegation of fraud or impropriety involving tribal policy for giving preference to Indian-owned businesses necessarily implicated tribal self-government. Plaintiff appealed, contending that a corporation, even if Indian-owned, is neither an "Indian" nor a "tribal member" for purposes of determining subject matter jurisdiction and that the matter was nothing more than one Montana corporation bringing a claim for money damages against another Montana corporation and did not call into question any tribal act. The District Court correctly applied the three-part test in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), in determining whether a state court may assume subject matter jurisdiction when tribal adjudicatory sovereignty over a civil dispute arising on a reservation is involved. The test involves consideration of whether: (1) federal treaties and statutes preempt state jurisdiction; (2) exercise of state jurisdiction would interfere with reservation self-government; and (3) the tribal court is currently exercising jurisdiction or has exercised it in a manner that preempts state jurisdiction. Pursuant to U.S. Supreme Court case law, if either of the first two prongs of the test is established, the state lacks jurisdiction. In analyzing the second prong of the test, the court applied Milbank Mut. Ins. Co. v. Eagleman, 218 M 58, 705 P2d 1117 (1985), which states that a tribe's interest in self-government for civil matters arising within a reservation can be implicated if a state or federal court resolves a dispute that impinges on a tribe's right to adjudicate controversies arising within the province of tribal courts or if the dispute itself calls into question the validity or propriety of an act fairly attributable to the tribe as a governmental body. In the context of this case, the questions then became: (1) whether the subcontractor was an Indian-owned business for preference purposes under its subcontract with the general contractor; and (2) whether the subcontractor committed fraud upon the tribe or otherwise violated the tribe's preference policy to the detriment of plaintiff. Concluding that the answers to both questions clearly implicated tribal court jurisdiction and policymaking authority, the court concluded that it could not assert jurisdiction without violating the policy favoring tribal self-government or interfering with the tribe's sovereignty. The Supreme Court agreed. To assume jurisdiction and decide whether a corporation had committed fraud upon the tribe or a contractor in privity with the tribe or to decide whether or not a corporation should be considered Indian-owned in spite of a prior determination by the tribe would require the District Court to impinge upon the tribe's right to adjudicate controversies arising within the province of the tribe's own courts. Further, even if the District Court were to assume that all of plaintiff's allegations were true, a hearing on the jurisdictional question was unnecessary because the court could not assume subject matter jurisdiction as a matter of law, so the court did not err by issuing its order rather than conducting a hearing on the question. Gen. Constructors, Inc. v. Chewculator, Inc., 2001 MT 54, 304 M 319, 21 P3d 604 (2001).

Spouse Responsible for Bankruptcy Credit Card Obligations Pursuant to Dissolution Decree: As part of the dissolution decree, the wife was ordered to return a quarterhorse and horse trailer to the husband. However, she sold both horse and trailer and used the proceeds for her own purposes, then declared bankruptcy. The District Court offset the husband's obligation to pay credit cards debts that resulted from discharge of the debts in the bankruptcy proceedings because the husband was then held solely responsible by the credit card companies for the debts that the wife had been ordered to pay under the dissolution decree. State District Courts have concurrent jurisdiction with federal bankruptcy courts in determining the dischargeability of debts, and the District Court thus had jurisdiction to determine that the wife was responsible for the credit card obligation. This determination conformed to federal bankruptcy law and was within the District Court's broad discretion to equitably apportion marital property. Lee v. Lee,

2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000). See also State ex rel. Rough v. District Court, 218 M 499, 710 P2d 47, 42 St. Rep. 1773 (1985).

Lack of District Court Jurisdiction Over Claims for Fees Incurred During Bankruptcy Proceedings: Watts filed a claim against Parsons in District Court for fees owing in a bankruptcy action, contending that the debt was incurred after the bankruptcy was discharged and closed and thus was not subject to review by the Bankruptcy Court. The District Court found that it had jurisdiction, based on Woodley v. Myers Capital Corp., 835 P2d 239 (Wash. Ct. App. 1992), and Metco, Inc. v. Huffman, 511 NW 2d 780 (Nebr. Ct. App. 1994), and granted Watts' request for fees. Citing In re Hathaway Ranch Partnership, 116 Bankr. Rep. 208 (Bankr. C.D. Calif. 1990), the Supreme Court noted that the burden of showing entitlement to fees was on Watts. Watts asserted that the parties entered into an agreement for payment of fees after the bankruptcy was discharged but that the agreement was never brought to the attention of or approved by the Bankruptcy Court. By withholding the terms of the agreement from the Bankruptcy Court, Watts denied Parsons the lawful protection of that court. The Supreme Court distinguished Woodley and Metco, noting that in the present case, Watts never submitted the question of fees to the Bankruptcy Court and that the District Court was not in a position to determine whether the fees were reasonable. Because the District Court did not have jurisdiction over the claim for professional fees incurred during the pendency of the bankruptcy action, the case was remanded to District Court with instructions to dismiss. Watts & Associates, Inc. v. Parsons, 1999 MT 56, 293 M 464, 976 P2d 984, 56 St. Rep. 237 (1999).

Sale of Trust Lands Within Flathead Reservation — No Jurisdiction Found for Purposes of Breach of Contract, Fraud, and Negligent Misrepresentation: Neuman, an enrolled member of the Confederated Salish and Kootenai Tribes, sought assistance from the Bureau of Indian Affairs (BIA) to clear the title to trust land within the Flathead Reservation so that Neuman could sell it. He also engaged a real estate broker. Both Neuman and prospective buyers, the Krauses, made considerable efforts to consummate the sale, but Neuman was informed by the BIA that there was a substantial cloud on the title. Neuman therefore terminated the listing agreement, and the Krauses sued for damages, alleging breach of contract, fraud, constructive fraud, fraud in the inducement, and negligent misrepresentation. The District Court, on the recommendation of a special master and after applying the test laid out in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), found a lack of subject matter jurisdiction. The Supreme Court held that 25 U.S.C. 345 and 28 U.S.C. 1353 vest exclusive jurisdiction in the federal courts over disputes involving allotted lands within Indian reservations and that 28 U.S.C. 1360 preempted its jurisdiction. The Supreme Court also held that the Krauses' lawsuit was a dispute involving title to allotted lands even though the action was a tort claim and breach of contract claim because all of the Krauses' claims could not be separated from questions of title to Indian trust lands. Noting that it had already held in In re Marriage of Wellman, 258 M 131, 852 P2d 559 (1993), that an attempt by state courts to adjudicate rights in Indian trust land for the purpose of money damages was precluded by federal law, the Supreme Court held that it made no difference that the Krauses had deleted from their complaint a prayer for specific performance. The claims could still not be separated from the issue of title to Indian lands. Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997).

Previous Assumption of Jurisdiction by Tribal Court — Jurisdiction Improperly Sustained by State District Court: It was error for a state District Court to sustain jurisdiction when a tribal court had previously assumed jurisdiction over the parties and the subject matter by issuing a temporary restraining order against plaintiff. Abstention, as a matter of comity, was exercised by the Supreme Court in holding that jurisdiction was retained in the tribal court. Agri W. v. Koyama Farms, Inc., 281 M 167, 933 P2d 808, 54 St. Rep. 118 (1997), following State ex rel. Stewart v. District Court, 187 M 209, 609 P2d 290 (1980), In re Marriage of Limpy, 195 M 314, 636 P2d 266 (1981), and In re Marriage of Wellman, 258 M 131, 852 P2d 559 (1993).

Damage Claim Not Available as Challenge to District Court Subject Matter Jurisdiction: Although the jurisdiction of courts can be limited by constitutional or statutory provisions on the basis of the amount in controversy or dispute between the parties, Montana District Courts are not constrained by such limits. Therefore, the amount and type of a damage claim in District Court may not be raised to challenge a District Court's subject matter jurisdiction. Day v. Payne, 280 M 273, 929 P2d 864, 53 St. Rep. 1400 (1996).

Lack of Probate Court Jurisdiction in Deciding Attorney Fee Related to Tort Claim: A probate attorney requested that the District Court stay proceedings on a claim that the attorney had wrongfully converted estate property until the probate court finally determined applicable attorney fees. The probate court had jurisdiction over and decided the amount of the attorney fees for probate of the estate but had no jurisdiction to decide the attorney fee related to the tort

claim. Thus, the District Court did not abuse its discretion in refusing to delay trial of the conversion claim until the probate court determined the amount of the attorney fee. Eatinger v. Johnson, 269 M 99, 887 P2d 231, 51 St. Rep. 1484 (1994).

Right to Declaratory Judgment on Discretionary Military Policy Threatening Public Sector Harm: The general rule of no subject matter court jurisdiction over a discretionary military policy (in this case, a state government military policy) did not apply to a state requirement that its firefighters protecting civilian and National Guard aircraft belong to the Montana Air National Guard. Loss of the job for failure to belong was a threatened injury resulting from military intrusion into the civilian sector by the state. The state did not show that the requirement was related to military employment. Therefore, the rule could not be used to dismiss a firefighter's petition for declaratory judgment. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Equitable Tolling of Statute of Limitations Applicable — Different Plaintiffs in Separate Actions: Natelson filed an original action in the Supreme Court seeking a declaratory judgment that a law increasing the state income tax was suspended by a referendum petition and that that suspension did not violate state or federal constitutional provisions. The Supreme Court dismissed that action. Nicholson then filed the present action in District Court, seeking a declaratory judgment that the suspension of the state income tax increase did violate constitutional principles. Defendant Cooney argued that Nicholson's complaint was time-barred, as it was not filed within 30 days of the certification of the referendum petitions suspending the income tax increase. Citing Harrison v. Chance, 244 M 215, 797 P2d 200 (1990), the Supreme Court held that the doctrine of equitable tolling of the statute of limitations applied to the second action even though the plaintiffs were not the same. The Supreme Court stated that it would not penalize the plaintiffs in the second action because of the premature filing of the original action in the Supreme Court. Nicholson v. Cooney, 265 M 406, 877 P2d 486, 51 St. Rep. 579 (1994), followed in Sorenson v. Massey-Ferguson, Inc., 279 M 527, 927 P2d 1030, 53 St. Rep. 1269 (1996).

Marriage Dissolution Brought by Tribal Member Against Non-Indian Spouse — Jurisdiction to Apportion Indian Trust Land: Wife who was a member of the Blackfeet Tribe sought a marriage dissolution in state court from her husband who was a non-Indian. The District Court granted the dissolution but held it did not have jurisdiction to apportion the parties' marital estate, which consisted of about 4,000 acres of Indian trust land on the Blackfeet Reservation, and granted wife's motion to dismiss. On appeal, husband contended that the state court had jurisdiction, relying on a provision in the Blackfeet Tribal Law and Order Code that all divorces must be consummated in accordance with Montana law. However, that provision did not cede jurisdiction to the state but merely governed the tribal court's choice of law. While the state has an interest in ensuring the existence of a forum in which marital property within its borders may be apportioned upon a dissolution, that interest is met by the availability of an alternative forum in the Blackfeet Tribal Court. The state's interest in the property and proceedings is inconsequential compared with the federal and tribal interests at stake. Therefore, the District Court did not err in concluding that it lacked jurisdiction to adjudicate the disposition of the Indian trust land that was the parties' only significant marital asset. In re Marriage of Wellman, 258 M 131, 852 P2d 559, 50 St. Rep. 462 (1993), following White Mountain Apache v. Bracker, 448 US 136, 65 L Ed 2d 665, 100 S Ct 2578 (1980), and N. Mex. v. Mescalero Apache Tribe, 462 US 324, 76 L Ed 2d 611, 103 S Ct 2375 (1983), and distinguishing Sheppard v. Sheppard, 655 P2d 895 (Idaho 1982). In re Marriage of Wellman was followed as to lack of jurisdiction over trust lands, in context of sale of real property, in Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997).

Lack of District Court Jurisdiction in Claim for Damages — Failure to Exhaust Administrative Remedies: Gilpins initiated suit for damages resulting from temporary suspension of their day-care license by the Department of Family Services (now Department of Public Health and Human Services), contending that, under this section, jurisdiction was in the District Court because the action involved a civil claim against the state for payment of money. However, the court properly dismissed the claim for lack of jurisdiction because Gilpins failed to exhaust all administrative remedies available within the agency, as required by 2-4-702, and because there was no showing made pursuant to 2-4-701 that a review of the agency decision by a hearings examiner would not provide an adequate remedy. Gilpin v. St., 249 M 37, 812 P2d 1265, 48 St. Rep. 567 (1991).

Judgment and Sentence Prerequisite to Appeal to District Court — Misdemeanors: Except for misdemeanors listed in subsection (2) of this section, a District Court is limited to appellate jurisdiction of misdemeanor cases. Imposition of sentence and entry of a final judgment by a

Justice's Court or City Court are prerequisites to appeal to a District Court, and a party may not consent to subject matter jurisdiction or waive the want of jurisdiction. St. v. Hegeman, 248 M 49, 808 P2d 509, 48 St. Rep. 318 (1991), followed in St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996), and St. v. Diesen, 1998 MT 163, 290 M 55, 964 P2d 712, 55 St. Rep. 655 (1998).

Discretion of One Judge to Reconsider Ruling Made by Another Judge in Same Case: The rule that judges of coordinate jurisdictions sitting in the same court and in the same case may not ordinarily overrule the decisions of each other is not an imperative and does not necessarily mandate that a court does not have discretion, in appropriate circumstances, to reconsider a ruling made by another judge in the same case. Therefore, a second judge was justified in reconsidering a previous ruling, by a judge who later retired, on the question of school district immunity when that issue had been addressed and significantly clarified by a Supreme Court decision subsequent to the initial ruling. Hayworth v. School District No. 19, 243 M 503, 795 P2d 470, 47 St. Rep. 1361 (1990).

Jurisdiction of Victimless Crime by Non-Indian on Reservation: The District Court held that state courts do not have jurisdiction over the crime of failing to report an accident when the incident occurred within the reservation, the driver was a non-Indian, and the property belonged to an Indian. The Supreme Court found that the offense should be analyzed as a victimless crime for purposes of determining jurisdiction because the alleged criminal act was failure to discharge a reporting duty, not infliction of damage upon property belonging to an Indian. Under the authority of U.S. v. Wheeler, 435 US 313, 55 L Ed 2d 303, 98 S Ct 1079 (1978), Draper v. U.S., 164 US 240, 41 L Ed 419, 17 S Ct 107 (1896), and 18 U.S.C. 1152, federal and tribal interests in providing a federal forum failed to outweigh the state's strong interest in public safety. The policy of providing a federal forum when criminal prosecutions pit the interests of non-Indian offenders against Indian victims was not furthered where, as here, the connection to destruction of Indian property was only tangential to the crime charged; therefore, the state's interests controlled. St. v. Thomas, 233 M 451, 760 P2d 96, 45 St. Rep. 1627 (1988), followed in St. v. Haskins, 269 M 202, 887 P2d 1189, 51 St. Rep. 1474 (1994).

Jurisdiction of Offense of Selling Alcohol Without a License: The District Court was the proper court to try the offense of sale of beer or wine without a valid state license. St. v. Barnes, 232 M 405, 758 P2d 264, 45 St. Rep. 1150 (1988).

Property in State Sufficient for Jurisdiction: In an action to recover unauthorized funds in a bank account in Montana, there were sufficient minimum contacts to establish jurisdiction in Montana even though the plaintiff had no contacts with the state and the defendant had never been in Montana. The deposited funds in the Montana bank account were found to be traceable to the alleged claims of kickback asserted against the defendant in a suit in his home state, and the bank account not only was related to the controversy, it was the subject of the controversy. The tests of "traditional notions of fair play and substantial justice" were met to establish jurisdiction over the nonresident defendant in Montana. Consumers United Ins. Co. v. Syverson, 227 M 188, 738 P2d 110, 44 St. Rep. 999 (1987).

New Findings on Motion to Amend Order — When Permissible: Plaintiff requested modification of child support. Defendant responded and requested custody of the child. The first judge, after a hearing, issued findings of fact, conclusions of law, and an order. A second judge sat on the plaintiff's motions to amend and for a new trial. He issued amended findings of fact, conclusions of law, and an order. The defendant questioned the propriety of the amended findings, conclusions, and order. The Supreme Court relied on St. v. Carden, 170 M 437, 555 P2d 738 (1976), and Mereness v. Frito-Lay, 216 M 154, 700 P2d 182 (1985), to reach the general rule that one District Judge may overrule or review a decision of another District Judge in the same case only when there are exceptional circumstances. The court found no exceptional circumstances or cogent reasons for amending the original decision in this case. The first judge could have been called back to sit on the motion to amend, there was no pressing urgency, and no substantially new evidence was presented. Hansen v. Jurgens, 222 M 345, 722 P2d 1151, 43 St. Rep. 1316 (1986).

When District Court Jurisdiction Concurrent With Bankruptcy Court: The state District Courts have concurrent jurisdiction with the federal Bankruptcy Court in determining whether certain obligations under a marriage dissolution decree are exempted from discharge in bankruptcy. State ex rel. Rough v. District Court, 218 M 499, 710 P2d 47, 42 St. Rep. 1773 (1985), followed in State ex rel. Austin v. Austin, 221 M 488, 719 P2d 429, 43 St. Rep. 998 (1986), and Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000).

District Court Jurisdiction — Invoked by Probable Cause in Leave to File Information — Res Judicata After Appeal Process: The issue of subject matter jurisdiction cannot be waived or

conferred by consent of a party and may be raised at any stage of a judicial proceeding or sua sponte by the court; but if the question of jurisdiction turns upon a finding of whether the affidavit of application for leave to file an information shows probable cause and the defendant has been found guilty and the judgment has not been appealed or has been affirmed on appeal, the issue of probable cause is res judicata. St. v. Davis, 210 M 28, 681 P2d 42, 41 St. Rep. 898 (1984).

Proper Forum Selection: With the plaintiff, the scene of the injury, and most of the witnesses in Idaho, a suit for personal injuries filed in Montana was dismissed by the District Court under the doctrine of forum non conveniens. The Supreme Court reversed, stating that the doctrine must be tempered by an open-door policy and that the doctrine should not presently be applied to Federal Employers' Liability Act (FELA) actions. Bevacqua v. Burlington N., Inc., 183 M 237, 598 P2d 1124, 36 St. Rep. 1523 (1979).

Order Absent Jurisdiction Void: An order entered in the absence of jurisdiction is void. In re the Marriage of Schultz v. Schultz, 183 M 20, 597 P2d 1174, 36 St. Rep. 1993 (1979), following State ex rel. Thompson v. District Court, 75 M 147, 242 P 959 (1926).

Forum Non Conveniens Not Applicable in FELA Suits: The doctrine of forum non conveniens is not applicable to a Federal Employers' Liability Act (FELA) suit filed in a Montana District Court. There is a strong policy favoring plaintiff's forum selection in FELA cases, and the Montana Constitution states that the courts of justice must be open to all persons. Labella v. Burlington N., Inc., 182 M 202, 595 P2d 1184, 36 St. Rep. 1016 (1979).

Naturalization of Aliens: The District Courts possess concurrent jurisdiction with the federal courts (within the limitations prescribed by act of Congress relating to the subject) to naturalize aliens, and therefore when such power is exercised by them, the proceeding is a judicial and not a political one. Hence the Supreme Court may, on certiorari, review a judgment rendered in such a proceeding. State ex rel. Weisz v. District Court, 61 M 427, 202 P 387 (1921).

ORIGINAL CIVIL JURISDICTION

Guidelines for Determining Whether Indian Tribe Has Waived Sovereign Immunity in Contract — Inapplicability of Statute of Frauds to Question of Subject Matter Jurisdiction: Plaintiff contended that he signed a 7-year contract with the Crow Tribe to provide consulting services and to act as a program manager for the planning and construction of a power plant on tribal property and that the tribe breached the contract and failed to pay him. The tribe moved to dismiss on grounds that the District Court lacked personal and subject matter jurisdiction because of the tribe's sovereign immunity. The District Court denied the motion but reserved the right to readdress the issue of subject matter jurisdiction. Following further discovery, neither party could produce a signed copy of the alleged contract. The District Court concluded that because the alleged contract was for employment for more than 1 year, the statute of frauds applied and noted that although plaintiff's performance would normally create an exception to the statute of frauds pursuant to the court's equitable powers, to exercise that power in this case would circumvent the tribe's sovereign immunity in contravention of federal law. The District Court further concluded that although there was an express agreement that was partially performed and that the agreement contained a waiver of tribal immunity from suit in state court, as indicated by affidavits submitted by plaintiff and the tribal presiding officer, because of the fact that a signed copy of the contract was not produced, there was insufficient evidence to overcome the presumption against waiver of tribal immunity, so the action was dismissed for lack of jurisdiction. Plaintiff appealed, and the Supreme Court reversed. The Montana statute of frauds in 28-2-903 limits the enforceability of certain contracts but does not affect a District Court's subject matter jurisdiction, so a District Court need not consider the statute of frauds when determining subject matter jurisdiction; furthermore, the court does not need to invoke its equitable powers to find jurisdiction. Rather, the question facing the District Court was whether the tribe clearly and unequivocally waived its sovereign immunity. The Supreme Court found that plaintiff's complaint alleged sufficient facts that, if true, would vest the District Court with subject matter jurisdiction. The tribe produced no evidence to refute the affidavits or to controvert the recollections of the affiants. Absent any factual issue to resolve, the Supreme Court concluded that plaintiff presented undisputed evidence proving the establishment of a contract that included an unequivocal waiver of sovereign immunity, so dismissal of the complaint by the District Court on jurisdictional grounds constituted reversible error. Bradley v. Crow Tribe of Indians, 2003 MT 82, 315 M 75, 67 P3d 306 (2003).

Venue Versus Jurisdiction — Failure to Move for Change of Venue at Initial Appearance Constituting Waiver of Right to Later Object to Venue: A mother filed in District Court in Judith Basin County for review of a child support modification consent order by the Department of

Public Health and Human Services Child Support Enforcement Division (CSED) reducing the father's child support obligation. CSED moved for dismissal, claiming that the mother had failed to exhaust her administrative remedies. The District Court granted the motion based on lack of jurisdiction, concluding that the petition should have been filed in a different county. The mother appealed, contending that the court confused the concepts of venue and jurisdiction and contending that dismissal of the petition for lack of jurisdiction was erroneous as a matter of law. The Supreme Court agreed and reversed. The District Court's interpretation of 2-4-702 as a requirement that a petition for judicial review must be filed in the correct venue for the court to obtain jurisdiction was incorrect as a matter of law. Jurisdiction is a court's authority to hear and determine a case that goes to the power of the court and cannot be waived or conferred by consent of the parties when there is no basis for jurisdiction under the law, while venue refers to the place where a case is to be heard or where the power of the court is to be exercised and is a personal privilege of defendant that may be waived and that is considered waived pursuant to Rule 12(b), M.R.Civ.P. (Title 25, ch. 20), unless a motion to change venue is made at defendant's initial appearance. Thus, the mother's petition for judicial review vested the Judith Basin County District Court with jurisdiction under 2-4-702. Whether venue was proper in the county where the petition was filed was an entirely different issue. Section 2-4-702 also sets forth the proper place where a contested administrative decision can be heard, providing that the petition must be filed in the District Court for the county where the petitioner resides or has a principal place of business or where the agency maintains its principal office. Upon proper motion, the matter should have been transferred to the proper county, but CSED failed to move for a change of venue at the initial appearance, thereby waiving its right to later object to venue, opting instead to move to dismiss for lack of jurisdiction. Therefore, Judith Basin County was a proper place for trial absent agreement by the parties to transfer venue. In re Support Obligation of McGurran, 2002 MT 144, 310 M 268, 49 P3d 626 (2002).

Failure to Remove Reference in Referendum — Substantive Defect: A legislative referendum purported to eliminate the Office of Secretary of State but failed to address a provision in the constitution assigning a duty to the Secretary of State or to designate who would assume that duty. Although judicial intervention in referenda or initiatives prior to an election is not encouraged, the Supreme Court exercised its statutory prerogative of judicial review and held that the omission was a substantive defect, not a defect of form. If passed, the referendum would have left a defect in the constitution that could not be remedied except by another election. The Secretary of State was thus properly enjoined from presenting the referendum to electors. Cobb v. St., 278 M 307, 924 P2d 268, 53 St. Rep. 920 (1996).

Taxpayer Properly Held in Contempt for Refusal to File Income Tax Returns — Privilege Against Self-Incrimination No Defense: Gillispie failed to file an income tax return for 4 years. The District Court ordered her to file the returns or to show cause why she should not be required to file them. At the hearing, the Department of Revenue introduced Gillispie's W-2 forms, which showed that she had made the minimum income necessary to require her to file returns. The District Court ordered her to file the returns or be found in contempt. When Gillispie failed to file the returns, the District Court held her in contempt, and Gillispie filed a petition for a writ of habeas corpus with the Supreme Court. The Supreme Court held that the District Court had jurisdiction to order Gillispie to file the returns and jurisdiction to hold Gillispie in contempt and that the District Court also had sufficient evidence to do so. The Supreme Court also held that Gillispie's privilege against self-incrimination does not justify the outright refusal to file a return and cannot be used as a method of evading payment of lawful taxes. The Supreme Court held that she must demonstrate the specific parts of the returns that would result in self-incrimination. Gillispie v. Sherlock, 279 M 21, 929 P2d 199, 53 St. Rep. 507 (1996).

Civil Action by Indians Against Non-Indians — Jurisdiction Upheld: Lamberts, enrolled members of the Fort Peck Tribe, sued Ryozik and others who were Canadian citizens for injuries sustained in an automobile accident that occurred within the exterior boundaries of the Fort Peck Indian Reservation. The District Court dismissed the action for lack of subject matter jurisdiction. Citing Emerson v. Boyd, 247 M 241, 805 P2d 587 (1990), and using the three-part test applied in Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), the Supreme Court held that there was no threat to tribal sovereignty posed by Indian citizens of Montana seeking to invoke the jurisdiction of the District Court as plaintiffs in an action against non-Indians for injuries sustained on a reservation. The Supreme Court noted that the use of the courts is guaranteed to all state citizens under Art. II, sec. 16, of the Montana Constitution. A failure to recognize that right would constitute a denial of due process guaranteed by Art. II, sec. 17, of the Montana Constitution and a denial of equal protection guaranteed by Art. II, sec. 4, of the Montana Constitution. Lambert v. Ryozik, 268 M 219, 886 P2d 378, 51 St. Rep. 1250 (1994).

No State Jurisdiction of Indian Reservation Commercial Transactions — Preemption by Tribal Jurisdiction: A state District Court did not have primary subject matter jurisdiction over a civil debt action arising out of a commercial transaction on an Indian reservation and brought by a non-Indian creditor against an enrolled tribal member debtor, both of whom resided on the reservation. State assumption of such jurisdiction interfered with tribal sovereignty and the tribe's right of self-government. Therefore, the state court's jurisdiction over the commercial transaction was preempted by tribal jurisdiction. Geiger v. Pierce, 233 M 18, 758 P2d 279, 45 St. Rep. 1257 (1988), followed in Balyeat Law, PC v. Pettit, 1998 MT 252, 291 M 196, 967 P2d 398, 55 St. Rep. 1038 (1998) (the state has no jurisdiction over an action to collect a debt for medical bills arising out of transactions, either on or off the reservation, brought by a non-Indian creditor against an enrolled tribal member residing on a reservation whose spouse incurred the debt but who engaged in no significant off-reservation contacts so as to subject herself to state jurisdiction).

Civil Controversy Between Indian and Non-Indian — No Jurisdiction: In a civil dispute between a non-Indian and an enrolled member of the Fort Peck Sioux and Assiniboine Tribes, arising within the boundaries of the reservation, the District Court's exercise of jurisdiction interferes with tribal sovereignty and the right to self-government of the tribes. Subject matter jurisdiction over civil litigation between Indians and non-Indians arising out of conduct on an Indian reservation is governed by the three-part test of State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973). Under that test, before a District Court can assume jurisdiction in any matter submitted to it, it must determine subject matter jurisdiction by considering: (1) whether the applicable federal treaties and statutes have preempted state jurisdiction; (2) whether the exercise of state jurisdiction would interfere with tribal self-government; and (3) whether the tribal court is currently exercising jurisdiction or has exercised jurisdiction in such a manner as to preempt state jurisdiction. The first and second elements are disjunctive; if either is present, as in the present case, the state lacks subject matter jurisdiction. Milbank Mut. Ins. Co. v. Eagleman, 218 M 58, 705 P2d 1117, 42 St. Rep. 1393 (1985). See also Emerson v. Boyd, 247 M 241, 805 P2d 587, 48 St. Rep. 180 (1991), distinguished in Lambert v. Ryozik, 268 M 219, 886 P2d 378, 51 St. Rep. 1250 (1994).

Probate Court's Jurisdiction Over Title to Real Property: Weeks after executing a will identical to her husband's, leaving their property to each other or to the husband's heirs, the decedent executed a new will naming a personal representative of her estate and giving him full power of attorney. Shortly before decedent's death, her personal representative transferred part of decedent's real property to her heirs. Husband's conservator sought to set aside the conveyances and remove decedent's personal representative. The District Court denied conservator's motion for summary judgment and determined that while sitting in probate, it lacked the requisite jurisdiction to determine title to real property. The Supreme Court affirmed. In Montana, title to real property, whether determined incidentally or intentionally, must be resolved in proper proceedings instituted for that purpose. In re Estate of Thomas, 216 M 87, 699 P2d 1046, 42 St. Rep. 662 (1985).

Title to and Public Use of Dearborn River — Subject Matter Jurisdiction Found: Landowner along the Dearborn River claimed the District Court lacked subject matter jurisdiction over action for determination of the public's right to use the river, basing his claim on the presumption that he held title to the riverbed and that the State had no power to strip him of that title under the guise of determining navigability of the waters over the riverbed. The claim lacked merit because the State holds title to the riverbed and the water flowing over it, so that there was no question of the District Court's subject matter jurisdiction. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Probate Court's Jurisdiction Over Wrongful Death Action in Another District: Estate was being probated in one District Court, and personal representative's wrongful death action was being considered in another district. The probate court exceeded its jurisdiction when it assumed jurisdiction over the settlement of the wrongful death action, approved it, and ordered dismissal of the action. The Supreme Court stated that whether the proceeds of the settlement or award in the wrongful death action belonged to the estate or to the heirs was pertinent to the issue of the probate court's jurisdiction over the wrongful death action and that the probate court had jurisdiction only if the proceeds belonged to the estate. The Supreme Court did not appear to definitively decide the underlying issue, though it leaned toward the traditional rule that the proceeds belong to the heirs, are personal to them, and constitute no part of the estate. The court stated that it was for the Legislature to decide whether a District Court acting as a probate court should have some jurisdiction over a wrongful death claim filed in another District Court. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984).

Jurisdiction of State Court Over Nonresident Federally Chartered Bank — Sufficiency of Evidence — Denial of Due Process and Equal Protection: Officers of the plaintiff corporation traveled to Reno, Nevada, to deposit money in the defendant branch bank in anticipation of business in Nevada and later brought an action in a Montana District Court against the defendant for unlawful dishonor of a check and associated charges. The District Court did not err in dismissing the action for lack of jurisdiction. Under the provisions of 12 U.S.C. §94, a federally chartered bank may be sued, among other places, where it is "located". The U.S. Supreme Court in Citizens & S. Nat'l Bank v. Bougas, 434 US 35, 54 L Ed 2d 218, 98 S Ct 88 (1977), construed the term "located" to mean wherever branch offices are found. Because there is no branch bank in Montana and there has been no business operation conducted by the defendant in Montana that would constitute a waiver of the protection of federal law, the District Court had no jurisdiction. There was, moreover, sufficient evidence before the District Court for it to make the determination that there was no voluntary waiver, and the U.S. Supreme Court has held in Mercantile Nat'l Bank at Dallas v. Langdeau, 371 US 555, 9 L Ed 2d 523, 83 S Ct 520 (1963), that Congress "unquestionably" has the authority to determine those situations in which national banks can be sued. Hamelly Int'l, Inc. v. First Nat'l Bank of Nev., 199 M 221, 648 P2d 282, 39 St. Rep. 1304 (1982).

Comity — Jurisdiction Declined: Wyoming residents were divorced under a Wyoming divorce decree which provided that disagreements between the parties arising out of any transaction relating to the decree were to be submitted to the Wyoming District Court for resolution. A disagreement arose in connection with the parties' interests in property located in Montana. Husband filed suit in Montana, and wife sought a ruling that the Montana court lacked jurisdiction and that the Wyoming court was the proper forum. The Montana District Court properly decided that it should decline to exercise jurisdiction on the basis of the doctrine of comity, though it did have jurisdiction. Application of the comity doctrine did not contravene the public policy of Montana or the open court policy mandated by the Montana Constitution. Kane v. Kane, 198 M 335, 646 P2d 505, 39 St. Rep. 1036 (1982).

District Court Jurisdiction Over Probate of and Claim and Delivery Action by Estate of Enrolled Tribal Indian: Where, following the death of an enrolled member of an Indian tribe, the decedent's wife petitioned the District Court to probate her deceased husband's estate, and estate property consisting of a road grader was later unlawfully sold by the deceased's wife to her brother, the District Court erred in holding that it did not have jurisdiction over the claim and delivery action instituted on behalf of the estate to recover the road grader or its value. The fact that there is no federal treaty or statute preempting the jurisdiction of the District Court and the fact that the tribal court has not and is not exercising jurisdiction over the case properly resulted in the District Court taking jurisdiction of the probate of the estate. Because the action for claim and delivery in the enforcement process to recover property within the jurisdiction of the probate court, the District Court should have exercised subject matter jurisdiction over the claim and delivery action as well. Estate of Standing Bear v. Belcourt, 193 M 174, 631 P2d 285, 38 St. Rep. 1064 (1981).

Crow Tribal Court — Exclusive Jurisdiction Over Divorces: The Crow Tribal Court exercises exclusive jurisdiction over divorce actions between tribal members living on the reservation by virtue of the duly enacted Crow Tribal Code. State ex rel. Stewart v. District Court, 187 M 209, 609 P2d 290, 37 St. Rep. 635 (1980). See also In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Jurisdiction and Federal Bankruptcy Decrees: The court has jurisdiction over a plenary proceeding by a trustee in bankruptcy. While the court must clearly enforce the terms of a bankruptcy reorganization plan, it cannot refuse to entertain defenses or related counterclaims arising out of events occurring after confirmation of the bankruptcy plan. Double X Ranch v. Savage Bros., 167 M 231, 536 P2d 1176 (1975).

Probate Powers Over Heirship Proceedings: Heirship proceedings are committed to the District Courts with all the power, authority, and jurisdiction made inherent in such courts by the Montana Constitution and affirmed by this section. In re Baxter's Estate, 101 M 504, 54 P2d 869 (1936).

Probate Court Status Under 1889 Constitution: The District Court sitting in probate is not the probate court of territorial days and therefore not an inferior court but is a court of record exercising the general jurisdiction granted it by the Montana Constitution adopted in 1889, the limitation placed upon its jurisdiction by statute relative to the exercise of its probate powers not affecting its character as a court of general jurisdiction. Thelen v. Vogel, 86 M 33, 281 P 753 (1929), explained in In re Baxter's Estate, 101 M 504, 54 P2d 869 (1936).

FELONIES

District Court Jurisdiction to Apply Persistent Felony Offender Designation to Felony DUI: Yorek pleaded guilty to and was sentenced on a felony DUI charge. The District Court determined that it had jurisdiction and imposed a persistent felony offender designation. Yorek sought postconviction relief on grounds that the District Court lacked subject matter jurisdiction to impose a persistent felony offender designation for felony DUI. The District Court denied the petition for postconviction relief, concluding that sentencing for felony DUI is not solely governed by 61-8-731 and 61-8-734, that nothing in the persistent felony offender statute excludes felony DUI offenders from its application, and that Yorek waived any jurisdiction claim by pleading guilty. The Supreme Court affirmed. Nothing in 46-18-502 distinguishes between or among the types of felonies to which it applies, or excludes DUI offenders. Rather, if the underlying charge meets the definition of a felony and if the state has provided proper notice of its intent to seek persistent felony offender status under 46-13-108, a District Court has the statutory authority to designate and sentence an offender as a persistent felony offender. Yorek's crime met the definition of a felony, and Yorek fell squarely within the persistent felony offender statute. The state met the notice provisions, and the District Court possessed subject matter jurisdiction to designate Yorek as a persistent felony offender. Because the jurisdiction question was dispositive, the Supreme Court did not reach the question of whether Yorek's guilty plea was a procedural bar against bringing the claim. St. v. Yorek, 2002 MT 74, 309 M 238, 45 P3d 872 (2002), followed in St. v. Pettijohn, 2002 MT 75, 309 M 244, 45 P3d 870 (2002).

Permissive Joinder — Not Grant of Jurisdiction: Relator was charged with misdemeanor assault and burglary (a felony). Relator contends that the District Court had no jurisdiction to try him for a misdemeanor. Section 46-11-404 allows an information to charge two or more offenses connected in their commission. This section is a permissive joinder statute for offenses within the jurisdiction of a given court, not a grant of jurisdiction. Jurisdiction for the misdemeanor assault lies with the Justice's Court. State ex rel. Rasmussen v. District Court, 189 M 183, 615 P2d 231, 37 St. Rep. 1498 (1980). (In 1981 this section was amended to give the District Court jurisdiction in such instances.)

ORIGINAL MISDEMEANOR JURISDICTION

Appeal of Guilty Plea in Justice's or City Court: From the standpoint of reason, justice, and public policy, an appeal of a guilty plea in Justice's Court or City Court may be tried anew in District Court provided it is properly perfected. However, this holding does not give the District Court original jurisdiction of a DUI case in violation of 3-5-302. St. v. Waymire, 226 M 406, 736 P2d 106, 44 St. Rep. 759 (1987).

Criminal Contempt and Contempt of Court Distinguished — District Court Without Jurisdiction to Try Criminal Contempt: Criminal contempt, a misdemeanor crime defined in 45-7-309, is an offense against society prosecuted by the state, whereas contempt of court is a judicial power arising out of Art. VII, sec. 1, Mont. Const., and Title 3 that allows a court to enforce its own judgments and maintain decorum in its proceedings. Thus, while only the District Court could have found the defendant in contempt of court for failure to pay a fine from a criminal proceeding of that court, it lacked jurisdiction to try a misdemeanor criminal contempt action for failure to pay the fine because criminal contempt, like most other misdemeanors, must be brought in Justice's Court. St. v. Abrams, 209 M 508, 680 P2d 585, 41 St. Rep. 871 (1984).

Justice's Court as Having Jurisdiction Despite Associated Felony Violation: A District Court did not have jurisdiction (prior to the 1981 amendment of this section) to try a misdemeanor offense of endangering the welfare of children, proscribed in 45-5-622, even though this offense was committed together with a felony offense. Section 46-11-404, which states that an information may charge two or more different offenses connected together in their commission, is not a grant of jurisdiction but is simply a permissive joinder statute for offenses within the jurisdiction of a given court. Under 3-5-302 and 3-10-303, providing that the District Court has original jurisdiction in all felony criminal cases and "cases of misdemeanor not otherwise provided for", the Justice's Court has jurisdiction over the misdemeanor offense of endangering the welfare of children. St. v. Campbell, 191 M 75, 622 P2d 200, 38 St. Rep. 19 (1981).

District Court Jurisdiction Over DWI Charge: Jurisdiction of the District Court over criminal matters depends on the maximum sentence that can be imposed for committing the crime (except for misdemeanors under subsection (2), inserted in 1981). When the maximum sentence increases to give the District Court jurisdiction because of repeated DWI offenses, proof of prior offenses does not become an element that must be proved at trial and can be proved at any time until sentencing. Thus, failure to introduce evidence of prior convictions at trial does not deprive

the District Court of jurisdiction. St. v. Campbell, 189 M 107, 615 P2d 190, 37 St. Rep. 1337 (1980).

Aggregation of Jurisdictional Amounts: Where there are several causes of action, each for less than the jurisdictional minimum for the court, they may be prosecuted in the District Court where their aggregate exceeds the jurisdictional minimum. Stokke v. Graham, 129 M 96, 281 P2d 1025 (1955). See, however, the concurring opinions.

CONCURRENT MISDEMEANOR JURISDICTION

Trespass Charge Properly in Justice's Court — Motion to Dismiss and Writ for Review Denied: Shiplet was charged in Justice's Court with criminal misdemeanor trespass. He moved to dismiss for lack of jurisdiction, claiming that subsequent to the filing of the charge, he filed a civil action in District Court seeking to enjoin the people claiming trespass from interfering with his purported ditch easement. Shiplet argued that the District Court, as opposed to the Justice's Court, was a better forum to determine whether he was legally exercising his ditch rights because it had jurisidiction over his civil suit and concurrent jurisdiction over the trespass charge. Shiplet's motion was denied, and his District Court petition for writ of review was denied. The Supreme Court stated that a writ of review can be granted only if the petitioner establishes both that: (1) the Justice's Court exceeded its jurisdiction; and (2) there is no appeal or there is no plain, speedy, and adequate remedy. The Supreme Court held that Shiplet could not meet the two-pronged test because a Justice's Court clearly has jurisdiction over a misdemeanor trespass charge and that he had the right to appeal a Justice's Court decision. The Supreme Court also stated that the District Court did not have concurrent jurisdiction over the criminal charge under the requirements for concurrent jurisdiction delineated in this section. Shiplet v. Egeland, 2001 MT 21, 304 M 141, 18 P3d 1001 (2001).

Criminal Contempt and Contempt of Court Distinguished — District Court Without Jurisdiction to Try Criminal Contempt: Criminal contempt, a misdemeanor crime defined in 45-7-309, is an offense against society prosecuted by the state, whereas contempt of court is a judicial power arising out of Art. VII, sec. 1, Mont. Const., and Title 3 that allows a court to enforce its own judgments and maintain decorum in its proceedings. Thus, while only the District Court could have found the defendant in contempt of court for failure to pay a fine from a criminal proceeding of that court, it lacked jurisdiction to try a misdemeanor criminal contempt action for failure to pay the fine because criminal contempt, like most other misdemeanors, must be brought in Justice's Court. St. v. Abrams, 209 M 508, 680 P2d 585, 41 St. Rep. 871 (1984).

EQUITY

Remand of Issue of Legality of Retroactive Designation of Funds as Business Loan: In an action concerning the sale of business property owned by tenants-in-common, the trial court, acting in equity, awarded each owner a portion of the sale proceeds in proportion to his initial capital investment. The issue of division of the sale proceeds was remanded to the court to make specific findings concerning the designation of certain advancements to the business as loans. Felska v. Goulding, 238 M 224, 776 P2d 530, 46 St. Rep. 1222 (1989).

Holdover Tenants Not Entitled to Restitution: Holdover tenants on agricultural land sought restitution for planting and harvesting costs under a theory of unjust enrichment when their lessors foreclosed on the property. The tenants were not holding over in good faith under color of title and had no right to remain on the property during the time for which they sought restitution. Because they did not come to court with clean hands, the tenants clearly were not entitled to restitution. Ruegsegger v. Welborn, 237 M 317, 773 P2d 305, 46 St. Rep. 833 (1989).

Equitable Power to Order Construction of Cattle Guard: Landowners who desired to use their property for cattle grazing were enjoined from maintaining a fence that unreasonably interfered with their neighbors' ingress and egress to the neighbors' property pursuant to a general easement right granted to the neighbors. The portion of the injunction order that allows the landowners to install a cattle guard at their own expense does not pose an additional burden upon the landowners not contemplated in the original easement. The court sitting in equity is empowered to determine the questions involved in the case and to do complete justice. Strahan v. Bush, 237 M 265, 773 P2d 718, 46 St. Rep. 789 (1989).

All Parties in Equity Court Entitled to Have Their Legal Claims and Counterclaims Tried by Jury: Although, in the past, the court has purported to permit a court of equity to rule on all questions in a case, the court has never held that a court sitting in equity may try those issues of fact raised by plaintiff in a legal cause of action. The modern merger of law and equity courts and the liberal joinder provisions of the Rules of Civil Procedure force reevaluation of the traditional justification for permitting an equity court to decide legal issues. Upon timely demand, all

parties are entitled to have their legal claims and counterclaims tried by jury. Gray v. Billings, 213 M 6, 689 P2d 268, 41 St. Rep. 1910 (1984). (To the extent that Butler Bros. Dev. Co. v. Butler, 111 M 329, 108 P2d 1041 (1941), and its progeny have been interpreted to deny plaintiff a right to jury trial of his legal claims, the cases are overruled.)

WRITS AND SPECIAL ACTIONS

District Court Without Authority to Issue Writ of Supervisory Control to City Court: Maloney was convicted in City Court of speeding and driving under the influence of alcohol. Maloney appealed his conviction de novo for a trial in District Court and, at the same time, filed a petition for a writ of review, mandamus, and supervisory control, asking the District Court to direct the City Court to dismiss the charges. The District Court denied the petition. The Supreme Court held that the District Court had no authority to issue a writ of supervisory control to a City Court. Maloney v. Gordon, 254 M 314, 837 P2d 1341, 49 St. Rep. 834 (1992).

Mandamus Against Those Determining Qualifications of Public Contract Bidders: The Department of Administration and Board of Examiners, in determining whether bidders for the construction of a public building are qualified and will perform the contract in conformity with the specifications and terms of the solicitation for bids, as required by 18-2-103, are acting in a discretionary manner, and mandamus may not be used to control their discretion. Martel Constr., Inc. v. Bd. of Examiners, 205 M 332, 668 P2d 222, 40 St. Rep. 1340 (1983).

Certiorari:

Where one adjudged guilty of contempt in a proceeding before a Justice of the Peace sought relief by Writ of Certiorari in the District Court where a peremptory writ was denied, the proper means of securing relief from the Supreme Court was by appeal and not by certiorari. State ex rel. Mercer v. District Court, 115 M 385, 145 P2d 527 (1943).

While the statutes relating to the Writ of Certiorari make no provision as to the limitation of time within which proceeding must be brought, the limitation of 5 years provided by section 93-2613, R.C.M. 1947 (now 27-2-231), in an "action" not otherwise provided for, is controlling under section 93-2720, R.C.M. 1947 (now 70-19-101), including special proceedings of a civil nature. Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), overruled in Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in 27-25-102 because pursuant to Rule 5, M.R.App.P. (Title 25, ch. 21), a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding.

Attorney General's Opinions

District Court Jurisdiction Over Gambling Acts: Pursuant to 46-2-201, District Courts have exclusive jurisdiction over violations of the Montana Card Games Act, the Bingo and Raffles Law, and the sports pools law. 35 A.G. Op. 86 (1974).

Law Review Articles

Criminal Jurisdiction in Montana Indian Country, Wilson, 47 Mont. L. Rev. 513 (1986).

Collateral References

Courts *key* 143 and specific titles; Criminal Law *key* 247, et seq.

21 C.J.S. Courts §§238, 240 through 243, 249, 273; 22 C.J.S. Criminal Law §367, et seq.

Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state. 37 ALR 4th 852.

Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR 4th 112.

Summary judgment in mandamus or prohibition cases. 3 ALR 3d 675.

3-5-303. Appellate jurisdiction.

Compiler's Comments

1989 Amendment: At beginning inserted exception clause; and made minor change in phraseology.

Case Notes

Out-of-Time Appeal in Criminal Matters — Exclusive Jurisdiction With Supreme Court: Under 46-20-101, the only method for review in criminal cases is by notice of appeal. Time limits for filing an appeal are mandatory and jurisdictional. If a defendant takes no action to perfect an

appeal within 90 days of judgment, the District Court loses its jurisdiction and the appeal is out-of-time. However, an out-of-time appeal is a remedy that may be available to a criminal defendant who, through no fault of the defendant, misses a deadline for filing an appeal. Although Rule 21(b), M.R.App.P. (Title 25, ch. 21), precludes an out-of-time appeal in a civil case, the Supreme Court is not precluded from addressing a motion for an out-of-time appeal in a criminal case. Further, a District Court lacks jurisdiction to grant an out-of-time appeal. The Supreme Court has exclusive jurisdiction to grant a motion for an out-of-time appeal, and the motion is considered an original proceeding subject to the provisions of Rule 17, M.R.App.P. Upon a showing that the failure to timely notice a criminal appeal was excusable under the circumstances, the Supreme Court may conclude that an out-of-time appeal is the appropriate remedy pursuant to Rule 21(b), M.R.App.P. In that event, the matter will be remanded to the District Court with instructions to vacate and reenter judgment to afford the defendant a second opportunity to act within the statutory timeframes for filing notice of appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002).

Authority of Municipal Court to Commit Mentally Incapacitated Defendant: A plain reading of 3-6-104 provides that Municipal Courts have all powers and duties of District Courts over matters within their jurisdiction, including the power and duty to commit mentally incapacitated criminal defendants to the Department of Public Health and Human Services, pursuant to the procedures and requirements of Title 46, if the Municipal Court determines that the defendant suffers from a mental disease or defect and lacks the fitness to proceed to trial. If there is any question regarding a Municipal Court's commitment of a criminal defendant, the issue may be appealed to the District Court pursuant to this section. Great Falls v. Dept. of Public Health and Human Services, 2002 MT 108, 309 M 467, 47 P3d 836 (2002).

No Authority to Appeal Justice's Court Order Denying Motion to Withdraw Guilty Plea: The Feights got into a fight with a highway patrol officer at a high school basketball game and were charged with misdemeanor assault. They were informed of their rights in Justice's Court, waived their right to counsel, and pleaded guilty. More than a month later, they moved through counsel to withdraw their guilty pleas, claiming good cause under 46-16-105. The Justice's Court denied the motion, holding that the Feights had been given due process and had voluntarily, knowingly, and willingly entered guilty pleas. The Feights appealed the denial of their motion to withdraw their guilty pleas to District Court. The state moved to dismiss the appeal, contending that the District Court lacked jurisdiction to review denial of the motion to withdraw a plea. The District Court dismissed the appeal but remanded to Justice's Court with a recommendation that the Feights be allowed to withdraw their pleas. Instead, the Justice's Court reinstated judgment, and the Feights appealed to the Supreme Court. The Supreme Court affirmed. The statutes that provide for and determine the jurisdiction of a District Court to entertain an appeal from a Justice's Court include 46-12-204, 46-17-203, 46-17-311, and this section. However, none of these statutes provide authority for appeal to the District Court from the denial of a motion to withdraw a guilty plea. Further, the specific language of these sections prevails over the general language in 46-20-104 defining the scope of appeal by a criminal defendant. The Legislature has not created a statutory right of appeal from a Justice's Court denial of a motion to withdraw a guilty plea, and the Supreme Court refrained from creating one. St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001), distinguishing St. v. Rogers, 267 M 190, 883 P2d 115 (1994), and followed in St. v. Fox, 2001 MT 209, 306 M 353, 34 P3d 484 (2001).

City Not Liable for City Judge's Civil Rights Violations — City Judge Acts Under State Authority: Claims of the indigent defendants, who were not effectively informed by a City Judge of their right to appointed counsel, were properly dismissed. Under Montana law, a City Judge's acts and decision in advising defendants of the right were performed under the state's authority rather than the city's authority, thereby precluding imposition of civil rights liability on the city. Further, the indigent defendants did not have standing to seek declaratory and injunctive relief. There are other remedies for indigent defendants in future situations—they can file a complaint with the state body charged with overseeing judicial conduct, they can appeal their convictions to a higher court, and they can sue a judge individually because a judge does not enjoy judicial immunity for unconstitutional behavior when the facts are sufficient to grant declaratory or injunctive relief. Eggar v. Livingston, 40 F3d 312 (9th Cir. 1994).

Retrial of Unconvicted Offense Prohibited — Dismissal of Conviction for Uncharged Offense Affirmed: Barker was charged with DUI but was convicted of reckless driving by the Ravalli County Justice of the Peace. Barker appealed to the District Court and filed a motion to dismiss, which the District Court granted. On appeal by the state, the Supreme Court affirmed, holding that the reckless driving charge and the DUI charge were inapposite charges and that reckless driving was not a lesser included offense of DUI. The Supreme Court also held that while a

defendant's statutory remedy for appealing a Justice's Court decision is a trial de novo in the District Court, it would be a violation of the prohibition against double jeopardy to try Barker again on the DUI charge because Barker was originally charged with that offense and jeopardy had attached when the first witness was sworn. When Barker appealed from the erroneous conviction of an uncharged offense, he did not waive his constitutional protection against double jeopardy for charges of which he was acquitted. St. v. Barker, 260 M 85, 858 P2d 360, 50 St. Rep. 970 (1993).

Order Absent Jurisdiction Void: An order entered in the absence of jurisdiction is void. In re the Marriage of Schultz v. Schultz, 183 M 20, 597 P2d 1174, 36 St. Rep. 1993 (1979), following State ex rel. Thompson v. District Court, 75 M 147, 242 P 959 (1926).

Incomplete Appeal: Where an appeal from a Justice's Court was never perfected, that court had exclusive jurisdiction of the cause and nothing done by the District Court therein could affect the judgment rendered by the Justice, and dismissal of the attempted appeal was correct. Greenough v. Rannel, 71 M 578, 230 P 1094 (1924).

Collateral References

Courts *key* 185; Justices of the Peace *key* 141.

51 C.J.S. Justices of the Peace §127.

3-5-304. Process.

Case Notes

Water Rights Adjudication: In an action to adjudicate water rights on a main river and its tributaries, the District Court of a county in which plaintiffs' lands lay and through which the main river flowed had jurisdiction to adjudicate the rights to waters of a tributary flowing entirely within another county, under the Montana Constitution and this section. Whitcomb v. Murphy, 94 M 562, 23 P2d 980 (1933), distinguished in State ex rel. McKnight v. District Court, 111 M 520, 111 P 292 (1941).

Prosecution Conducted in Name of Municipality: Prosecutions for violations of local ordinances must be conducted in the name of the municipality and by its prosecuting officer. State ex rel. Streit v. Justice Court, 45 M 375, 123 P 405 (1912).

Collateral References

Process *key* 19.

72 C.J.S. Process §8.

3-5-311. Powers of judges at chambers.

Case Notes

Sale of Automobile Franchise — Error in Failure to Resolve Mootness as Threshold Issue Before Underlying Dispute Addressed: Ford Motor Company (Ford) notified franchisee Shamrock Motors (Shamrock) that it intended to terminate Shamrock's automobile dealer franchise because Shamrock had sold 80% of its stock without Ford's knowledge or consent, which violated their franchise agreement. The Motor Vehicle Division of the Department of Justice issued a ruling that Ford had good cause, so Shamrock filed for judicial review in the District Court. Ford then removed to federal court, where the ruling was reversed, so Ford appealed to the Ninth Circuit Court. Shamrock then sold the dealership, and the decision was vacated because of lack of jurisdiction. The case was remanded to state court, where Ford moved to dismiss for mootness. The District Court denied the motion without discussion and ruled for Shamrock, concluding that the franchise could not be terminated as a result of the sale of 80% of the franchise stock. Reversing on appeal, the Supreme Court cited Adkins v. Livingston, 121 M 528, 194 P2d 238 (1948), in holding that mootness is a threshold issue that must be dealt with before the underlying dispute may be addressed. A matter is moot when, because of an event or happening, the issue has ceased to exist and no longer presents an actual controversy. A question is moot when a court cannot grant effective relief. If the parties cannot be restored to their original position, an appeal becomes moot. When Shamrock chose to sell the franchise during the appellate process, the question of whether Ford had good cause to terminate the franchise in the first instance became academic and thus moot. The District Court erred when it did not resolve the issue of mootness before addressing the merits of the claim, not recognizing that once Shamrock sold the dealership and was no longer the franchisee, there was no effective relief that the court could fashion under Title 61, ch. 4, part 2, so the appeal from the Motor Vehicle Division's ruling should have been dismissed as moot. Shamrock Motors, Inc. v. Ford Motor Co., 1999 MT 21, 293 M 188, 974 P2d 1154, 56 St. Rep. 99 (1999), followed in Shamrock Motors, Inc. v. Chrysler Corp., 1999 MT 39, 293 M 317, 974 P2d 1154, 56 St. Rep. 164 (1999).

Abuse of Discretion for Court to Correct Failure to Sentence by Nunc Pro Tunc Order: The District Court failed to sentence Winterrowd, in either open court or by written judgment, on his misdemeanor theft conviction. Four months later, the court issued an order nunc pro tunc, sentencing Winterrowd to 6 months' imprisonment. It is within a District Court's power to enter an order nunc pro tunc modifying or amending a judgment in order to remedy certain types of clerical errors or to make the record reflect what was actually decided. However, in this case, not only was the sentence omitted from the written sentencing order, but the sentence was not even discussed at the sentencing hearing. The Supreme Court reversed and vacated the nunc pro tunc order and sentence. St. v. Winterrowd, 1998 MT 74, 288 M 208, 957 P2d 522, 55 St. Rep. 307 (1998).

District Court Without Authority to Issue Writ of Supervisory Control to City Court: Maloney was convicted in City Court of speeding and driving under the influence of alcohol. Maloney appealed his conviction de novo for a trial in District Court and, at the same time, filed a petition for a writ of review, mandamus, and supervisory control, asking the District Court to direct the City Court to dismiss the charges. The District Court denied the petition. The Supreme Court held that the District Court had no authority to issue a writ of supervisory control to a City Court. Maloney v. Gordon, 254 M 314, 837 P2d 1341, 49 St. Rep. 834 (1992).

Court Not to Change Original Intent of Order: A District Court may correct clerical errors to make the record speak the truth as to what was actually decided, but it may not change what was originally intended. Reinstatement of a dismissed information was impermissible. St. v. Onstad, 234 M 487, 764 P2d 473, 45 St. Rep. 2071 (1988), followed in St. v. District Court, 265 M 445, 877 P2d 1008, 51 St. Rep. 599 (1994).

Award of Attorney Fees by Judge Who Did Not Try Case — No Abuse of Discretion: Parties had 2 months following judgment and prior to a change in jurisdiction to bring the matter of attorney fees before the judge who presided over a lien foreclosure action. Neither side did, and jurisdiction of the action was transferred from the 13th to the 16th Judicial District. Defendant later claimed the new judge abused his discretion by awarding fees in a case he did not try because he could not know all of the circumstances surrounding the foreclosure action. The Supreme Court held that a judge's jurisdiction over a case is a matter of law and that while it is preferable that the presiding trial judge consider the matter of attorney fees, it is not mandatory. Finding no abuse of discretion, judgment was affirmed. Donnes v. Orlando, 221 M 356, 720 P2d 233, 43 St. Rep. 890 (1986).

Error in Sentencing Order — Correction "Nunc Pro Tunc" Two Years Later Upheld: The District Court, as a condition of sentence, ordered defendant to pay certain medical expenses and called the required payment "restitution" in the order. The payment was not restitution, but the court did have statutory authority to require payment. The court's effort to correct nunc pro tunc the original order 2 years after it was entered was proper. The error was clerical in nature. Every court has the inherent right to correct clerical errors. Dahlman v. District Court, 215 M 470, 698 P2d 423, 42 St. Rep. 550 (1985), followed in St. v. Owens, 230 M 135, 748 P2d 473, 45 St. Rep. 89 (1988). See also St. v. Christianson, 1999 MT 156, 295 M 100, 983 P2d 909, 56 St. Rep. 613 (1999).

No Discretion to Issue Probationary Driver's License: A District Court Judge clearly does not have the power to issue a probationary license in a court hearing to determine habitual traffic offender status under 61-11-210. State ex rel. Majerus v. Carter, 214 M 272, 693 P2d 501, 41 St. Rep. 2468 (1984).

Judge's Reappointment to Finish Case Started Before Retirement: That trial Judge retired prior to his issuance of orders in the case at issue did not make the orders void. Under the recent decision in State ex rel. Wilcox & Bradley v. District Court, 41 St. Rep. 397 (1984), the trial Judge had authority to perform all functions of an active District Judge, including the issuance of final orders and judgments. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984). (Annotator's Note: The District Court's records indicate that the Judge retired after beginning work on the case and was reappointed to finish the case.)

Retired Judges Eligible for Assignment for Temporary Service: The term "other judges" in subsection (3) of Art. VII, sec. 6, Mont. Const., includes retired judges. That subsection empowers the Chief Justice of the Supreme Court, upon request of a District Judge, to assign retired judges for temporary service to any judicial district or county in Montana. Further, that provision is a constitutional grant of power exclusive of any statutory grant by the Legislature. State ex rel. Wilcox v. District Court, 208 M 351, 678 P2d 209, 41 St. Rep. 397 (1984).

Habeas Corpus — No Jurisdiction to Declare Children Dependent and Neglected: In a consolidated proceeding based on a petition for a Writ of Habeas Corpus by a natural parent and a petition by a nonparent for guardianship, the court was without jurisdiction to find the

children involved dependent and neglected and to enter an order granting custody to the nonparent petitioners. Unless 41-3-401 (renumbered 41-3-422) is followed, the court is without jurisdiction to deprive the parent of custody. In re the Marriage of Schultz v. Schultz, 183 M 20, 597 P2d 1174, 36 St. Rep. 1993 (1979), following Guardianship of Aschenbrenner 182 M 540, 597 P2d 1156 (1979), and Guardianship of Evans, 179 M 438, 587 P2d 372 (1978). However, see also In re L.E.B., 259 M 492, 856 P2d 1382, 50 St. Rep. 895 (1993), in which Aschenbrenner was distinguished in a case brought under adoption proceedings rather than guardianship proceedings.

Absence of Judge From County: When a District Judge was invited to another district to hear and determine an action to quiet title but at chambers in his own county sustained a motion for judgment on the pleadings, the judgment so rendered was made without jurisdiction. Eustance v. Francis, 52 M 295, 157 P 573 (1916).

Temporary Judge: The power of a Judge at chambers to determine any matter left pending in the district into which he has been called ceases when he has returned to his own district. State ex rel. Mannix v. District Court, 51 M 310, 152 P 753 (1915).

Contempt of Court: Where there has been disobedience of an order made at a term of court, the Judge at chambers in vacation has power to punish the same as a contempt. State ex rel. N. Pac. Ry. v. Loud, 24 M 428, 62 P 497 (1900).

Collateral References

Certiorari *key* 35, 62; Habeas Corpus *key* 4, 47, 113; Injunction *key* 139, 164; Judges *key* 27; Judgment *key* 120, 131; Mandamus *key* 141; Prohibition *key* 16; Quo Warranto *key* 27.

14 C.J.S. Certiorari §§54 through 57, 143, 146; 39 C.J.S. Habeas Corpus §§8, 55, et seq.; 43A C.J.S. Injunctions §§169, 229, 239; 48A C.J.S. Judges §§53 through 60; 49 C.J.S. Judgments §§206, 207, 218; 55 C.J.S. Mandamus §§271 through 274; 73 C.J.S. Prohibition §28; 74 C.J.S. Quo Warranto §§52 through 55.

3-5-312. Jurisdiction of judges coextensive with the state.

Case Notes

Guidelines for Determining Whether Indian Tribe Has Waived Sovereign Immunity in Contract — Inapplicability of Statute of Frauds to Question of Subject Matter Jurisdiction: Plaintiff contended that he signed a 7-year contract with the Crow Tribe to provide consulting services and to act as a program manager for the planning and construction of a power plant on tribal property and that the tribe breached the contract and failed to pay him. The tribe moved to dismiss on grounds that the District Court lacked personal and subject matter jurisdiction because of the tribe's sovereign immunity. The District Court denied the motion but reserved the right to readdress the issue of subject matter jurisdiction. Following further discovery, neither party could produce a signed copy of the alleged contract. The District Court concluded that because the alleged contract was for employment for more than 1 year, the statute of frauds applied and noted that although plaintiff's performance would normally create an exception to the statute of frauds pursuant to the court's equitable powers, to exercise that power in this case would circumvent the tribe's sovereign immunity in contravention of federal law. The District Court further concluded that although there was an express agreement that was partially performed and that the agreement contained a waiver of tribal immunity from suit in state court, as indicated by affidavits submitted by plaintiff and the tribal presiding officer, because of the fact that a signed copy of the contract was not produced, there was insufficient evidence to overcome the presumption against waiver of tribal immunity, so the action was dismissed for lack of jurisdiction. Plaintiff appealed, and the Supreme Court reversed. The Montana statute of frauds in 28-2-903 limits the enforceability of certain contracts but does not affect a District Court's subject matter jurisdiction, so a District Court need not consider the statute of frauds when determining subject matter jurisdiction; furthermore, the court does not need to invoke its equitable powers to find jurisdiction. Rather, the question facing the District Court was whether the tribe clearly and unequivocally waived its sovereign immunity. The Supreme Court found that plaintiff's complaint alleged sufficient facts that, if true, would vest the District Court with subject matter jurisdiction. The tribe produced no evidence to refute the affidavits or to controvert the recollections of the affiants. Absent any factual issue to resolve, the Supreme Court concluded that plaintiff presented undisputed evidence proving the establishment of a contract that included an unequivocal waiver of sovereign immunity, so dismissal of the complaint by the District Court on jurisdictional grounds constituted reversible error. Bradley v. Crow Tribe of Indians, 2003 MT 82, 315 M 75, 67 P3d 306 (2003).

No State Jurisdiction of Indian Reservation Commercial Transactions — Preemption by Tribal Jurisdiction: A state District Court did not have primary subject matter jurisdiction over a civil debt action arising out of a commercial transaction on an Indian reservation and brought by a non-Indian creditor against an enrolled tribal member debtor, both of whom resided on the reservation. State assumption of such jurisdiction interfered with tribal sovereignty and the tribe's right of self-government. Therefore, the state court's jurisdiction over the commercial transaction was preempted by tribal jurisdiction. Geiger v. Pierce, 233 M 18, 758 P2d 279, 45 St. Rep. 1257 (1988), followed in Balyeat Law, PC v. Pettit, 1998 MT 252, 291 M 196, 967 P2d 398, 55 St. Rep. 1038 (1998) (the state has no jurisdiction over an action to collect a debt for medical bills arising out of transactions, either on or off the reservation, brought by a non-Indian creditor against an enrolled tribal member residing on a reservation whose spouse incurred the debt but who engaged in no significant off-reservation contacts so as to subject herself to state jurisdiction).

Jurisdiction to Issue Investigative Subpoenas: The plain language of 46-4-301 vests every District Court Judge with the power to issue investigative subpoenas with no jurisdictional limitation. There simply is no requirement, explicit or implicit, that the subpoena be issued by the sitting judge of the district where the crime allegedly occurred. The venue statutes have no application to the jurisdictions of any District Court to issue such subpoenas, which jurisdiction is coextensive with the state boundaries. St. v. Holmes, 212 M 526, 687 P2d 662, 41 St. Rep. 1535 (1984).

Collateral References

Courts *key* 29, 143; Judges *key* 30.

21 C.J.S. Courts §§20, 91, 238, 240, 243, 249, 273; 48A C.J.S. Judges §§72 through 74.

Part 4
Terms and Location of District Courts

3-5-401. Terms of court.

Case Notes

Grand Jury Term: Although District Court is always open and each term continues until the succeeding term, the terms as fixed by the court limit the existence of the grand jury, the beginning of each term constituting a "final adjournment" of the preceding term within the meaning of section 94-6314, R.C.M. 1947 (now repealed). State ex rel. Adami v. Lewis & Clark County, 124 M 282, 220 P2d 1052 (1950).

Sentence Pronounced After Term: Since there is no statute requiring pronouncement of sentence during the same term of court in which the verdict was returned, the court could properly pronounce sentence during a subsequent term. St. v. Heaston, 109 M 303, 97 P2d 330 (1939).

Collateral References

Courts *key* 61, et seq.

21 C.J.S. Courts §§150, 164.

20 Am. Jur. 2d Courts §21.

3-5-402. Adjournments — conduct of business in multicounty districts.

Case Notes

Sentence Pronounced After Term: Since there is no statute requiring pronouncement of sentence during the same term of court in which the verdict was returned, the court could properly pronounce sentence during a subsequent term. St. v. Heaston, 109 M 303, 97 P2d 330 (1939).

Collateral References

Courts *key* 66.

21 C.J.S. Courts §152.

3-5-403. Terms and departments in multijudge districts.

Compiler's Comments

1995 Amendment: Chapter 18 at end of (1) deleted "either elected or appointed to, called into, or assigned to the performance of the duties of holding court therein"; deleted (4) that read: "(4) The principal office of the judgeship in the 4th district created by Chapter 542, L. 1979, shall be in Lake County. The chief judge of the district shall have authority to assign a judge to such office"; and made minor changes in style.

Case Notes

Actions by Judge Not Assigned:

Where judge of the second department assumed jurisdiction of a divorce suit, even though under the rules it was properly assignable to the first department, it was beyond the power of the judge of the first department to interfere in any way and proceedings wherein he set aside the divorce were void. Deich v. Deich, 136 M 566, 323 P2d 35 (1958).

Where court rule mandated that case be assigned to one division of court and motion was heard in another division, rulings were void. State ex rel. Magnuson v. District Court, 125 M 79, 231 P2d 941 (1951).

Nature of Departments: Where the District Court is divided into departments, the court presided over by each of the Judges is the District Court and not a departmental court; neither department is a court of concurrent jurisdiction to the other, and in the absence of rules either judge has full authority to proceed in any matter properly before the court. State ex rel. Eden v. Schneider, 102 M 286, 57 P2d 783 (1936); State ex rel. P.S.C. v. Great N. Util. Co., 86 M 442, 284 P 772 (1930).

Distribution of Business: This section treats the division of court business and the enactment of court rules as entirely independent matters. State ex rel. Little v. District Court, 49 M 158, 141 P 151 (1914).

Collateral References

Courts *key* 50, 61, et seq.

21 C.J.S. Courts §§137, 150, 164, et seq.

3-5-405. Change of place of holding court in emergency.

Collateral References

Courts *key* 74.

21 C.J.S. Courts §§161, 165.

Part 5
Clerk of the District Court

Part Attorney General's Opinions

Disposition of Money Received by County Officers for Preparation of Abstracts: Preparation of abstracts by a Clerk of District Court, a County Clerk, or their respective deputies is an official service of the office. Therefore, compensation paid to them by title companies, credit bureaus, banks, realtors, and others for preparation on a regular basis of abstracts of instruments recorded in their respective offices may not be retained for their personal use, but rather must be paid to the county general fund, District Court fund, or state, as provided by law. 43 A.G. Op. 75 (1990).

3-5-501. General duties — electronic filing and storage of court records.

Compiler's Comments

1995 Amendment: Chapter 174 inserted (2) allowing electronic filing or storage of documents; and made minor changes in style.

1981 Amendment: Deleted indexing requirement from (7). (See 1981 Session Law for text.)

Case Notes

Order Signed During Judge's Term of Office, but Not Filed Until After Expiration of Judge's Term, Considered Binding: One day before the expiration of her legal term of office, a District Court Judge signed an order affirming an administrative decision in a labor dispute, but the order was not filed until 3 days after the judge's term of office expired. The judge's successor struck the order and directed further proceedings. The union then petitioned the Supreme Court for supervisory control, contending that striking the original order was a mistake of law. The Supreme Court agreed, applying Plumb v. District Court, 279 M 363, 927 P2d 1011 (1996), and accepted supervisory control because of the absence of a plain, speedy, or adequate remedy at law. The court noted that states generally recognize that judgments undergo three phases of final development, including rendition, reduction to writing, and entry, but that states vary in their determination of the stage at which a judgment binds the parties before the court. The court determined that the case most directly on point to the facts in the present case was Cirro Wrecking Co. v. Roppolo, 605 NE 2d 544 (Ill. 1992). The filing of the District Court's order was merely a ministerial function performed by the Clerk of the District Court. The judgment was otherwise properly rendered during the pendency of the judge's term and was binding on the parties at that point, even though it was entered by the clerk after the judge's vacation of office.

Further, for purposes of commencing time periods, judgments continue to take effect from the date on which they are filed with the clerk, so that a fixed date is established and known to the parties. Int'l Ass'n of Firefighters, Local No. 8 v. District Court, 2002 MT 17, 308 M 183, 40 P3d 396 (2002).

Retention of Passport Execution Fees by Clerk of District Court: Because the execution of passport applications is not an official duty imposed upon a Clerk of District Court by state statute and since the Legislature has not enacted a specific statute with regard to the disposition of execution fees, the Clerk has no duty to remit the fees to the county general fund. Platz v. Hamilton, 201 M 184, 653 P2d 144, 39 St. Rep. 2041 (1982).

3-5-502. Indexes to court records.

Compiler's Comments

1981 Amendment: Renamed indexes as "General Index—Plaintiffs" and "General Index—Defendants"; added second sentence providing broad guidelines to clerk concerning index; and deleted specific column headings.

3-5-503. Duties concerning indexes.

Compiler's Comments

1981 Amendment: Renamed indexes as "General Index—Plaintiffs" and "General Index—Defendants"; deleted redundant requirement that entries continue to be made from time to time.

3-5-505. Register of criminal actions.

Case Notes

Issuance of Certificates: The Clerk must observe the same formalities in issuing jurors' certificates as in issuing witnesses' certificates. County of Silver Bow v. Davies, 40 M 418, 107 P 81 (1910).

3-5-506. Index of bonds in criminal cases.

Case Notes

"Fees" Defined: The word "fees", as used in this section, refers to the per diem and mileage of witnesses. St. v. Story, 53 M 573, 165 P 748 (1917).

3-5-510. Duties relating to jurors and witnesses.

Compiler's Comments

2003 Amendment: Chapter 152 in (1) and (2) after "warrants" deleted "and copies"; and made minor changes in style. Amendment effective March 26, 2003.

1983 Amendment: In (1), changed name from "Book of Jurors' Certificates" to "Book of Jurors' Warrants"; after "blank" substituted "warrants" for "certificates" and "copies" for "stubs to be filled"; in (2), after "blank" substituted "warrants" for "certificates" and "copies" for "stubs to be filled".

3-5-511. Procedure in reference to witnesses' warrants.

Compiler's Comments

2003 Amendment: Chapter 152 in (2) near beginning after "witness a" substituted "county warrant" for "warrant taken from a book containing a carbon copy of the warrant"; and made minor changes in style. Amendment effective March 26, 2003.

2001 Amendment: Chapter 585 in (3) substituted "The amount specified in the warrant must be paid by the state as provided in 3-5-901 and 3-5-902" for "On presentation of such warrant to the county treasurer, the amount specified in the warrant must be paid out of the general fund unless the county has a district court fund. If the county has a district court fund, the amount must be paid out of such fund"; and made minor changes in style. Amendment effective July 1, 2002.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1985 Amendment: In (3) after "general fund", inserted requirement that payment be out of district court fund if there is one.

1983 Amendment: Once in (2) and in two places in (3), substituted "warrant" for "certificate"; in (2), after "book containing a" substituted "carbon copy of the same" for "stub with like designations" and after "by the clerk" deleted "under seal".

Collateral References

Witnesses *key* 32.

3-5-513. Probate records.

Compiler's Comments

1981 Amendment: Deleted executor, administrator, and guardian from those names to be indexed in (1); deleted (2) requiring "Probate Record Book" for wills, bonds, and other papers.

Part 6
Court Reporters

3-5-601. Court reporters — appointment — oath — employment status.

Compiler's Comments

2003 Amendment: Chapter 152 in (1) at end of first sentence deleted "and holds office at the pleasure of the appointing judge"; and in (4)(c) at end of second sentence inserted "unless an exemption from workers' compensation coverage has been obtained pursuant to 39-71-401". Amendment effective March 26, 2003.

2001 Amendment: Chapter 585 in (1) inserted fourth sentence allowing judge to direct court reporter's duties; inserted (2) allowing court reporter to be appointed as state employee, with or without retaining fees, or as independent contractor; inserted (3) designating court reporter appointed as state employee subject to state classification, compensation, and receipt of benefits; inserted (4)(a) relating to state provision of equipment and supplies for court reporter appointed as state employee foregoing transcription fees and payment of fees to state treasurer; inserted (4)(b) requiring court reporter appointed as state employee retaining transcription fees to provide and maintain transcription equipment and supplies, prohibiting receipt of overtime, and allowing retention of fees; inserted (4)(c) requiring court reporter appointed as independent contractor to provide and maintain necessary equipment and supplies, retain fees, and maintain professional liability insurance and workers' compensation coverage; inserted (5) allowing shared use of state-owned equipment; and made minor changes in style. Amendment effective July 1, 2002.

Code Commissioner Instruction: Pursuant to sec. 47, Ch. 257, L. 2001, in (4)(a) the code commissioner changed "state treasurer" to "department of revenue".

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

Collateral References

Courts *key* 57(1).

82 C.J.S. Stenographers §5.

3-5-602. Court reporter as independent contractor — compensation and expenses.

Compiler's Comments

2001 Amendments — Composite Section: (Temporary version) Chapter 278 in (2) in last sentence after "within the meaning of" deleted "7-6-2351, 7-6-2352, and". Amendment effective July 1, 2001.

(Version effective July 1, 2002) Chapter 585 in (1) substituted "Each court reporter who is an independent contractor under 3-5-601 is entitled to compensation as provided in the contract" for "Each reporter is entitled to receive a base annual salary of not less than $28,000 or more than $35,000 and no other compensation except as provided in 3-5-604, unless the judge decides to solicit bids for the work performed by the reporter, in which case the salary must be for the amount specified in the bid accepted by the judge. The salary must be set by the judge for whom the reporter works. The salary is payable in monthly installments out of the general funds of the counties composing the district for which the reporter is appointed and out of an appropriation made to the supreme court administrator as provided in subsection (2)"; in (2) substituted "The supreme court administrator shall pay the compensation due under subsection (1) as provided in 3-5-901 and 3-5-902" for "The supreme court administrator shall determine the total number of civil and criminal actions commenced in the preceding year in the district court or courts in the judicial district for which a reporter is appointed. The state shall pay its portion of the reporter's salary based on the proportion of the total number of criminal actions commenced in the district court or courts in the district and the amount appropriated for that purpose. Each county shall pay its portion of the remainder of the salary based on its proportion of the total number of civil and criminal actions commenced in the district courts in the district. The judge or judges of the district shall, on January 1 of each year or as soon thereafter as possible, apportion the amount of the salary to be paid by each county in the district on the basis prescribed in this subsection. The portion of the salary payable by a county is a district court expense within the meaning of 7-6-2351, 7-6-2352, and 7-6-2511"; in (3) in first sentence substituted "compensation provided for

in subsection (1) and fees" for "salary and fees provided for in subsection (1)" and in second sentence substituted "expenses are payable as provided in subsection (2)" for "expenses must be apportioned and are payable in the same way as the salary"; and made minor changes in style.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1997 Amendment: Chapter 384 in (1), near middle of first sentence, increased minimum salary from $23,000 to $28,000 and increased maximum salary from $30,000 to $35,000 and at end inserted "unless the judge decides to solicit bids for the work performed by the reporter, in which case the salary must be for the amount specified in the bid accepted by the judge"; and made minor changes in style.

1993 Amendment: Chapter 10 near end of (1) and at beginning of (2) substituted "supreme court administrator" for "department of commerce"; at end of first sentence of (3) deleted "from the time he leaves his place of residence until he returns thereto"; and made minor changes in style.

1989 Amendment (Temporary): In middle of first sentence of (1) increased base to $23,000 from $16,000 and increased cap to $25,000 from $23,000; and made minor change in phraseology. Amendment effective July 1, 1989.

1989 Amendment (Effective July 1, 1991): In middle of first sentence of (1) increased base to $23,000 from $16,000 and increased cap to $30,000 from $23,000. Amendment effective July 1, 1991.

1985 Amendments: Chapter 680 in (1) near end after "appointed", inserted "and out of an appropriation made to the supreme court as provided in subsection (2)"; in (2), inserted first two sentences relating to number of actions and state payment, in third sentence, after "portion", inserted "of the remainder" and at end of third sentence, after "district", deleted "in the preceding year", in fourth sentence, near beginning after "judge", inserted "or judges" and near end after "his" inserted "or their", and in last sentence of (2) at beginning substituted "The portion of the salary payable by a county" for "The salary".

Chapter 1, Sp. L. 1985, amended Ch. 680, L. 1985, near end of (1) by substituting "department of commerce" for "supreme court", and near beginning of (2) by substituting "department of commerce" for "supreme court administrator".

Interim Study Committee Bill: Chapter 680, L. 1985, which amended this section, was introduced by request of Joint Interim Subcommittee No. 3 of the 48th Legislature. See Committee report entitled "Court Unification in Montana", Montana Legislative Council, December 1984.

1983 Amendment: Near beginning of (1), substituted "a base" for "an" before "annual salary"; increased the salary range to between $16,000 and $23,000 from between $14,000 and $20,000; substituted "for whom" for "in the district in which" before "the reporter works"; substituted "The salary" for "It" before "is payable in monthly installments"; and inserted last sentence providing that the salary is a judicial expense under 7-6-2351, 7-6-2352, and 7-6-2511.

1981 Amendment: Increased the district court reporter's salary from between $12,500 and $18,000 to between $14,000 and $20,000; inserted "Each county shall pay its portion of the salary based on its" after "appointed" in (1); inserted "of the total" before "number of civil and criminal actions" in (1); substituted "courts" for "court" after "district" in (1); substituted "in the district" for "in and for each county" after "district courts" in (1); made minor changes in phraseology.

Severability: Section 17, Ch. 528, L. 1979, was a severability section.

Case Notes

Full-Time District Court Reporters Subject to Statutory Workweek Requirement — Recordkeeping Required — Designation of Court Reporter's "Workstation": A District Court reporter who is treated as a full-time salaried county employee is subject to the statutory 40-hour workweek requirement in 7-5-2108, and recordkeeping to document a court reporter's working hours, including overtime, annual leave, and sick leave, must be as determined by the District Court Judge who employs the court reporter. However, any method used to fulfill these requirements must comport with the District Court Judge's authority to control court assistants because allowing a Board of County Commissioners to enforce county personnel policies on court reporters would infringe on that authority. Any mandatory location of work for a court reporter that is set by anyone but the District Court Judge would interfere with the necessary flexibility of the judge. Thus, a court reporter's "workstation" is wherever that reporter is required to be to perform the duties for the judge for whom that court reporter works. (See 2001 amendment.) Bd.

of County Comm'rs v. District Court, 2000 MT 258, 301 M 496, 10 P3d 805, 57 St. Rep. 1061 (2000).

Court Reporter Salary Dispute — Writ of Supervisory Control Appropriate: The Board of Lewis and Clark County Commissioners set the salary for court reporters, based on its interpretation of the 1997 amendment to this section. The salary did not include fringe benefits because the statute states that a court reporter is to receive the base salary "and no other compensation except as provided in 3-4-604", which allows a court reporter to collect only certain fees for providing transcripts. The District Court Judges ordered the Board to give the court reporters the maximum raise allowed and to continue their benefits at the prior level. The Board appealed the order directly to the Supreme Court. The judges contended that the appeal was improper because the Board filed no appropriate underlying civil action, whether a petition for a writ of mandamus, a petition for a writ of prohibition, or another action, and sought to have the appeal dismissed. The Board characterized the judges' order as a final appealable order rather than an administrative action. The Supreme Court found some merit to both arguments. Applying the rationale in Awareness Group v. School District, 243 M 469, 795 P2d 447 (1990), the court found that neither a writ of mandamus nor a writ of prohibition was appropriate and that they would not provide meaningful relief because it would be futile to seek to prohibit or to compel an act already accomplished. While granting the judges' motion to dismiss without prejudice to the underlying merits of the case, the Supreme Court held that if the Board decided to do so, it could file a petition for a writ of supervisory control with the Supreme Court, pursuant to Rule 17, M.R.App.P. (Title 25, ch. 21), and could raise whatever legal questions that it determined were at issue. If the Supreme Court determined it necessary, it could then remand for an evidentiary hearing in a neutral District Court in the same manner as in Gallatin County v. District Court, 281 M 33, 930 P2d 680 (1997). (See 2001 amendment.) In re District Court Budget Order, 1998 MT 4, 287 M 137, 952 P2d 427, 55 St. Rep. 9 (1998).

Attorney General's Opinions

Travel With Judge Outside of District — Compensation: A court reporter paid under the provisions of Title 3, ch. 5, part 6, is not entitled to additional compensation, other than traveling expenses, when traveling with a judge outside his judicial district. 41 A.G. Op. 12 (1985).

Court Reporter Serving Grand Jury: The taking of grand jury testimony is not an official duty of official court reporters, and additional compensation is due for that work performed. 36 A.G. Op. 110 (1976).

Collateral References

Courts *key* 57(2).

82 C.J.S. Stenographers §12.

3-5-603. Duties.

Compiler's Comments

1983 Amendment: Near middle substituted "the reporter's" for "his" before "services"; inserted last sentence requiring official notes to be kept for 10 years; and deleted former (2), which read: "All objections made during the trial or hearing and the rulings, decisions, and opinions of the court must be written out at length or printed in type by the reporter and filed with the clerk immediately after the close of the trial or hearing."

Case Notes

Full-Time District Court Reporters Subject to Statutory Workweek Requirement — Recordkeeping Required — Designation of Court Reporter's "Workstation": A District Court reporter who is treated as a full-time salaried county employee is subject to the statutory 40-hour workweek requirement in 7-5-2108, and recordkeeping to document a court reporter's working hours, including overtime, annual leave, and sick leave, must be as determined by the District Court Judge who employs the court reporter. However, any method used to fulfill these requirements must comport with the District Court Judge's authority to control court assistants because allowing a Board of County Commissioners to enforce county personnel policies on court reporters would infringe on that authority. Any mandatory location of work for a court reporter that is set by anyone but the District Court Judge would interfere with the necessary flexibility of the judge. Thus, a court reporter's "workstation" is wherever that reporter is required to be to perform the duties for the judge for whom that court reporter works. (See 2001 amendment to 3-5-602.) Bd. of County Comm'rs v. District Court, 2000 MT 258, 301 M 496, 10 P3d 805, 57 St. Rep. 1061 (2000).

Court Reporter Failing to File Trial Notes — Not a Denial of Trial Transcript: Petitioner was not denied due process on the grounds that he was denied a transcript of his criminal trial when

the court reporter failed to file his notes with the Clerk of Court, as required by this section. The defendant attempted to get a free transcript as provided by 3-5-604 but failed to allege anything to warrant moving any court's discretion to order one; therefore, he was not denied a transcript merely because the court reporter kept his notes. Spurlock v. Crist, 188 M 449, 614 P2d 498, 37 St. Rep. 1146 (1980).

Waiver of Reporter: Defendant, an experienced lawyer who was warned by the court of the consequences, waived his right to question the court's discretion by actively participating in the trial after his request for a reporter had been denied. Niewoehner v. District Court, 142 M 1, 381 P2d 464 (1963).

Attendance Within Court's Discretion:

The court may in its discretion dispense with the stenographer's services in the absence of a request by the parties or one of them that he be present. In view of the importance of preserving a record in controverted matters, the court should, in the absence of an express stipulation waiving the recording of the testimony, inquire of the contending parties whether a record is desired; and where the testimony is not taken the records should show the reason, whether by stipulation or because of the court's exercise of its discretion. State ex rel. Stimatz v. District Court, 105 M 510, 74 P2d 8 (1937).

Where County Attorney during argument attempted repeatedly to present to jury the fact of an attempt to commit a second robbery although there was no evidence of such offense in the record, and defense counsel objected thereto and requested the attendance of the official stenographer, the court's refusal to comply with his request was an abuse of discretion. St. v. Hogan, 100 M 434, 49 P2d 446 (1935), distinguished in State ex rel. Stimatz v. District Court, 105 M 510, 74 P2d 8 (1937).

Exceptions to Rulings: An exception to an adverse ruling by the District Court is a matter of right, not one of grace or discretion on the part of the court, and when taken, the court stenographer must enter it, any opinion of the trial court to the contrary notwithstanding. St. v. Postal Tel. Cable Co., 53 M 104, 161 P 953 (1916).

Payment of Fees: The fees for stenographers must be paid to official stenographers appointed by the court. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 27 M 288, 70 P 1114 (1902).

Mandamus: Mandamus lies to compel the stenographer to write out and file a list of the objections, rulings, and exceptions occurring on the trial, where the order of the trial court is insufficient. State ex rel. Kranich v. Supple, 22 M 184, 56 P 20 (1899); explained in State ex rel. Donovan v. Ledwidge, 27 M 197, 70 P 511 (1902).

Attorney General's Opinions

Court Reporter Serving Grand Jury: The taking of grand jury testimony is not an official duty of official court reporters, and additional compensation is due for that work performed. 36 A.G. Op. 110 (1976).

Collateral References

Courts *key* 57(1).

82 C.J.S. Stenographers §9.

20 Am. Jur. 2d Courts §1.

3-5-604. Court reporters — transcript of proceedings — costs.

Compiler's Comments

2003 Amendment: Chapter 583 in (3)(a) at beginning before "judge" deleted "county attorney, attorney general, or"; inserted (3)(b) concerning county attorney or attorney general requiring a transcript; and made minor changes in style. Amendment effective July 1, 2003.

2001 Amendment: Chapter 585 inserted (2) requiring deposit of certain transcription fees in state general fund; in (3) substituted "If the county attorney, attorney general, or judge requires a transcript in a criminal case, the reporter shall furnish it. The transcription fee must be paid by the state as provided in 3-5-901" for "If the county attorney, attorney general, or judge requires a transcript in a criminal case, the reporter is entitled to the reporter's fees for the transcript, but the reporter shall furnish it. Upon furnishing it, the reporter must receive a certificate for the sum to which the reporter is entitled. The reporter shall submit the certificate to the supreme court administrator who, in accordance with 3-5-902, is responsible for the prompt payment of all or a portion of the amount due the reporter. If the state, in accordance with 3-5-902, pays none or only a portion of the amount due, the county shall pay the balance upon receipt of a statement from the reporter"; in (5) at end substituted "paid for by the state as provided in 3-5-901" for "paid for by the state in the manner provided in subsection (2) to the extent funds are available. The

county shall pay the remainder as required in 3-5-901"; and made minor changes in style. Amendment effective July 1, 2002.

Code Commissioner Instruction: Pursuant to sec. 47, Ch. 257, L. 2001, in (2) in version effective July 1, 2002, the code commissioner changed "state treasurer" to "department of revenue".

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1999 Amendment: Chapter 394 in (4) after "case" inserted "or a parent or guardian in a proceeding brought pursuant to Title 41, chapter 3, part 4 or 6"; and made minor changes in style. Amendment effective July 1, 1999.

1991 Amendment: In (2), in third sentence, substituted reference to Supreme Court Administrator for reference to Department of Commerce and in fourth sentence, near beginning, substituted "state" for "department". Amendment effective July 1, 1991.

1985 Amendments: Chapter 680 in (2) in second sentence, after "entitled", deleted "which is a county charge and must be paid by the county treasurer upon the certificate like other county charges" and inserted last two sentences relating to state payment and county payment of balance; in (4) in first sentence, after "by the", deleted "county" and inserted "state in the manner provided in subsection (2) to the extent funds are available" and inserted last sentence providing that the county must pay the remainder as required in 3-5-901; and made minor changes in phraseology.

Chapter 1, Sp. L. 1985, amended Ch. 680, L. 1985, in two places by substituting references to "department of commerce" for references to "supreme court administrator".

Interim Study Committee Bill: Chapter 680, L. 1985, which amended this section, was introduced by request of Joint Interim Subcommittee No. 3 of the 48th Legislature. See Committee report entitled "Court Unification in Montana", Montana Legislative Council, December 1984.

1983 Amendment: In first sentence of (1), deleted "the defendant in a criminal case or" before "a party"; deleted "civil" before "case"; substituted "transcript" for "copy, written out at length or in narrative form" before "from his stenographic notes"; substituted "of" for "upon" after "testimony and proceedings"; at end of (1), substituted "$2 per page for the original transcript, 50 cents per page for the first copy, 25 cents per page for each additional copy" for "10 cents per folio"; in (2), substituted "transcript" for "copy" before "in a criminal case"; at end of (3), substituted reference to actual cost for "without cost"; and in (4), substituted "transcript" for "copy".

1981 Amendment: Increased folio cost from 7 ½ to 10 cents in (1).

Case Notes

Court Reporter Failing to File Trial Notes — Not a Denial of Trial Transcript: Petitioner was not denied due process on the grounds that he was denied a transcript of his criminal trial when the court reporter failed to file his notes with the Clerk of Court as required by 3-5-603. The defendant attempted to get a free transcript, as provided by this section, but failed to allege anything to warrant moving any court's discretion to order one; therefore, he was not denied a transcript merely because the court reporter kept his notes. Spurlock v. Crist, 188 M 449, 614 P2d 498, 37 St. Rep. 1146 (1980).

Indigent Criminal Defendants:

Proper showing must be made to the District Court that a defendant in a criminal case is unable to pay for a transcript so as to secure an order that it be furnished him and paid for by the county. (Under a 1985 amendment to this section payment is by the state, county, or both.) St. v. Davis, 139 M 616, 362 P2d 1013 (1961).

Where a defendant convicted of crime is unable to meet the expense incident to procuring a transcript of the evidence to enable him to present his appeal to the Supreme Court for review, it is the duty of the court to order the county to pay therefor. (Under a 1985 amendment to this section payment is by the state, county, or both.) State ex rel. Parmenter v. District Court, 111 M 453, 110 P2d 971 (1941).

Appeals to Supreme Court: This section governs only the furnishing of copies of the transcript of record for use in the trial court and has nothing to do with appeals to the Supreme Court. Sullivan v. Bd. of County Comm'rs, 124 M 364, 224 P2d 135 (1950).

Certiorari Proceedings: Although it is the duty of the Clerk of Court to prepare the return required by the Supreme Court on issuance of a Writ of Certiorari, the court to which the Writ is directed has the power to order the court stenographer to prepare not only a transcript of the evidence heard in the particular case but the entire transcript, as one of his implied duties, without extra compensation. Pelletier v. Glacier County, 107 M 221, 82 P2d 595 (1938).

Waiver of Reporter: A party is entitled to a record of the testimony only when the stenographer has in fact attended the trial or hearing, not when the services of the stenographer have been dispensed with by the court, either by waiver or agreement of the parties or by the court's exercise of its discretion. State ex rel. Stimatz v. District Court, 105 M 510, 74 P2d 8 (1937).

Fees of Clerk: Charges by stenographer were considered excessive. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 33 M 400, 84 P 706 (1905).

Fees of Reporters:

The stenographer may not require the State or its Attorney General to pay the amount of his fees in advance. State ex rel. Donovan v. Ledwidge, 27 M 197, 70 P 511 (1902).

Fees paid court stenographers for transcribing testimony from their notes are chargeable as part of the costs. State ex rel. King v. District Court, 25 M 1, 63 P 402 (1901), explained in Gahagan v. Gugler, 103 M 521, 63 P2d 145 (1936).

Mandamus:

The appropriate remedy to compel the court stenographer to furnish the transcript in a civil cause is a Writ of Mandate. State ex rel. Donovan v. Ledwidge, 27 M 197, 70 P 511 (1902).

Where the stenographer failed to furnish an indigent defendant with a copy of the transcript when ordered to do so under this section, the Supreme Court will not compel obedience thereto by mandamus. State ex rel. Dempsey v. District Court, 24 M 566, 63 P 389 (1901), distinguished in State ex rel. Donovan v. Ledwidge, 27 M 197, 70 P 511 (1902).

Attorney General's Opinions

Transcript Fees: Prior to the 1981 amendment this section provided for a 7 ½ cents per folio page fee, and the Attorney General issued an opinion stating that court reporters may only charge 7 ½ cents per folio, as defined in 1-1-203, per copy for transcripts to be used on appeal to the Supreme Court. The charge applies to each page of the original and copies, including the title pages and the index pages. 37 A.G. Op. 85 (1977).

Court Reporter Serving Grand Jury: The taking of grand jury testimony is not an official duty of official court reporters, and additional compensation is due for that work performed. 36 A.G. Op. 110 (1976).

3-5-611. Reporter pro tempore.

Collateral References

Courts *key* 57(1).

82 C.J.S. Stenographers §5.

3-5-612. Reporter's report prima facie evidence.

Case Notes

Notes of Other Persons: In making up statements or bills of exceptions, litigants may use the notes of any person which furnish a correct narrative of the proceedings. York v. Steward, 30 M 367, 76 P 756 (1904).

Effect of Certificate: The certificate of the stenographer that the transcript contains all the evidence cannot supply the certificate of the judge to that effect or an omission of the bill of exceptions itself to show that it does. St. v. Shepphard, 23 M 323, 58 P 868 (1899). See Conklin v. Cullen, 25 M 214, 64 P 502 (1901).

Collateral References

Evidence *key* 383(3), (4).

32 C.J.S. Evidence §629.

Part 9
State Funding for District Courts

Part Compiler's Comments

Interim Study Committee Bill: Chapter 680, L. 1985, which enacted this part, was introduced by request of Joint Interim Subcommittee No. 3 of the 48th Legislature. See Committee report entitled "Court Unification in Montana", Montana Legislative Council, December 1984.

3-5-901. State assumption of district court expenses.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 583 in (1) at end substituted reference to subsection (4) for reference to subsection (2); in (1)(b) at end substituted "expenses for indigent defense that are paid under contract or at an hourly rate" for "witness fees and necessary

expenses, juror fees"; deleted former (1)(f) that read: "(f) costs of juror and witness fees and witness expenses before a grand jury"; inserted (1)(f) concerning involuntary commitment cases; in (1)(i) after "contractors" deleted "costs of the youth court and youth division offices, and costs of training for persons listed in subsections (1)(a)(i) through (1)(a)(v)"; inserted (1)(j) concerning youth court and youth court division operations; deleted former (2) that read: "(2) For the purposes of subsection (1), district court costs do not include:

(a) one-half of the salaries of county attorneys;

(b) salaries of deputy county attorneys;

(c) salaries of employees and expenses of the office of county attorney;

(d) costs for clerks of district court and employees and expenses of the office of the clerks of district court; or

(e) costs of providing district court office space"; in (2) at end inserted "and directly pay"; deleted former (3)(b) that read: "(b) district court expenses related to involuntary commitment proceedings and youth court proceedings in an annual amount not to exceed the district court expense for those proceedings in fiscal year 2001 plus a 3% growth factor each year. Any amount that exceeds the district court expense for those proceedings is the responsibility of the county"; in (3) at end inserted "within 30 days of receipt of a claim, for the following"; in (3)(a) at end deleted "only"; in (3)(a)(i) at end inserted "that are not paid under subsection (1)(b)"; inserted (3)(a)(ii) concerning juror fees and expenses; inserted (3)(a)(iii) concerning witness fees and expenses; inserted (3)(c) concerning juror and witness fees and witness expenses before grand jury; deleted former (4)(b) that read: "(b) If money appropriated for the expenses listed in subsection (4)(a) is insufficient to fully fund those expenses, the county is responsible for payment of the balance"; inserted (4) excluding enumerated expenses from district court costs; and made minor changes in style. Amendment effective July 1, 2003.

Chapter 585 in (1)(h) near middle after "trials if" substituted "similar expenses" for "those expenses" and at end substituted "district court fund or the county general fund in any previous year" for "district court budget in fiscal year 1998 or fiscal year 1999". Amendment effective July 1, 2003.

2001 Amendments — Composite Section: (Temporary version) Chapter 278 in (4)(a) at end substituted "7-6-4023" for "7-6-2352"; and made minor changes in style. Amendment effective July 1, 2001.

(Version effective July 1, 2002) Chapter 585 substituted (1), (1)(a), and (1)(b) establishing state-funded district court program and delineating district court costs for former (1)(a) that read: "(1) To the extent that revenue is available under 61-3-509, the state shall fund:

(a) the following district court expenses in criminal cases only:

(i) salaries of court reporters;

(ii) fees for transcripts of proceedings;

(iii) witness fees and necessary expenses;

(iv) juror fees;

(v) expenses for indigent defense; and

(vi) expenses for psychiatric examinations"; in (1)(c) after "expenses" deleted "as listed in subsection (1)(a)"; deleted former (1)(e)(v) and (1)(e)(vi) that read: "(v) expenses for appointed counsel for the youth;

(vi) expenses for appointed counsel for the parent, guardian, or other person having physical or legal custody of the youth"; inserted (1)(f) relating to grand jury costs; inserted (1)(g) relating to costs of court-sanctioned educational programs and expenses of education; inserted (1)(h) relating to civil jury trial expenses paid out of district court budget in fiscal years 1998 and 1999; inserted (1)(i) relating to all other costs associated with operation and maintenance of district court except office, courtroom, and other space costs; deleted former (2), (3), and (4) that read: "(2) If revenue received under 61-3-509 exceeds the amount appropriated by the legislature to fund the expenses of the appellate defender program, the excess amount is statutorily appropriated, as provided in 17-7-502, to the supreme court to fund the expenses described in subsections (1)(a) through (1)(d), the district court grant program as described in subsection (4)(a), and the costs of administering this section.

(3) All revenue disbursed under this section must be deposited in and credited to the district court fund. If a district court fund does not exist, the revenue must be deposited in the county general fund for district court operations.

(4) If money appropriated for the expenses listed in subsection (1):

(a) exceeds the amount necessary to fully fund those expenses, the remaining excess amounts must be used for district court grants as provided in 7-6-2352; or

(b) is insufficient to fully fund those expenses, the county is responsible for payment of the balance"; inserted (2) delineating what costs are not district court costs; inserted (3) providing that the state will fund certain percentage of expenses of appellate defender program and district court expenses related to involuntary commitment proceedings and youth court proceedings; inserted (4) providing for state reimbursement of indigent defense in criminal cases and appointed counsel in child abuse and neglect proceedings up to amount of appropriation; and made minor changes in style. Subsections (3)(b) and (4)(b) terminate June 30, 2003.

The amendments to this section in sec. 7, Ch. 574, L. 2001, were rendered void by sec. 255(3), Ch. 574, L. 2001, a coordination section.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1999 Amendment: Chapter 394 inserted (1)(d) itemizing expenses to be funded by the state pertaining to certain proceedings involving a youth; in (2) near end after "through" substituted "(1)(d), the district court grant program as described in subsection (4)(a)" for "(1)(c)"; inserted (3) concerning deposit of revenue; in (4)(a) after "expenses" deleted "up to $500,000 of the excess amount must be used for youth court and probation foster care placements if the department of corrections certifies to the supreme court that appropriations for youth court and probation foster care placements will be inadequate to fund those costs and"; and made minor changes in style. Amendment effective July 1, 1999.

1995 Amendment — Coordination Instruction: Chapter 535 in (1)(a)(ii), at beginning, inserted "fees for"; in (1)(a)(v), at beginning, inserted "expenses for"; deleted (1)(f) that read: "(f) expenses of the appellate defender commission and the office of appellate defender"; in (1)(a)(vi), at beginning, inserted "expenses for"; inserted (1)(b) regarding funding of District Court expenses in postconviction and habeas corpus proceedings; inserted (1)(c) regarding funding of certain state expenses in federal habeas corpus cases; substituted (2) regarding statutory appropriation of excess funding for the appellate defender program for former language that read: "The revenue received under 61-3-509 is statutorily appropriated, as provided in 17-7-502, to the supreme court for funding the expenses listed in subsection (1) and the costs of administering this section"; in (3)(a), near beginning after "expenses", substituted "up to $500,000 of the excess amount must be used for youth court and probation foster care placements if the department of family services certifies to the supreme court that appropriations for youth court and probation foster care placements will be inadequate to fund those costs and remaining excess amounts" for "the excess amount"; in (3)(b), after "expenses", deleted "the appellate defender commission and the office of appellate defender must be funded first and"; and made minor changes in style. Amendment effective July 1, 1995.

Section 2, Ch. 535, L. 1995, provided: "If both [this act] [Senate Bill No. 127] and Senate Bill No. 83 are passed and approved and if both include a section that amends 3-5-901, then 3-5-901 must read as follows". (See 1995 Session Law for text.) Senate Bill No. 83 was approved April 21, 1995, as Ch. 509, L. 1995, and included an amendment to 3-5-901. Therefore, the version of 3-5-901 in sec. 2, Ch. 535, L. 1995, is the effective version and has been codified accordingly.

Code Commissioner Change — Correction: Pursuant to sec. 2, Ch. 546, L. 1995, the Code Commissioner substituted Department of Corrections for the erroneous substitution of Department of Public Health and Human Services for Department of Family Services.

1993 Amendment: Chapter 330 in (1), after "extent that", substituted "revenue is available under 61-3-509" for "money is appropriated"; in (2) substituted statutory appropriation of revenue for funding expenses and costs for "The supreme court administrator, in consultation with the district judges for each judicial district, shall include within the supreme court's biennial budget request to the legislature a request for funding the expenses listed in subsection (1)"; deleted former (3)(b) that read: "(b) If no money is appropriated, the county is responsible for payment of all expenses"; and inserted (4) providing that money deposited in the state general fund during fiscal year 1992 in excess of the legislative appropriation is statutorily appropriated to the Supreme Court for District Court and courts of limited jurisdiction automation purposes during the 1995 biennium. Amendment effective April 13, 1993.

Termination Date Repealed: Section 1, Ch. 323, L. 1993, repealed sec. 13, Ch. 781, L. 1991, which would have terminated the 1991 amendments to this section regarding the Appellate Defender Commission effective July 1, 1993. The effect of the repealer is to make the amendments permanent. Repealer effective April 12, 1993.

Termination: Section 7, Ch. 330, L. 1993, provided: "The amendment to 3-5-901, enacting subsection (4) for purposes of the 1995 biennium, terminates July 1, 1995."

Judicial Unification and Finance Commission: Chapter 632, L. 1993, provided for the establishment of a Judicial Unification and Finance Commission, effective July 1, 1993, and terminating June 30, 1995. Because of the temporary nature of the Commission, Ch. 632, L. 1993, was not codified.

1991 Amendments: Chapter 704 in (1), at beginning, deleted "Effective July 1, 1985"; and in (2), near beginning, substituted "supreme court administrator" for "department of commerce" and near middle substituted "supreme court's" for "department's". Amendment effective July 1, 1991.

Chapter 781 inserted (1)(f) to include expenses of Appellate Defender Commission and Office of Appellate Defender; in (2), after "judicial district", inserted "and the appellate defender commission"; and in (3)(a)(ii), before "county", inserted language concerning first funding Appellate Defender Commission and Office of Appellate Defender. Amendment effective May 17, 1991, and terminates July 1, 1993.

1991 Statement of Intent: The statement of intent attached to Ch. 781, L. 1991, provided: "A statement of intent is required for this bill because [section 2] [2-15-1020] grants the appellate defender commission rulemaking authority for the conduct of the commission's affairs. It is the intent that the commission adopt rules of procedure necessary to implement and carry out the duties of the commission."

Retroactive Applicability: Section 11, Ch. 781, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to January 1, 1991."

Termination: Section 13, Ch. 781, L. 1991, provided: "[This act] terminates July 1, 1993."

1987 Amendment: Inserted (3)(a)(i) stating that if money appropriated for expenses listed in subsection (1) exceeds what is needed, the excess must be used as provided in 7-6-2352.

1985 Amendment: In (2) near beginning substituted "department of commerce" for "supreme court administrator, under the direction of the supreme court and"; and near middle of (2) before "biennial budget request" substituted "department's" for "supreme court's".

Case Notes

Reimbursement for Costs Incurred in Procuring Witness Testimony: Hardaway sought reimbursement for costs incurred in procuring the testimony of two out-of-state witnesses, one who appeared in person under subpoena and one who was deposed telephonically. The District Court denied reimbursement because Hardaway's counsel was retained rather than court-appointed. However, the only prerequisites that appear in the applicable statutes are that the court has revenue available and that the witness be subpoenaed. The procedural requirements of 46-15-113 for compelling the attendance of an out-of-state witness do not apply to an out-of-state witness who voluntarily appears and acknowledges service of a subpoena. Further, under 46-15-202, costs of a telephonic deposition are within the scope of a reimbursable deposition. The statutes do not distinguish between court-appointed and retained attorneys, but rather rely on the indigency of the defendant. Hardaway was declared indigent and remained so throughout the proceedings and, as such, was entitled to reimbursement for witness costs and deposition costs. St. v. Hardaway, 1998 MT 224, 290 M 516, 966 P2d 125, 55 St. Rep. 936 (1998).

County Employment of Independent Contractor to Provide Legal Services: There is no express prohibition under Montana law preventing a county from entering into an independent contractor relationship for the provision of legal services. Hamner v. Butte-Silver Bow County, 233 M 271, 760 P2d 76, 45 St. Rep. 1481 (1988).

Attorney General's Opinions

State Funding of Legal Defense Expenses of Indigent Defendants Limited to District Courts: The 2001 amendments to 46-8-201 and this section revised the manner in which District Courts are funded by providing for state assumption of most costs. However, the amendments did not revise funding for Justices' Courts, and nothing indicates that the Legislature intended to include costs associated with indigent defendants in Justices' Courts. Under 46-8-201, costs of remuneration for counsel appointed for indigent criminal defendants are paid by the state, but payments are limited to District Court criminal cases only. 49 A.G. Op. 21 (2002).

County, Not State, Required to Fund Legal Expenses of Indigent Juvenile Under Youth Court Act: Youth Court defense expenses are not included in this section as a specific expense that the state is required to fund; thus, the Legislature did not intend the state to be responsible for funding Youth Court expenses. Rather, pursuant to 41-5-104 and 41-5-111, the Board of County Commissioners is required to fund the legal defense expenses of an indigent youth against whom a petition has been filed in Youth Court. 48 A.G. Op. 16 (2000).

Collateral References

Court Unification in Montana, a Report to the 49th Legislature, Montana Legislative Council, December 1984.

3-5-902. Fiscal administration for payment of court expenses.

Compiler's Comments

2003 Amendment: Chapter 583 in first sentence near beginning substituted "the direct payment" for "disbursement of funds for payment" and after "listed in 3-5-901" inserted "and for the reimbursement of district court expenses to counties as provided in 3-5-901"; inserted second sentence concerning reimbursement in timely manner; and made minor changes in style. Amendment effective July 1, 2003.

The amendment to this section made by sec. 4, Ch. 152, L. 2003, was rendered void by sec. 11(2), Ch. 583, L. 2003, a coordination section.

2001 Amendment: Chapter 585 substituted "shall establish procedures for disbursement of funds for payment of district court expenses listed in 3-5-901 and record payments at a detailed level for budgeting and auditing purposes" for "shall:

(1) establish procedures for disbursement of funds for payment of district court expenses listed in 3-5-901, including prorating of those funds if they are insufficient to cover all expenses listed in 3-5-901; and

(2) require the use of a uniform accounting system in accordance with 2-7-504 by the counties in reporting court expenses at a detailed level for budgeting and auditing purposes"; and made minor changes in style. Amendment effective July 1, 2002.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1991 Amendments: Chapter 489 in (2), after "system", inserted "in accordance with 2-7-504"; deleted former (3) that read: "(3) provide for annual auditing of district court expenses to assure normal operations and consistency in reporting of expenditures"; and made minor changes in style. Amendment effective July 1, 1992.

Chapter 704 in introductory clause substituted "supreme court administrator" for "department of commerce"; in (2), at beginning, substituted "require the use of" for "develop" and before "by the counties" deleted "for use"; and in (3), at beginning, substituted "require" for "provide for". Amendment effective July 1, 1991.

Effective Date — Applicability: Section 30, Ch. 489, L. 1991, provided: "(1) Except as provided in (2), [this act] is effective July 1, 1992, and applies to the fiscal year ending June 30, 1992.

(2) The department of commerce may adopt rules to implement [this act] to become effective July 1, 1992."

1985 Amendment: In introductory clause substituted "department of commerce" for "supreme court administrator"; and in (2) at beginning deleted "in consultation with the department of commerce".

3-5-904. Account established for court information technology.

Compiler's Comments

Termination Provision Extended: Section 5, Ch. 498, L. 2003, had the effect of extending the termination date of this section to June 30, 2005.

Extension of Termination Date: Section 1, Ch. 71, L. 1999, amended sec. 4, Ch. 361, L. 1995, by extending the termination date imposed by Ch. 361 to June 30, 2003. Effective March 16, 1999.

Effective Date: Section 4(1), Ch. 361, L. 1995, provided: "[This act] is effective July 1, 1995."

Termination: Section 4(2), Ch. 361, L. 1995, provided: "[This act] terminates June 30, 1999."

CHAPTER 6
MUNICIPAL COURTS

Chapter Law Review Articles

Montana's Judicial System — A Blueprint for Modernization, Mason & Crowley, 29 Mont. L. Rev. 1 (Fall 1967).

Chapter Collateral References

Montana Judges Deskbook for Municipal, Justice, and City Courts (1999).

Part 1
General Provisions

3-6-101. Establishment of court.

Compiler's Comments

1991 Amendment: At beginning of (1) decreased population criteria from 10,000 to 4,000 and at end inserted third sentence concerning municipal court assumption of jurisdiction over pending city court cases in the city in which the municipal court is established; in first sentence of (2) substituted "A city may have a municipal court only if" for "The provisions of this chapter apply only after" and inserted second sentence concerning establishment by ordinance of transition provisions for judge; and made minor changes in style. Amendment effective July 1, 1991.

3-6-102. Abolition of city court.

Compiler's Comments

2003 Amendment: Chapter 389 in (2) at end after "3-6-201" deleted "and 3-6-202"; and made minor changes in style. Amendment effective July 1, 2003.

Grandfather Clause: Section 13, Ch. 389, L. 2003, provided: "An incumbent justice of the peace on [the effective date of this act] [effective July, 1, 2003], in a county in which a justice's court established as a court of record is established, who meets the minimum education requirements for a justice of the peace is eligible to run for the justice of the peace for a justice's court established as a court of record in that county at the next and subsequent elections held for the justice of the peace for the justice's court established as a court of record unless the justice of the peace has a break in service."

Saving Clause: Section 14, Ch. 389, L. 2003, was a saving clause.

1991 Amendment: Inserted (2) providing that a city judge whose office is abolished shall serve as municipal court judge until that office is filled; and made minor change in style. Amendment effective July 1, 1991.

3-6-103. Jurisdiction.

Compiler's Comments

1991 Amendment: In (2), near end after "district court", substituted "in actions arising under Title 70, chapters 24 through 27" for "within their respective counties in forcible entry and unlawful detainer"; inserted (3) regarding filing of applications in municipal court, jurisdiction and responsibility of municipal court judge, and responsibilities of City and County Attorneys; and made minor changes in style.

Case Notes

Jurisdiction Over Municipal Court Protection Order: The Missoula County District Court issued a permanent injunction, based on a stalking violation of 45-5-220, prohibiting Gillispie from contacting his former wife "by a third person, except by telephone or correspondence through her attorney of record". Gillispie admitted contacting his former wife's mother in Missoula and was charged with and convicted in Municipal Court of an order of protection violation pursuant to 45-5-626. On appeal, Gillispie contended that the Municipal Court did not have jurisdiction over the offense. A Municipal Court has geographic jurisdiction over misdemeanors coextensive with the jurisdiction of Justices' Courts located in the same county. Although neither Gillispie nor the former wife was present in Missoula County at the time of the prohibited phone call, the former wife's mother received the call in Missoula County. Thus, the Municipal Court was vested with jurisdiction over the misdemeanor order of protection violation when the necessary result of Gillispie's third-party contact by telephone was committed within Missoula County. Missoula v. Gillispie, 1999 MT 268, 296 M 444, 989 P2d 401, 56 St. Rep. 1085 (1999).

Attorney General's Opinions

Cities' Use of County Jails: Because the consent of the County Commissioners is required before a municipality may use the county jail, it was not presumed that consent was meaningless and, therefore, counties may refuse the use of county jails for confinement of persons accused or convicted of violating local ordinances. Likewise, a county may charge a municipality for maintaining prisoners committed to county jail at the request of a municipal police department in the course of enforcing local ordinances and state laws. 37 A.G. Op. 10 (1977).

Law Review Articles

The Effect of Lack of Jurisdiction, Slaight, 16 Mont. L. Rev. 54 (Spring 1955).

Collateral References

Criminal jurisdiction of municipal or other local court. 102 ALR 5th 525.

3-6-104. Powers and duties of the court.

Case Notes

Authority of Municipal Court to Commit Mentally Incapacitated Defendant: A plain reading of this section provides that Municipal Courts have all powers and duties of District Courts over matters within their jurisdiction, including the power and duty to commit mentally incapacitated criminal defendants to the Department of Public Health and Human Services, pursuant to the procedures and requirements of Title 46, if the Municipal Court determines that the defendant suffers from a mental disease or defect and lacks the fitness to proceed to trial. If there is any question regarding a Municipal Court's commitment of a criminal defendant, the issue may be appealed to the District Court pursuant to 3-5-303. Great Falls v. Dept. of Public Health and Human Services, 2002 MT 108, 309 M 467, 47 P3d 836 (2002).

Appeal Bond to Perfect Criminal Appeal: Because there is no statutory basis or court rule requiring an appeal bond to perfect an appeal in a criminal case from Municipal Court, the Municipal Court may not require one. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

Law Review Articles

The Increasing Use of the Power of Contempt, Hilts, 32 Mont. L. Rev. 183 (Summer 1971).

3-6-110. Appeal to district court — record on appeal.

Compiler's Comments

Effective Date: Section 8, Ch. 99, L. 1991, provided: "[This act] is effective July 1, 1991."

Case Notes

No District Court Error in Failing to Hold Trial De Novo in Municipal Court Appeal: Campbell was charged in Missoula Municipal Court with criminal trespass, disorderly conduct, and obstructing a police officer. Campbell failed to appear for trial and was tried in absentia and convicted on all charges. Campbell appealed to District Court, was notified of the appropriate Municipal Court appeal procedure in this section, and was given 10 days to file a brief. Campbell failed to file a brief, so the District Court dismissed the appeal and remanded to Municipal Court for further proceedings. Campbell appealed to the Supreme Court on grounds that the District Court should have conducted a trial de novo pursuant to 46-17-311. The Supreme Court disagreed. Campbell's appeal was from a Municipal Court and thus was governed by this section, rather than 46-17-311, so the appeal was confined to review of the record and questions of law. The District Court did not err in failing to conduct a trial de novo, and dismissal of Campbell's appeal for failure to file a brief was affirmed. Missoula v. Campbell, 2001 MT 271, 307 M 286, 37 P3d 670 (2001).

No District Court Jurisdiction of Appeal From Municipal Court When Defendant Not Incarcerated and Fine Less Than $300: Koestner was convicted in Municipal Court of reckless driving and was fined $175, court costs of $20, and a witness fee of $10, and no jail time was ordered. Koestner appealed the conviction and the denial of a request for a jury trial to District Court, but that court concluded that it did not have jurisdiction to hear the appeal. Koestner appealed to the Supreme Court, arguing that under the Montana Uniform Municipal Court Rules of Appeal to District Court (Title 25, ch. 30, part 2100), a city must have an ordinance in place to trigger the statutory amount necessary to bring an appeal and that because the city never presented evidence that such an ordinance existed, the District Court had jurisdiction under this section to review the Municipal Court decision. The Supreme Court agreed that because Koestner was not incarcerated and the fine imposed was less than $300, the District Court properly concluded that it was bound by Rule 1(b)(2), U.M.C.R.App. (Title 25, ch. 30, part 2100), which limits appeals in criminal cases to those in which the minimum amount in controversy is greater than $300, unless jail time is ordered. Although Koestner, under Rule 3, U.M.C.R.App., could have petitioned the District Court to hear the appeal in the interests of justice, no petition was filed. Koestner's arguments regarding lack of a city ordinance were not raised before the District Court, and the Supreme Court declined to address the issue for the first time on appeal. Kalispell v. Koestner, 2001 MT 53, 304 M 315, 21 P3d 622 (2001).

District Court Exceeding Scope of Appellate Review — Abuse of Discretion in Applying Particularized Suspicion of DUI to Traffic Stop Triggered by Report of Vandalism: Robertson was stopped after a vehicle of the description that he was driving was reported leaving the scene of a vandalism. He was subsequently convicted of DUI in City Court and appealed to District

Court on grounds that his right to confront witnesses was denied and that the city had not sustained the necessary burden of proof to support the conviction. The District Court remanded to the City Court for dismissal on grounds that the arresting officer did not have a sufficient particularized suspicion to justify the investigative stop for DUI. However, the issue of a sufficient particularized suspicion was never raised or ruled on in City Court by either Robertson or the city. When a District Court exercises its power of appellate review, it must refrain from deciding issues not properly raised or objected to in the court below; thus, the District Court abused its discretion by exceeding the scope of its appellate review in addressing the issue of particularized suspicion, so the Supreme Court reversed the order of the District Court dismissing the City Court judgment against Robertson. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000). See also Missoula v. Asbury, 265 M 14, 873 P2d 936, 51 St. Rep. 383 (1994), and St. v. Herrera, 1998 MT 173, 289 M 499, 962 P2d 1180 (1998).

Proper Cross-Appeal of Adverse District Court Decision Regarding City Court Denial of Motion for Continuance: The established doctrine governing appeals to all appellate courts is that a party must cross-appeal if the party seeks to change any part of the judgment below. Further, the Montana Supreme Court follows the rule that it has jurisdiction only over those issues addressed in the appeal or in a properly filed cross-appeal, not jurisdiction over the entire case. Conversely, it is also the general rule that a cross-appeal is not necessary to enable a prevailing party to defend its judgment on any ground properly raised below, whether or not that ground was relied upon, rejected, or even considered by the court below. The proper way for a respondent to raise an issue before the Supreme Court, if the issue would support the decision below and is an issue that the court below did not address because it found another issue to be dispositive, is to assert the issue in the brief to the Supreme Court and fully discuss it. If a respondent does not assert and fully discuss the issue, the Supreme Court may in its discretion: (1) review the issue itself; (2) decide that the respondent has waived the right to review of the issue; or (3) remand to the court below for a decision on the issue. Here, issues raised by respondent that the District Court declined to address, having found another issue dispositive, undoubtedly supported the District Court's decision reversing the City Court's judgment. Thus, because the respondent sufficiently asserted the issues and both parties fully briefed each one, the Supreme Court concluded that the respondent had properly cross-appealed and that it was proper to review the respondent's issues on appeal. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000), following In Interest of Jamie L., 493 NW 2d 56 (Wis. 1992). See also Wash. v. Yakima Indian Nation, 439 US 463, 58 L Ed 2d 740, 99 S Ct 740 (1979).

City Not Liable for City Judge's Civil Rights Violations — City Judge Acts Under State Authority: Claims of the indigent defendants, who were not effectively informed by a City Judge of their right to appointed counsel, were properly dismissed. Under Montana law, a City Judge's acts and decision in advising defendants of the right were performed under the state's authority rather than the city's authority, thereby precluding imposition of civil rights liability on the city. Further, the indigent defendants did not have standing to seek declaratory and injunctive relief. There are other remedies for indigent defendants in future situations—they can file a complaint with the state body charged with overseeing judicial conduct, they can appeal their convictions to a higher court, and they can sue a judge individually because a judge does not enjoy judicial immunity for unconstitutional behavior when the facts are sufficient to grant declaratory or injunctive relief. Eggar v. Livingston, 40 F3d 312 (9th Cir. 1994).

Failure to Present Issue to First Level Appellate Court as Precluding Consideration at Second Appellate Level: At their initial trial in Municipal Court, defendants raised an issue of reliance on treaties entered into by the United States, but the issue was not raised at the first level of appeal when the case was considered by the District Court pursuant to this section. As a result, the issue was held to be not properly before the Supreme Court at the second level of appeal. Missoula v. Asbury, 265 M 14, 873 P2d 936, 51 St. Rep. 383 (1994), followed in Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000).

Part 2
Municipal Court Judges

3-6-201. Number of judges — election — term of office.

Compiler's Comments

1991 Amendment: Inserted (1) providing that the governing body of a city shall determine by ordinance the number of judges required to operate the municipal court; in (2) substituted "election, as provided in 13-1-104(2)" for "city election"; at beginning of (3) inserted exception clause, after "municipal" inserted "court", and after "election of" substituted "district court

judges" for "nonpartisan city officials"; and made minor changes in style. Amendment effective July 1, 1991.

Transition: Section 404, Ch. 571, L. 1979, is a transition section.

3-6-202. Qualifications — certification — training.

Compiler's Comments

2003 Amendment: Chapter 389 in (1) near end increased law practice requirement for municipal judges from 2 years to 3 years; in (2) near beginning after "judge" substituted "shall reside in the county in which the court is located and shall meet the residency requirements provided in 3-10-204" for "must be a resident and voter in the city in which he is elected at the time of his election"; substituted (3) through (7) concerning certification and training of a municipal court judge for former (3) through (5) that read: "(3) A municipal court judge must be certified as provided in 3-1-1502 or 3-1-1503 prior to assuming office.

(4) There must be two mandatory annual training sessions supervised by the supreme court for all elected and appointed municipal court judges. One of the training sessions may be held in conjunction with the Montana magistrates' association convention. Actual and necessary travel expenses, as defined and provided for in 2-18-501 through 2-18-503, and the costs of registration and books and other materials must be paid to the elected or appointed municipal court judge for attending the sessions by the city in which he holds or will hold court and must be charged against that city.

(5) Each municipal court judge shall attend the training sessions provided for in subsection (4). Failure to attend disqualifies a judge from office and creates a vacancy in the office. However, the supreme court may excuse a municipal court judge from attendance because of illness, a death in the family, or any other good cause"; and made minor changes in style. Amendment effective July 1, 2003.

Grandfather Clause: Section 13, Ch. 389, L. 2003, provided: "An incumbent justice of the peace on [the effective date of this act] [effective July, 1, 2003], in a county in which a justice's court established as a court of record is established, who meets the minimum education requirements for a justice of the peace is eligible to run for the justice of the peace for a justice's court established as a court of record in that county at the next and subsequent elections held for the justice of the peace for the justice's court established as a court of record unless the justice of the peace has a break in service."

Saving Clause: Section 14, Ch. 389, L. 2003, was a saving clause.

1991 Amendment: Inserted (3) requiring certification of municipal court judge; inserted (4) establishing mandatory annual training sessions; and inserted (5) requiring municipal court judge to attend training sessions. Amendment effective April 2, 1991.

Supreme Court Orders: "The following Montana Supreme Court order, signed by all seven justices, was issued on June 10[, 2003]:

IN THE MATTER OF ESTABLISHING GREATER TRAINING REQUIREMENTS FOR MUNICIPAL COURT JUDGES AND FOR JUSTICES OF THE PEACE OF JUSTICE'S COURTS ESTABLISHED AS COURTS OF RECORD

Pursuant to Sec. 3, Ch. 389, L. 2003, the 2003 Montana Legislature, among other things, adopted certain amendments to §3-6-202, MCA. Specifically, §3-6-202, MCA, now provides in pertinent part:

(4) A municipal court judge shall complete a minimum of 15 hours of continuing judicial education requirements each year or a greater number established by the supreme court. Attendance at the two annual training sessions under 3-10-203 may fulfill the requirement provided for in this subsection.

(5) Completion of a course approved for continuing judicial or legal education hours applies to the judicial education requirements under subsection (4).

Similarly, Sec. 6, Ch. 389, L. 2003, amended §3-10-203, MCA by providing, in pertinent part:

(4) A justice of the peace for a justice's court established as a court of record, provided for in 3-10-101, must meet the requirements provided for in [section 10].

In that regard, Sec. 10, Ch. 389, L. 2003, provides in pertinent part:

(2) A justice of the peace for a justice's court established as a court of record, provided for in 3-10-101, shall complete a minimum of 15 hours of continuing judicial education requirements each year or a greater number established by the supreme court. Attendance at the two annual training sessions under 3-10-203 may fulfill the requirement provided for in this subsection.

(3) completion of a course approved for continuing judicial or legal education hours applies to the judicial education requirements under subsection (2).

Aside from whatever other judicial or legal education courses a municipal court judge or a justice of the peace for a justice's court established as a court of record may choose to complete, this Court has determined that attendance of such judges and justices at the two mandatory annual training sessions prescribed by §3-10-203, MCA, must also be required.

These two mandatory annual training sessions provide judicial education directed specifically at Montana statutory and jurisprudential law and provide information relating to the efficient operation and standards of justice and judicial services expected from all courts of limited jurisdiction in Montana. Moreover, these two annual training sessions prepare the judges and justices of the courts of limited jurisdiction for the certification test which is prerequisite to the Commission on Courts of Limited Jurisdiction issuing certificates of completion of a course of education and training prescribed by §3-1-1502 and 1503, MCA.

Therefore, this Court has determined that municipal court judges and justices of the peace for justice's courts established as courts of record are required to complete a greater number of hours of judicial education than the minimum hours specified in Secs. 3 and 10, Ch. 389, L. 2003. Accordingly,

IT IS ORDERED that pursuant to Article VII, Section 2(2) of the Constitution of Montana, Sec. 3, Ch. 389, L. 2003 and §3-6-202(4) and (5), MCA, all municipal court judges shall attend the two mandatory annual training sessions provided for in §3-10-203, MCA, in addition to whatever other courses of continuing judicial or legal education they may choose to complete.

IT IS FURTHER ORDERED that pursuant to Article VII, Section 2(2) of the Constitution of Montana, Sec. 10, Ch. 389, L. 2003, and §3-10-203(4), MCA, all justices of the peace for justice's courts established as courts of record shall attend the two mandatory annual training sessions provided for in §3-10-203, MCA, in addition to whatever other courses of continuing judicial or legal education they may choose to complete.

IT IS FURTHER ORDERED that this order shall be effective July 1, 2003."

Case Notes

Municipal Ordinance Prohibiting Outside Employment by Municipal Judge Void: The city of Bozeman passed municipal ordinance 2.06.050 prohibiting the Municipal Court Judge from obtaining outside employment. The city contended that under this section, it was allowed to enact an ordinance governing the qualifications of the judge, as long as the ordinance did not violate Art. VII, sec. 9, Mont. Const., and also argued that the ordinance was consistent with 3-1-604, which precludes a Municipal Court Judge from practicing law in that judge's own court. The Supreme Court agreed with the District Court that the ordinance was void because it conflicted with 3-1-604 when read in conjunction with 3-1-601. The legislative history also demonstrated that the statutes are intended to allow Municipal Court Judges to practice law in courts other than their own in order to supplement their income. Although the constitutional provision prohibits a District Court Judge from the outside practice of law and this section requires a Municipal Court Judge to have the same qualifications as a District Court Judge, qualifications should not be confused with restrictions. Although 3-1-604 does not affirmatively declare that Municipal Court Judges can practice law outside their own courts, its intent is clear. The ordinance conflicted with the statutes and was therefore void. Carlson v. Bozeman, 2001 MT 46, 304 M 277, 20 P3d 792 (2001).

Collateral References

Validity of age requirement for state public office. 90 ALR 3d 900.

Validity and construction of constitutional or statutory provision making legal knowledge or experience a condition of eligibility for judicial office. 71 ALR 3d 498.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period. 65 ALR 3d 1048.

3-6-203. Salary.

Compiler's Comments

1991 Amendment: In first sentence, before "ordinance", deleted "city", after "ordinance" inserted "or resolution", and in second sentence, after "judge", substituted "are" for "shall be the travel"; and made minor changes in style. Amendment effective July 1, 1991.

Transition: Section 16, Ch. 528, L. 1979, provided: "A judicial officer, as defined in 1-1-202, who is occupying his judicial office on the effective date of this act shall continue to be paid expenses on the same basis as he is receiving them on the effective date of this act until the expiration of his term of office. All judicial officers who take office or begin a new term of office after the effective date of this act shall receive expenses as provided in this act."

Severability: Section 17, Ch. 528, L. 1979, was a severability section.

3-6-204. Disqualification — judge pro tempore.

Compiler's Comments

2003 Amendment: Chapter 389 near middle of first sentence after "call in" substituted "a justice of the peace for a justice's court established as a court of record provided for in 3-10-101, another municipal court judge, a retired justice of the peace for a justice's court established as a court of record, a retired municipal court judge or an attorney" for "some practicing attorney" and at end of second sentence after "the same" substituted "power and authority as the municipal court judge" for "powers for the purposes of the cause as the judge of the court"; and made minor changes in style. Amendment effective July 1, 2003.

Grandfather Clause: Section 13, Ch. 389, L. 2003, provided: "An incumbent justice of the peace on [the effective date of this act] [effective July, 1, 2003], in a county in which a justice's court established as a court of record is established, who meets the minimum education requirements for a justice of the peace is eligible to run for the justice of the peace for a justice's court established as a court of record in that county at the next and subsequent elections held for the justice of the peace for the justice's court established as a court of record unless the justice of the peace has a break in service."

Saving Clause: Section 14, Ch. 389, L. 2003, was a saving clause.

Part 3
Conduct of Court Business

3-6-301. Clerk of the court — administrative expenses.

Compiler's Comments

1991 Amendment: In first sentence substituted "position of municipal court clerk" for "city clerk of the city in which said court is located shall be ex officio clerk of such", at end of sentence, after "court", inserted "must be established by ordinance", and inserted second sentence concerning salary and expenses of the clerk incurred in operating the court. Amendment effective July 1, 1991.

3-6-302. Records — electronic filing and storage.

Compiler's Comments

1995 Amendment: Chapter 174 inserted (2) allowing electronic filing or storage of documents; and made minor changes in style.

CHAPTER 7
WATER COURTS

Chapter Case Notes

Failure to Participate in Water Court Hearing — Attorney Fees Assessed as Sanction for Defense of Unreasonable Appeal: Despite warnings from the Water Court of the consequences, plaintiffs chose not to participate in a Water Court hearing, thereby creating no record of their issues and preserving none of their arguments for appeal. They appealed anyway, contending that the Water Court's findings were in error. The Supreme Court first found that the findings and conclusions were correct, then sanctioned plaintiffs pursuant to Rule 32, M.R.App.P. (Title 25, ch. 21), finding that defendant was entitled to attorney fees incurred in defending an appeal that was taken without any substantial or reasonable grounds, that delayed the case, and that wasted the resources of defendant and the Supreme Court. Swinger v. Collins, 1999 MT 202, 295 M 447, 984 P2d 151, 56 St. Rep. 787 (1999).

Federal Reserved Water Rights — Dismissal of Federal Court Actions — Judicial Administration: When the United States brings actions in federal court for a general adjudication of Indian and other federal reserved water rights under 28 U.S.C. 1345, the actions are properly dismissed because the state courts have concurrent jurisdiction as a result of the McCarran Amendment, because the State has established a comprehensive system under state law for adjudication of all water rights in the state, including federal reserved rights, and because the policy of wise judicial administration announced in Colorado River Conservation District v. U.S., 424 US 800 (1976), requires the court to defer to the state system for efficient adjudication of these rights. N. Cheyenne Tribe v. Tongue River Water Users Ass'n, 484 F. Supp. 31, 36 St. Rep. 2265 (D.C. Mont. 1979).

Chapter Law Review Articles

The Adjudication of Montana's Waters—A Blueprint for Improving the Judicial Structure, MacIntyre, 49 Mont. L. Rev. 211 (Summer 1988).

Montana's Judicial System—A Blueprint for Modernization, Mason & Crowley, 29 Mont. L. Rev. 1 (Fall 1967).

Chapter Collateral References

Water Court Procedures, Lawyers Deskbook and Directory, p. 108, State Bar of Montana, 1997-98.

Part 1
Water Divisions

3-7-101. Water divisions.

Compiler's Comments

1985 Amendment: In first sentence, after "water rights", inserted "and to conduct hearings in cases certified under 85-2-309".

Purpose: Subsection (1) of sec. 1, Ch. 697, L. 1979, provided: "[This act] amends the Montana Water Use Act to expedite and facilitate the adjudication of existing water rights."

Codification: Section 35, Ch. 697, L. 1979, provided: "(1) Sections 1 through 10 of this act are intended to be codified as an integral part of Title 3, and the provisions contained in Title 3 apply to this act.

(2) Sections 11 through 27 are intended to be codified as an integral part of Title 85, chapter 2, part 2, and the provisions contained in Title 85, chapter 2, apply to this act.

(3) If the provisions of this act are not codified as stated above, the code commissioner shall add to the MCA, if necessary, statutory language to convey the intent of this section."

Because of rearrangement of the new material, Ch. 697 is now codified in Title 3, ch. 7; Title 85, ch. 2, parts 2 and 7; and 2-15-212.

Severability: Section 36, Ch. 697, L. 1979, was a severability section.

3-7-103. Promulgation of rules and prescription of forms — advisory committee.

Compiler's Comments

1995 Amendment: Chapter 421 inserted (2) concerning Water Adjudication Advisory Committee. Amendment effective April 13, 1995.

1981 Amendment: Added "of natural resources and conservation" at the end of the section.

Case Notes

No Departmental Rulemaking Authority Regarding Water Claims — Jurisdiction in Water Courts — Rulemaking Reserved to Supreme Court: Legislation in 1979 placed the procedure for adjudication of water claims in the Water Courts and reserved the power of rulemaking with respect to pending judicial proceedings to the Supreme Court. Lacking express legislative authority, neither the Board nor Department of Natural Resources and Conservation has any rulemaking authority with respect to procedures in the adjudication of water rights before the Water Courts, and the Montana Administrative Procedure Act does not supply such authority. Functions of the Department respecting water claims are limited to rendering assistance to the Water Judges as set out in 85-2-243. In re Dept. of Natural Resources and Conservation, 226 M 221, 740 P2d 1096, 44 St. Rep. 604 (1987).

Part 2
Water Judges

3-7-201. Designation of water judge.

Compiler's Comments

1989 Amendment: In second sentence of (1), after "subsection (2)", deleted "and 3-7-213". Amendment effective April 21, 1989.

Saving Clause: Section 9, Ch. 604, L. 1989, was a saving clause.

Severability: Section 10, Ch. 604, L. 1989, was a severability clause.

Retroactive and Prospective Applicability: Section 11, Ch. 604, L. 1989, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all temporary preliminary decrees and preliminary decrees that have been issued by the Montana water courts and prospectively to all decrees issued on or after [the effective date of this act] [effective April 21, 1989].

(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] [effective April 21, 1989] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

1981 Amendment: In last sentence of (1) inserted "except as provided in subsection (2) and 3-7-213" and inserted "or retired district judge"; in (2) inserted "or retired district judge" and "if requested by the chief justice of the supreme court or the water judge of the division in which he is requested to sit".

3-7-203. Vacancies.

Compiler's Comments

1981 Amendment: Inserted "resigns" near middle of section and substituted "water judge" for "district judge".

3-7-204. Supervision and administration by supreme court.

Compiler's Comments

1999 Amendment: Chapter 389 in (2) at end of first sentence substituted "appropriations made for that purpose" for "the water right adjudication account established by 85-2-241"; and made minor changes in style. Amendment effective July 1, 1999.

3-7-211. Appointment of water commissioners.

Compiler's Comments

1991 Amendment: Corrected citation to subsection of 85-2-231 concerning a preliminary decree for a specified portion of a water division; and made minor changes in style.

1989 Amendment: At beginning substituted language authorizing District Court with jurisdiction over interrelated water division where controversy arises to appoint and supervise commissioner for "water judge of each water division". Amendment effective April 21, 1989.

Saving Clause: Section 9, Ch. 604, L. 1989, was a saving clause.

Severability: Section 10, Ch. 604, L. 1989, was a severability clause.

Retroactive and Prospective Applicability: Section 11, Ch. 604, L. 1989, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all temporary preliminary decrees and preliminary decrees that have been issued by the Montana water courts and prospectively to all decrees issued on or after [the effective date of this act] [effective April 21, 1989].

(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] [effective April 21, 1989] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

3-7-212. Enforcement of decrees.

Compiler's Comments

1989 Amendment: At beginning substituted "district court having jurisdiction" for "water judge of each water division"; after "decree" deleted "issued in that water division as provided in 85-2-234"; and inserted second sentence authorizing District Court to enforce modified preliminary decree in absence of final decree. Amendment effective April 21, 1989.

Saving Clause: Section 9, Ch. 604, L. 1989, was a saving clause.

Severability: Section 10, Ch. 604, L. 1989, was a severability clause.

Retroactive and Prospective Applicability: Section 11, Ch. 604, L. 1989, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all temporary preliminary decrees and preliminary decrees that have been issued by the Montana water courts and prospectively to all decrees issued on or after [the effective date of this act] [effective April 21, 1989].

(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] [effective April 21, 1989] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

3-7-221. Appointment of chief water judge — term of office.

Compiler's Comments

1987 Amendment: At end of (1) substituted "as provided in Title 3, chapter 1, part 10" for "from among the district judges serving or retired as of the time of appointment"; and inserted (2) stating the qualifications of an appointee.

Attorney General's Opinions

Chief Water Judge Not Subject to State Leave Policies — Executive Branch Not to Supervise Judicial Branch: Although the Chief Water Judge is appointed and not elected, the Chief Water Judge is a judicial officer and is not subject to the vacation leave policies of the Department of Administration. This interpretation of the statutes is also required by the application of the separation of powers clause of the Montana Constitution. To hold otherwise would subject a judicial officer to control by the Executive Branch of state government and not to the control of the Montana Supreme Court or the Judicial Standards Commission. 48 A.G. Op. 2 (1999).

3-7-222. Salary — office space.

Compiler's Comments

1999 Amendment: Chapter 389 at end substituted "general fund" for "water right adjudication account"; and made minor changes in style. Amendment effective July 1, 1999.

3-7-223. Duties of the chief water judge.

Compiler's Comments

1985 Amendment: In (1) at beginning inserted "administer the adjudication of existing water rights by"; renumbered former (1), (2), and (3) as (1)(a), (1)(b), and (1)(c); inserted (2) relating to conducting hearings in cases certified to District Court; and made minor changes in phraseology.

1983 Amendment: Inserted (4) relating to assigning court personnel; and inserted (5) relating to transfers of judges between divisions.

3-7-224. Jurisdiction of chief water judge.

Compiler's Comments

1985 Amendment: In (2) after "jurisdiction over", inserted "cases certified to the district court under 85-2-309 and"; in (3) in first sentence substituted "consideration of a matter within his jurisdiction" for "determination of existing water rights"; and at end of (3) after "responsibilities", added inclusion relating to orders requiring joinder of persons not parties.

Collateral References

Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR 4th 112.

Summary judgment in mandamus or prohibition cases. 3 ALR 3d 675.

Part 3
Water Masters

3-7-301. Appointment of water masters — removal.

Compiler's Comments

1983 Amendment: In (1) substituted "The chief water judge or the water judge in each division may appoint one or more water masters" for "The water judge in each water division shall appoint at least one water master and may appoint more than one water master."; in (4), changed "water judge" to "chief water judge" in two places; and inserted (5) allowing a water master to serve in any division and be moved among the divisions.

1981 Amendment: Substituted "at least one" for "a" in (1); and added "and may appoint more than one water master" at the end of (1).

3-7-311. Duties of water masters.

Compiler's Comments

Rule Reference: If the proposed amendment to Rule 53, M.R.Civ.P., is adopted, the reference to Rule 53(c) in this section will become Rule 53(a)(3). See proposed amendment comment to Rule 53 for text of proposed amendment.

Part 4
Disqualification

3-7-402. Disqualification of water judge or master.

Compiler's Comments

1993 Amendment: Chapter 494 in (1) and (2), before "disqualify", inserted "withdraw or may"; in (2)(e) substituted "72-11-104" for "72-11-105"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Part 5
Jurisdiction

Part Case Notes

Jurisdiction Required Before Judgment Effective: It is fundamental that a court rendering a decision in a particular case have jurisdiction over the parties. When the judgment roll on its face shows that the court was without jurisdiction to render the judgment, its pronouncement is in fact no judgment and cannot be enforced. No right can be derived from it. All proceedings founded upon it are invalid and ineffective for any purpose. Ciotti v. Hoover, 237 M 462, 774 P2d 406, 46 St. Rep. 969 (1989), following Apple v. Edwards, 123 M 135, 211 P2d 138 (1949).

Part Law Review Articles

The Effect of Lack of Jurisdiction, Slaight, 16 Mont. L. Rev. 54 (Spring 1955).

3-7-501. Jurisdiction.

Compiler's Comments

1997 Amendment: Chapter 174 inserted (4) to include abandonment of existing water rights in the final decree; and made minor changes in style. Amendment effective March 28, 1997.

Saving Clause: Section 7, Ch. 174, L. 1997, was a saving clause.

1989 Amendment: In (2), after "3-7-201", deleted "and 3-7-213". Amendment effective April 21, 1989.

Saving Clause: Section 9, Ch. 604, L. 1989, was a saving clause.

Severability: Section 10, Ch. 604, L. 1989, was a severability clause.

Retroactive and Prospective Applicability: Section 11, Ch. 604, L. 1989, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all temporary preliminary decrees and preliminary decrees that have been issued by the Montana water courts and prospectively to all decrees issued on or after [the effective date of this act] [effective April 21, 1989].

(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] [effective April 21, 1989] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

1985 Amendment: In each of the three subsections inserted "cases certified to the court under 85-2-309 or"; and made minor changes in phraseology.

1981 Amendment: At end of (2) added "except as provided in 3-7-201 and 3-7-213".

Case Notes

District Court Error in Restraining Use of Contracted Irrigation Water: Micks contracted to purchase the right to 775 acre feet of water from the Deadman"s Basin Water Users Association, to be appropriated from the Deadman's Basin Reservoir, in order to irrigate a hay crop. In April 2000, the District Court appointed two Water Commissioners to distribute the reservoir water pursuant to a rotation plan. In August 2000, the District Court, on its own motion, found that the water level in the reservoir had reached a critical level, that the remaining water was necessary to maintain domestic, municipal, stock, and wildlife usage, and that the irrigation of crops from the river was prohibited as long as the reservoir level remained critically low. Micks determined that he had used only 431 acre feet of his contracted 775 acre feet, and based on his limited usage and other reasons, he presumed that the District Court prohibition did not apply to him, so he continued to irrigate his hay crop. Micks' continued irrigation was discovered, and he was ordered by the District Court to show cause why he should not be held in contempt for failure to comply with the prohibition order. Micks requested that the District Court reconsider its order, but the request was denied, so Micks appealed. The Supreme Court noted that under Mildenberger v. Galbraith, 249 M 161, 815 P2d 130 (1991), and Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260 (1992), the jurisdiction to interpret and determine existing water rights rests exclusively with the Water Courts and that although the District Court has the authority to supervise the distribution of previously adjudicated water or to enforce an existing water decree and may in certain cases fill in a pre-1973 decree with further delineations, such as time or season of use and acreage of application, in this case, the District Court made a priority determination regarding domestic and irrigation water consumption based on the court's own inclinations, exceeding its authority to simply fill in a water decree with further delineations. Micks' contract unambiguously required a pro rata reduction in water distribution when an inadequate amount existed to satisfy outstanding water purchase contracts. Therefore, the District Court erred as a matter of law when it employed a first come, first served policy in contravention of the water contract. Denial of Micks' motion to reconsider the prohibition order

was reversible error, and his motion to restrain the Water Commissioners from interfering with use of Deadman's Basin Reservoir irrigation water to which he was entitled should have been granted. In re Petition of Deadman's Basin Water Users Ass'n to Appoint Water Comm'r to Distribute Stored Water, 2002 MT 15, 308 M 168, 40 P3d 387 (2002).

Jurisdiction of District Court to "Update" Old Water Rights Decree — Statute Governing Complaints by Dissatisfied Users Inapplicable: Pursuant to a previous writ of supervisory control, a remand to the District Court, and findings entered by the Senior Water Master, the Supreme Court found that the Order Authorizing Updated Decree, entered by the judges of the Fourth Judicial District in January of 1989, was beyond the jurisdiction of the District Court. The order was intended to deal with the problem of a 1902 water rights decree by a District Court, in which the judge adjudicated 27 water rights on Carlton Creek, that had become so brittle with age and damaged by time that the decree could not be readily handled. In the process of updating and reissuing the 1902 order, the Supreme Court found that the Fourth Judicial District Judges had actually made a de facto adjudication of water rights in an overly appropriated drainage and that that adjudication had been undertaken without notice and hearing to the holders of certain of those water rights. Citing Mildenberger v. Galbraith, 249 M 161, 815 P2d 130 (1991), and Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260 (1992), the Supreme Court held that under 85-2-234(6), it is within the sole jurisdiction of the Water Court to determine such things as priority dates, flow rates, place of use, and means of diversion with respect to a water right. The Supreme Court also held that the matters adjudicated by the decree were not within the scope of matters cognizable under 85-5-301 because that section concerns the correct administration of a water rights decree while the Updated Decree attempts to change the terms of the decree itself. For these reasons, the Supreme Court vacated the 1989 Updated Decree. State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

No Departmental Rulemaking Authority Regarding Water Claims — Jurisdiction in Water Courts — Rulemaking Reserved to Supreme Court: Legislation in 1979 placed the procedure for adjudication of water claims in the Water Courts and reserved the power of rulemaking with respect to pending judicial proceedings to the Supreme Court. Lacking express legislative authority, neither the Board nor Department of Natural Resources and Conservation has any rulemaking authority with respect to procedures in the adjudication of water rights before the Water Courts, and the Montana Administrative Procedure Act does not supply such authority. Functions of the Department respecting water claims are limited to rendering assistance to the Water Judges as set out in 85-2-243. In re Dept. of Natural Resources and Conservation, 226 M 221, 740 P2d 1096, 44 St. Rep. 604 (1987).

Jurisdiction of Water Judge Beyond Boundaries of Water Division: The apparent purpose of 3-7-501(2) is to recognize the parochial nature of water usage and assure that Water Judges are conversant with the history of water usage when making water adjudications. The provisions of 3-7-213 (now repealed) must be interpreted in conjunction with the provisions of 3-7-501. A reading of the two sections together indicates that the intent of the Legislature was to provide that a District Judge, sitting as a Water Judge, could not serve beyond the boundaries of his division absent the showing required by 3-7-213 (now repealed). Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983), followed in Marks v. District Court, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989).

3-7-502. Jurisdictional disputes.

Compiler's Comments

1985 Amendment: Near middle, after "concerning", inserted "a case certified to the court under 85-2-309 or".

CHAPTER 10
JUSTICES' COURTS

Chapter Law Review Articles

Civil Practice in Montana's "People's Courts": The Proposed Montana Justice and City Court Rules of Civil Procedure, Ford, 58 Mont. L. Rev. 197 (1997).

Civil Procedure (a Montana Supreme Court Survey), Williams, 45 Mont. L. Rev. 335 (Summer 1984).

Justice Court Reform in Montana, Holden, 34 Mont. L. Rev. 122 (Winter 1973).

Montana's Judicial System — A Blueprint for Modernization, Mason & Crowley, 29 Mont. L. Rev. 1 (Fall 1967).

Montana Justices' Courts — According to the Law, Mason & Kimball, 23 Mont. L. Rev. 62 (Fall 1961).

Chapter Collateral References

Montana Judges Deskbook for Municipal, Justice, and City Courts (1999).

Part 1
General Provisions

3-10-101. Number and location of justices' courts — authorization to combine with city court — justice's court established as court of record.

Compiler's Comments

2003 Amendment: Chapter 389 inserted (5) concerning a county's establishment of a justice's court as a court of record. Amendment effective July 1, 2003.

Grandfather Clause: Section 13, Ch. 389, L. 2003, provided: "An incumbent justice of the peace on [the effective date of this act] [effective July, 1, 2003], in a county in which a justice's court established as a court of record is established, who meets the minimum education requirements for a justice of the peace is eligible to run for the justice of the peace for a justice's court established as a court of record in that county at the next and subsequent elections held for the justice of the peace for the justice's court established as a court of record unless the justice of the peace has a break in service."

Saving Clause: Section 14, Ch. 389, L. 2003, was a saving clause.

1999 Amendment: Chapter 393 in (1) inserted second sentence requiring county commissioners to designate number of justices in justice's court; and made minor changes in style. Amendment effective October 1, 1999.

1981 Amendment: Rewrote section (see 1981 Session Law for text). Former language read: "(1) There must be at least one justice's court in each county of the state. The board of county commissioners of each county of the state shall have authority to constitute one additional justice's court in its respective county, as the board deems necessary.

(2) One justice's court in each county must be located at the county seat, and the board of county commissioners shall determine the location of the other justice's court in its respective county."

Collateral References

Justices of the Peace *key* 2, 3.

51 C.J.S. Justices of the Peace §§4, 6.

47 Am. Jur. 2d Justices of the Peace §§5, 6.

3-10-102. When courts open.

Case Notes

False Imprisonment Action Against Sheriff: In an action for false imprisonment brought against a Sheriff and the surety on his official bond based on alleged delay in bringing plaintiff before a magistrate, it was essential that the plaintiff prove that a magistrate was available on the particular day when the false imprisonment allegedly occurred. Rounds v. Bucher, 137 M 39, 349 P2d 1026 (1960).

Attorney General's Opinions

Justice's Court to Be Open on All Working Days — Limited Office Hours of Justice Permitted: A Justice's Court is always open for the transaction of business except on legal holidays and nonjudicial days. However, the office hours that must be kept by a Justice of the Peace each day are set by the County Commissioners and need not include hours on every day that the Justice's Court is open for the transaction of business. 40 A.G. Op. 26 (1983).

Closure for One Day Prohibited: The Justice of the Peace who is located at the county seat cannot close that court 1 day a week in order to hold Justice's Court in another city. 35 A.G. Op. 99 (1974).

Collateral References

Justices of the Peace *key* 71.

51 C.J.S. Justices of the Peace §59.

3-10-103. County to provide facilities.

Compiler's Comments

2001 Amendment: Chapter 6 in (1) at end of introductory clause substituted "justice's court" for "justice of the peace"; in (1)(a) after "enable" substituted "the justice of the peace and the clerk of justice's court, if any, to conduct business" for "him to perform his duties"; in (1)(b) near middle substituted "court" for "judicial office"; inserted (2) allowing for a clerk of justice's court; and made minor changes in style. Amendment effective October 1, 2001.

Case Notes

Separation of Powers Doctrine Not to Preclude Compliance With Employee Grievance Procedure by Justice's Court: A Justice of the Peace involved in a disciplinary action against the court office manager contended that a grievance hearing before the County Commission would violate the separation of powers doctrine by interfering with the independence of the court by requiring the Justice of the Peace to be an adverse witness against court personnel, allowing the Justice of the Peace's decision on personnel matters to be overruled by another branch of government, and possibly requiring the Justice of the Peace to accept an employee believed to be unsatisfactory. However, as established in Hillis v. Sullivan, 48 M 320, 137 P 392 (1913), the hiring by the County Commission of a clerk to assist a court does not violate the separation of powers doctrine. In addition, the County Commission is statutorily required to provide a Justice of the Peace with clerical assistance. Thus, a grievance hearing before the County Commission does not violate the separation of powers doctrine because the County Commission's independent hiring of the office manager is consistent with the doctrine; nor does the County Commission's hearing of the grievance constitute an exercise of authority belonging to the Judicial Branch. Clark v. Dussault, 265 M 479, 878 P2d 239, 51 St. Rep. 642 (1994).

Agreement by County Commission to Pay Justice Court Expenses — Failure to Object — Appeal Precluded: A Justice of the Peace requested approval of funds from the County Commission for employment of a temporary clerical assistant. The County Commission initially refused to approve the funds. The claim was then submitted for certification pursuant to Browman v. Wood, 168 M 341, 543 P2d 184 (1975), and was subsequently certified as an actual and necessary expense incurred in the performance of actual duties of the Justice Court. When the bill was still not paid, the Justice of the Peace filed a petition for a contempt order against the County Commissioners for failure to pay the certified claim. The order was amended to include attorney fees. The County Commission then agreed to pay the claim and did not oppose the motion to amend, nor did it file a responsive brief. However, it later alleged error. The Supreme Court held that the County Commission waived the right to appeal by agreeing to pay the claim and then failing to object to the District Court order to pay the claim and taking no further action to challenge the claim. In re Certain Justice Court Expenses, 264 M 510, 872 P2d 795, 51 St. Rep. 372 (1994).

Claim of Justice's Court for Unbudgeted Actual and Necessary Expenses: When Justice of Peace filed claim to pay necessary extra clerical assistance, County Commissioners did not have discretion to disallow claim under section 16-1906, R.C.M. 1947 (renumbered 7-6-2323 through 7-6-2325, 7-6-2327, and 7-6-2328, all sections now repealed), as section 93-412, R.C.M. 1947 (now 3-10-103 and 3-10-209), prevailed. When a specific statute conflicts with a general statute, the specific controls over the general to the extent of any repugnancy. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975). (Annotator's Comment: In this case Supreme Court exercised supervisory powers to provide a procedure to prevent future actual or potential conflict between the Board of County Commissioners and Justice's Courts.)

Mandamus — Payment of Clerical Expenses: County Commissioners can be compelled to pay for necessary clerical expenses under this section and 3-10-209 when necessity is shown for the performance of duties. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975).

Attorney General's Opinions

Duty of Boards of County Commissioners to Accept and Pay Claims for Actual and Necessary Clerical Expenses of Justice's Court: Under this section, a duty is created on the part of Boards of County Commissioners to accept and pay claims for actual and necessary clerical expenses associated with the operation of Justices' Courts. If disputes arise regarding payment of those expenses, the procedural rule in State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975), applies. Although Boards may have some budgetary discretion when considering payment of actual and necessary court expenses, the statutes governing the county budgeting process do not preclude application of the Browman rule when disputes arise. 49 A.G. Op. 19 (2002).

Codes Provided: The latest edition of the Revised Codes of Montana (now Montana Code Annotated) and all official supplements thereto must be supplied to each Justice of the Peace in each county. 35 A.G. Op. 93 (1974).

3-10-111. What provisions of code applicable to justices' courts.

Collateral References

Justices of the Peace *key* 32, 64, 66.
51 C.J.S. Justices of the Peace §§26, 53.

3-10-115. Appeal to district court from justice's court established as court of record — record on appeal.

Compiler's Comments

Grandfather Clause: Section 13, Ch. 389, L. 2003, provided: "An incumbent justice of the peace on [the effective date of this act] [effective July, 1, 2003], in a county in which a justice's court established as a court of record is established, who meets the minimum education requirements for a justice of the peace is eligible to run for the justice of the peace for a justice's court established as a court of record in that county at the next and subsequent elections held for the justice of the peace for the justice's court established as a court of record unless the justice of the peace has a break in service."

Saving Clause: Section 14, Ch. 389, L. 2003, was a saving clause.

Effective Date: Section 16, Ch. 389, L. 2003, provided: "[This act] is effective July 1, 2003."

3-10-116. Disqualification of justice of peace for justice's court established as court of record — judge pro tempore.

Compiler's Comments

Grandfather Clause: Section 13, Ch. 389, L. 2003, provided: "An incumbent justice of the peace on [the effective date of this act] [effective July, 1, 2003], in a county in which a justice's court established as a court of record is established, who meets the minimum education requirements for a justice of the peace is eligible to run for the justice of the peace for a justice's court established as a court of record in that county at the next and subsequent elections held for the justice of the peace for the justice's court established as a court of record unless the justice of the peace has a break in service."

Saving Clause: Section 14, Ch. 389, L. 2003, was a saving clause.

Effective Date: Section 16, Ch. 389, L. 2003, provided: "[This act] is effective July 1, 2003."

3-10-117. Minimum judicial education requirements — justice of peace for justice's court established as court of record.

Compiler's Comments

Grandfather Clause: Section 13, Ch. 389, L. 2003, provided: "An incumbent justice of the peace on [the effective date of this act] [effective July, 1, 2003], in a county in which a justice's court established as a court of record is established, who meets the minimum education requirements for a justice of the peace is eligible to run for the justice of the peace for a justice's court established as a court of record in that county at the next and subsequent elections held for the justice of the peace for the justice's court established as a court of record unless the justice of the peace has a break in service."

Saving Clause: Section 14, Ch. 389, L. 2003, was a saving clause.

Effective Date: Section 16, Ch. 389, L. 2003, provided: "[This act] is effective July 1, 2003."

Supreme Court Orders: "The following Montana Supreme Court order, signed by all seven justices, was issued on June 10[, 2003]:

IN THE MATTER OF ESTABLISHING GREATER TRAINING REQUIREMENTS FOR MUNICIPAL COURT JUDGES AND FOR JUSTICES OF THE PEACE OF JUSTICE'S COURTS ESTABLISHED AS COURTS OF RECORD

Pursuant to Sec. 3, Ch. 389, L. 2003, the 2003 Montana Legislature, among other things, adopted certain amendments to §3-6-202, MCA. Specifically, §3-6-202, MCA, now provides in pertinent part:

(4) A municipal court judge shall complete a minimum of 15 hours of continuing judicial education requirements each year or a greater number established by the supreme court. Attendance at the two annual training sessions under 3-10-203 may fulfill the requirement provided for in this subsection.

(5) Completion of a course approved for continuing judicial or legal education hours applies to the judicial education requirements under subsection (4).

Similarly, Sec. 6, Ch. 389, L. 2003, amended §3-10-203, MCA by providing, in pertinent part:

(4) A justice of the peace for a justice's court established as a court of record, provided for in 3-10-101, must meet the requirements provided for in [section 10].

In that regard, Sec. 10, Ch. 389, L. 2003, provides in pertinent part:

(2) A justice of the peace for a justice's court established as a court of record, provided for in 3-10-101, shall complete a minimum of 15 hours of continuing judicial education requirements each year or a greater number established by the supreme court. Attendance at the two annual training sessions under 3-10-203 may fulfill the requirement provided for in this subsection.

(3) completion of a course approved for continuing judicial or legal education hours applies to the judicial education requirements under subsection (2).

Aside from whatever other judicial or legal education courses a municipal court judge or a justice of the peace for a justice's court established as a court of record may choose to complete, this Court has determined that attendance of such judges and justices at the two mandatory annual training sessions prescribed by §3-10-203, MCA, must also be required.

These two mandatory annual training sessions provide judicial education directed specifically at Montana statutory and jurisprudential law and provide information relating to the efficient operation and standards of justice and judicial services expected from all courts of limited jurisdiction in Montana. Moreover, these two annual training sessions prepare the judges and justices of the courts of limited jurisdiction for the certification test which is prerequisite to the Commission on Courts of Limited Jurisdiction issuing certificates of completion of a course of education and training prescribed by §3-1-1502 and 1503, MCA.

Therefore, this Court has determined that municipal court judges and justices of the peace for justice's courts established as courts of record are required to complete a greater number of hours of judicial education than the minimum hours specified in Secs. 3 and 10, Ch. 389, L. 2003. Accordingly,

IT IS ORDERED that pursuant to Article VII, Section 2(2) of the Constitution of Montana, Sec. 3, Ch. 389, L. 2003 and §3-6-202(4) and (5), MCA, all municipal court judges shall attend the two mandatory annual training sessions provided for in §3-10-203, MCA, in addition to whatever other courses of continuing judicial or legal education they may choose to complete.

IT IS FURTHER ORDERED that pursuant to Article VII, Section 2(2) of the Constitution of Montana, Sec. 10, Ch. 389, L. 2003, and §3-10-203(4), MCA, all justices of the peace for justice's courts established as courts of record shall attend the two mandatory annual training sessions provided for in §3-10-203, MCA, in addition to whatever other courses of continuing judicial or legal education they may choose to complete.

IT IS FURTHER ORDERED that this order shall be effective July 1, 2003."

Part 2
Justices of the Peace

Part Attorney General's Opinions

Official Misconduct Conviction of Justice of the Peace — Right to Run for Subsequent Term: Under 45-7-401, a Justice of the Peace convicted of official misconduct forfeits the remainder of his term. However, he may run for a subsequent term if state supervision for the offense has ended. 39 A.G. Op. 61 (1982).

3-10-201. Election.

Attorney General's Opinions

Required Form of Ballots for Justice of the Peace: In an election for Justice of the Peace, the ballot must be the same in form as the ballot used to elect District Court Judges, including the form of ballot used by an incumbent who shall run against himself if unopposed. 35 A.G. Op. 61 (1974).

Collateral References

Justices of the Peace *key* 2, 3.

51 C.J.S. Justices of the Peace §§4, 6.

47 Am. Jur. 2d Justices of the Peace §7.

3-10-202. Oath — proof of certification.

Compiler's Comments

1991 Amendment: Substituted present (2) requiring certification for former (2)(a) through (2)(c) establishing qualifications for a Justice of the Peace. Amendment effective April 2, 1991.

1987 Amendment: In (2)(c), at end of first sentence, substituted "the supreme court or has been excused by the supreme court" for "the university of Montana law school".

Case Notes

Substitute Justice of the Peace Not Duly Authorized or Properly Called — Search Warrants Invalid: A Justice of the Peace submitted a written waiver request form for proposing substitute Justices of the Peace but failed to create a list of proposed substitutes as required in 3-10-231. One of the designated substitutes took the judicial oath of office, but not in the form required by Art. III, sec. 3, Mont. Const. The substitute justice was called by a Deputy Sheriff, who requested warrants allowing a search of defendant's property. The warrants were issued and executed, but the warrants were challenged by defendants on the grounds that the warrants were not issued by a properly authorized substitute justice. The state argued that the authorization and call-in of the substitute justice were in substantial compliance with the law and that any technical errors in the procedures should not operate to suppress evidence. Applying Potter v. District Court, 266 M 384, 880 P2d 1319 (1994), the Supreme Court held that substantial compliance was insufficient. The procedure used in authorizing the substitute justice with a variant form of the constitutional oath of office was a major discrepancy in the authorization process, and the procedure of providing law enforcement with a menu of substitutes from which to choose clearly violated Potter. The substitute Justice of the Peace was not duly authorized, thus the warrants issued by the substitute were void ab initio. St. v. Vickers, 1998 MT 201, 290 M 356, 964 P2d 756, 55 St. Rep. 859 (1998), distinguishing U.S. v. Leon, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405 (1984).

Attorney General's Opinions

County Residency Not Required of Acting Justice of the Peace: An acting Justice of the Peace who is called to act pursuant to 3-10-231 and who is otherwise qualified to serve under this section need not be a resident of the county where the court sits. 43 A.G. Op. 51 (1990).

Qualifications for List of Temporary Substitute Justices: In order to be eligible for the list of persons provided by a Justice of the Peace as temporary substitute justices, persons must meet the qualifications set forth in 3-10-202(2) and the residency requirements of 3-10-204. 42 A.G. Op. 4 (1987).

Collateral References

Validity of age requirement for state public office. 90 ALR 3d 900.

Validity and construction of constitutional or statutory provision making legal knowledge or experience a condition of eligibility for judicial office. 71 ALR 3d 498.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period. 65 ALR 3d 1048.

3-10-203. Orientation course — annual training.

Compiler's Comments

2003 Amendment: Chapter 389 in (2) at beginning of first sentence inserted "Subject to subsection (4)"; in (3) at beginning of first sentence inserted exception clause; inserted (4) requiring that a justice of the peace for a justice's court established as a court of record meet the requirements of 3-10-117; and made minor changes in style. Amendment effective July 1, 2003.

Grandfather Clause: Section 13, Ch. 389, L. 2003, provided: "An incumbent justice of the peace on [the effective date of this act] [effective July, 1, 2003], in a county in which a justice's court established as a court of record is established, who meets the minimum education requirements for a justice of the peace is eligible to run for the justice of the peace for a justice's court established as a court of record in that county at the next and subsequent elections held for the justice of the peace for the justice's court established as a court of record unless the justice of the peace has a break in service."

Saving Clause: Section 14, Ch. 389, L. 2003, was a saving clause.

1987 Amendment: At beginning of (1) substituted "Under the supervision of the supreme court, a course of study must be presented" for "The university of Montana law school, under the supervision of the supreme court, shall present a course".

Transition: Section 16, Ch. 528, L. 1979, provided: "A judicial officer, as defined in 1-1-202, who is occupying his judicial office on the effective date of this act shall continue to be paid expenses on the same basis as he is receiving them on the effective date of this act until the expiration of his term of office. All judicial officers who take office or begin a new term of office after the effective date of this act shall receive expenses as provided in this act."

Severability: Section 17, Ch. 528, L. 1979, was a severability section.

Supreme Court Orders: "The following Montana Supreme Court order, signed by all seven justices, was issued on June 10[, 2003]:

IN THE MATTER OF ESTABLISHING GREATER TRAINING REQUIREMENTS FOR MUNICIPAL COURT JUDGES AND FOR JUSTICES OF THE PEACE OF JUSTICE'S COURTS ESTABLISHED AS COURTS OF RECORD

Pursuant to Sec. 3, Ch. 389, L. 2003, the 2003 Montana Legislature, among other things, adopted certain amendments to §3-6-202, MCA. Specifically, §3-6-202, MCA, now provides in pertinent part:

(4) A municipal court judge shall complete a minimum of 15 hours of continuing judicial education requirements each year or a greater number established by the supreme court. Attendance at the two annual training sessions under 3-10-203 may fulfill the requirement provided for in this subsection.

(5) Completion of a course approved for continuing judicial or legal education hours applies to the judicial education requirements under subsection (4).

Similarly, Sec. 6, Ch. 389, L. 2003, amended §3-10-203, MCA by providing, in pertinent part:

(4) A justice of the peace for a justice's court established as a court of record, provided for in 3-10-101, must meet the requirements provided for in [section 10].

In that regard, Sec. 10, Ch. 389, L. 2003, provides in pertinent part:

(2) A justice of the peace for a justice's court established as a court of record, provided for in 3-10-101, shall complete a minimum of 15 hours of continuing judicial education requirements each year or a greater number established by the supreme court. Attendance at the two annual training sessions under 3-10-203 may fulfill the requirement provided for in this subsection.

(3) completion of a course approved for continuing judicial or legal education hours applies to the judicial education requirements under subsection (2).

Aside from whatever other judicial or legal education courses a municipal court judge or a justice of the peace for a justice's court established as a court of record may choose to complete, this Court has determined that attendance of such judges and justices at the two mandatory annual training sessions prescribed by §3-10-203, MCA, must also be required.

These two mandatory annual training sessions provide judicial education directed specifically at Montana statutory and jurisprudential law and provide information relating to the efficient operation and standards of justice and judicial services expected from all courts of limited jurisdiction in Montana. Moreover, these two annual training sessions prepare the judges and justices of the courts of limited jurisdiction for the certification test which is prerequisite to the Commission on Courts of Limited Jurisdiction issuing certificates of completion of a course of education and training prescribed by §3-1-1502 and 1503, MCA.

Therefore, this Court has determined that municipal court judges and justices of the peace for justice's courts established as courts of record are required to complete a greater number of hours of judicial education than the minimum hours specified in Secs. 3 and 10, Ch. 389, L. 2003. Accordingly,

IT IS ORDERED that pursuant to Article VII, Section 2(2) of the Constitution of Montana, Sec. 3, Ch. 389, L. 2003 and §3-6-202(4) and (5), MCA, all municipal court judges shall attend the two mandatory annual training sessions provided for in §3-10-203, MCA, in addition to whatever other courses of continuing judicial or legal education they may choose to complete.

IT IS FURTHER ORDERED that pursuant to Article VII, Section 2(2) of the Constitution of Montana, Sec. 10, Ch. 389, L. 2003, and §3-10-203(4), MCA, all justices of the peace for justice's courts established as courts of record shall attend the two mandatory annual training sessions provided for in §3-10-203, MCA, in addition to whatever other courses of continuing judicial or legal education they may choose to complete.

IT IS FURTHER ORDERED that this order shall be effective July 1, 2003."

3-10-204. Residence requirements.

Attorney General's Opinions

County Residency Not Required of Acting Justice of the Peace: An acting Justice of the Peace who is called to act pursuant to 3-10-231 and who is otherwise qualified to serve under 3-10-202 need not be a resident of the county where the court sits. 43 A.G. Op. 51 (1990).

Collateral References

Justices of the Peace *key* 4, 5.

51 C.J.S. Justices of the Peace §§5, 7.

47 Am. Jur. 2d Justices of the Peace §8.

3-10-205. Term of office.

Compiler's Comments

1999 Amendment: Chapter 90 at end substituted "as provided in 7-4-2205" for "4 years from the first Monday in January next succeeding their election"; and made minor changes in style. Amendment effective March 16, 1999.

Collateral References

Justices of the Peace *key* 8.
51 C.J.S. Justices of the Peace §8.
47 Am. Jur. 2d Justices of the Peace §10.

3-10-206. Vacancies.

Compiler's Comments

1985 Amendment: Substituted "until the next general election and until a successor is elected and qualified" for "for the remainder of the unexpired term".

Applicability: Section 3, Ch. 175, L. 1985, provided that the amendment applies to vacancies occurring on or after January 1, 1986.

Attorney General's Opinions

Vacancy: Prior to the 1985 amendment, an appointed Justice of the Peace would hold office for the remainder of the unexpired term. 36 A.G. Op. 67 (1976).

3-10-207. Salaries.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 114 in (1) deleted reference to subsection (1) of 7-4-2504. Amendment effective October 1, 2003.

Chapter 389 in (1) at beginning inserted "Subject to subsections (2) through (4)"; inserted (4) setting the salary of the justice of the peace for a justice's court established as a court of record; and made minor changes in style. Amendment effective July 1, 2003.

Grandfather Clause: Section 13, Ch. 389, L. 2003, provided: "An incumbent justice of the peace on [the effective date of this act] [effective July, 1, 2003], in a county in which a justice's court established as a court of record is established, who meets the minimum education requirements for a justice of the peace is eligible to run for the justice of the peace for a justice's court established as a court of record in that county at the next and subsequent elections held for the justice of the peace for the justice's court established as a court of record unless the justice of the peace has a break in service."

2001 Amendment: Chapter 507 in (1) in first sentence after "resolution and" deleted "may, for all or the remainder of each fiscal year" and at end after "7-4-2504(1)" deleted "set their salaries at the prior fiscal year level if that does not result in a reduction in salary" and deleted former second sentence that read: "Salaries must meet the minimum requirements established by this section"; deleted former (2) and (3) that read: "(2) If the salary of the justice of the peace was determined on a fee basis for the years 1971 and 1972, he shall receive a monthly salary of not less than one-eighteenth of the total fees, civil and criminal, collected by the justice or his predecessor in office during the 2 years 1971 and 1972.

(3) If the salary of the justice of the peace was determined on a nonfee basis for the years 1971 and 1972, the justice shall be paid not less than the highest salary earned by the justice or his predecessor for the years 1971 and 1972"; at end of (2) after "county" deleted "except as provided for in subsections (1) and (5)"; in (3) inserted second sentence prohibiting reduction of justice's salary during term of office; and made minor changes in style. Amendment effective May 1, 2001.

1986 Amendment: In first sentence of (1) following "resolution", inserted remainder of sentence relating to setting salaries at the prior fiscal year level; and at end of (4) inserted reference to subsection (1).

Case Notes

Apparent Intent of Legislature to Improve Salaries: Court applied ordinary rules of grammar to the provisions of this section relating to nonfee Justices of the Peace that raised minimum salaries to level comparable to other county elected officials by combining 1971 and 1972 rates so as to insure significant improvement of the Justice's Court system as contemplated by the 1972 Montana Constitution. Bd. of County Comm'rs v. Lamoreaux, 168 M 102, 540 P2d 975 (1975), followed in Dept. of Natural Resources and Conservation v. Clark Fork Logging Co., 198 M 494, 646 P2d 1207, 39 St. Rep. 1146 (1982).

Attorney General's Opinions

Justice of the Peace — Deduction From Full-Time Status: Absent a voluntary waiver by the incumbent, the proper time at which to reduce a full-time Justice of the Peace position to a part-time position is before the next election. 38 A.G. Op. 90 (1980).

Justice of the Peace — When Pay Raise May Be Diminished: Any pay raises given a Justice of the Peace must stand for the remainder of the term, and only at the beginning of the next term may such raises be diminished. 38 A.G. Op. 90 (1980).

Salary Diminution Prohibited for Justices of the Peace: The reduction of a full-time Justice of the Peace to a part-time Justice of the Peace with a salary commensurate to the workload and office hours constitutes a prohibited salary diminution within the language of Art. VII, sec. 7, Mont. Const. 38 A.G. Op. 90 (1980).

3-10-208. Office hours.

Compiler's Comments

1983 Amendment: Changed "justice" to "justice's court".

Attorney General's Opinions

Justice of the Peace Not Precluded From Acting as City Judge During Justice Court Office Hours: The office hours of a Justice Court are set by the County Commissioners, and during those hours, the court is always open for the transaction of business, such as the filing of court documents with the Clerk of Court. However, a Justice of the Peace is not statutorily required to be present in Justice Court during every hour the Justice Court is open for business. Thus, a Justice of the Peace is not precluded from acting as a city judge during office hours of the Justice Court. 43 A.G. Op. 49 (1989), overruling 40 A.G. Op. 26 (1983), to the extent that it concludes that the Board of County Commissioners sets the hours of the Justice of the Peace.

Justice's Court to Be Open on All Working Days — Limited Office Hours of Justice Permitted: A Justice's Court is always open for the transaction of business except on legal holidays and nonjudicial days. However, the office hours that must be kept by a Justice of the Peace each day are set by the County Commissioners and need not include hours on every day that the Justice's Court is open for the transaction of business. 40 A.G. Op. 26 (1983).

Justice of the Peace — Deduction From Full-Time Status: Absent a voluntary waiver by the incumbent, the proper time at which to reduce a full-time Justice of the Peace position to a part-time position is before the next election. 38 A.G. Op. 90 (1980).

Justice of the Peace — When Pay Raise May Be Diminished: Any pay raises given a Justice of the Peace must stand for the remainder of the term, and only at the beginning of the next term may such raises be diminished. 38 A.G. Op. 90 (1980).

Salary Diminution Prohibited for Justices of the Peace: The reduction of a full-time Justice of the Peace to a part-time Justice of the Peace with a salary commensurate to the workload and office hours constitutes a prohibited salary diminution within the language of Art. VII, sec. 7, Mont. Const. 38 A.G. Op. 90 (1980).

Office Closure: The Justice of the Peace who is located at the county seat cannot close that court 1 day a week in order to hold Justice's Court in another city. 35 A.G. Op. 99 (1974).

3-10-209. Expenses.

Case Notes

Agreement by County Commission to Pay Justice Court Expenses — Failure to Object — Appeal Precluded: A Justice of the Peace requested approval of funds from the County Commission for employment of a temporary clerical assistant. The County Commission initially refused to approve the funds. The claim was then submitted for certification pursuant to Browman v. Wood, 168 M 341, 543 P2d 184 (1975), and was subsequently certified as an actual and necessary expense incurred in the performance of actual duties of the Justice Court. When the bill was still not paid, the Justice of the Peace filed a petition for a contempt order against the County Commissioners for failure to pay the certified claim. The order was amended to include attorney fees. The County Commission then agreed to pay the claim and did not oppose the motion to amend, nor did it file a responsive brief. However, it later alleged error. The Supreme Court held that the County Commission waived the right to appeal by agreeing to pay the claim and then failing to object to the District Court order to pay the claim and taking no further action to challenge the claim. In re Certain Justice Court Expenses, 264 M 510, 872 P2d 795, 51 St. Rep. 372 (1994).

Claim of Justice's Court for Unbudgeted Actual and Necessary Expenses: When Justice of Peace filed claim to pay necessary extra clerical assistance, County Commissioners did not have

discretion to disallow claim under section 16-1906, R.C.M. 1947 (renumbered 7-6-2323 through 7-6-2325, 7-6-2327, and 7-6-2328, all sections now repealed), as section 93-412, R.C.M. 1947 (now 3-10-103 and 3-10-209), prevailed. When a specific statute conflicts with a general statute, the specific controls over the general to the extent of any repugnancy. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975). (Annotator's Comment: In this case Supreme Court exercised supervisory powers to provide a procedure to prevent future actual or potential conflict between the Board of County Commissioners and Justice's Courts.)

Mandamus — Payment of Clerical Expenses: County Commissioners can be compelled to pay for necessary clerical expenses under this section and 3-10-103 when necessity is shown for the performance of duties. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975).

Attorney General's Opinions

Duty of Boards of County Commissioners to Accept and Pay Claims for Actual and Necessary Clerical Expenses of Justice's Court: Under 3-10-103, a duty is created on the part of Boards of County Commissioners to accept and pay claims for actual and necessary clerical expenses associated with the operation of Justices' Courts. If disputes arise regarding payment of those expenses, the procedural rule in State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975), applies. Although Boards may have some budgetary discretion when considering payment of actual and necessary court expenses, the statutes governing the county budgeting process do not preclude application of the Browman rule when disputes arise. 49 A.G. Op. 19 (2002).

3-10-221. Duties of justices.

Collateral References

Justices of the Peace *key* 19 through 21.

51 C.J.S. Justices of the Peace §§12 through 14.

3-10-222. Collection and payment of money.

Compiler's Comments

2001 Amendment: Chapter 515 near beginning substituted "may require the sheriff, levying officer, or constable of any county to pay over" for "must receive from the sheriff or constable of their county"; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

Justices of the Peace *key* 17, 20, et seq.

51 C.J.S. Justices of the Peace §§14, 16.

3-10-231. Circumstances in which acting justice called in — by whom.

Compiler's Comments

1997 Amendment: Chapter 150 in (1) substituted "3-1-803 and 3-1-805" for "subdivision 1, 2, or 3" and at end, after "preside", deleted "in his behalf"; in (2)(a) inserted introductory clause relating to requirements to qualify substitute Justice of the Peace; at end of (2)(a)(i), after second sentence, deleted "The county commissioners shall administer the oath of office to each"; inserted (2)(a)(ii) requiring sitting Justice of the Peace to obtain waiver of training for substitutes; in (2)(a)(iii), after "list", inserted "provided for in subsection (2)(a)(i), shall subscribe to the written oath of office" and inserted second sentence allowing oath to be subscribed before member of Board of County Commissioners or any other authorized officer; inserted (2)(b) requiring list, oath, and approval and waiver to be filed with County Clerk; inserted (2)(c) allowing County Clerk to provide list of substitutes to local law enforcement; and made minor changes in style. Amendment effective March 25, 1997.

Preamble: The preamble attached to Ch. 150, L. 1997, provided: "WHEREAS, in Potter v. District Court, 266 Mont. 384 (1994), the Montana Supreme Court ordered the suppression of evidence obtained under search warrants issued by an acting Justice of the Peace who had not been properly qualified; and

WHEREAS, the Montana Supreme Court found that compliance with the statutory scheme for qualifying substitutes for Justices of the Peace is mandatory and that failure to follow the statutory requirements may result in an unqualified substitute attempting to act in a judicial capacity without authority; and

WHEREAS, the Legislature finds that clarification of the statutory scheme for qualifying substitutes for Justices of the Peace may avoid future problems in which an unqualified substitute attempts to act in a judicial capacity and may avoid the consequences associated with such a situation.

THEREFORE, the Legislature of the State of Montana finds it appropriate to clarify the statutory scheme for qualifying substitutes for Justices of the Peace."

1991 Amendment: In (2) inserted second sentence regarding qualifications of persons listed, in third sentence, after "list", deleted "within the ensuing 30 days or", after "soon" deleted "thereafter", and after "possible" inserted "after the person has received a waiver of training from the supreme court". Amendment effective April 2, 1991.

1985 Amendment: Inserted (2) requiring Justice of the Peace to provide a list of persons qualified to hold court in his place during a temporary absence and requiring them to take an oath; in (3) substituted text authorizing Justice of the Peace or County Commissioners to call in a substitute for the Justice if he is sick, disabled, or absent for former text that read: "Whenever a justice is sick, disabled, or absent and the county commissioners find that there is a delay in the proper administration of justice or the county attorney makes a written request, another justice, if there is one readily available, or a city judge or some other qualified person shall be called in to hold court for the absent justice until his return"; and in (4) in last sentence, after "county", substituted "the justice of the peace may designate another person" for "the county commissioners shall handle the situation".

Case Notes

Substitute Justice of the Peace Not Duly Authorized or Properly Called — Search Warrants Invalid: A Justice of the Peace submitted a written waiver request form for proposing substitute Justices of the Peace but failed to create a list of proposed substitutes as required in this section. One of the designated substitutes took the judicial oath of office, but not in the form required by Art. III, sec. 3, Mont. Const. The substitute justice was called by a Deputy Sheriff, who requested warrants allowing a search of defendant's property. The warrants were issued and executed, but the warrants were challenged by defendants on the grounds that the warrants were not issued by a properly authorized substitute justice. The state argued that the authorization and call-in of the substitute justice were in substantial compliance with the law and that any technical errors in the procedures should not operate to suppress evidence. Applying Potter v. District Court, 266 M 384, 880 P2d 1319 (1994), the Supreme Court held that substantial compliance was insufficient. The procedure used in authorizing the substitute justice with a variant form of the constitutional oath of office was a major discrepancy in the authorization process, and the procedure of providing law enforcement with a menu of substitutes from which to choose clearly violated Potter. The substitute Justice of the Peace was not duly authorized, thus the warrants issued by the substitute were void ab initio. St. v. Vickers, 1998 MT 201, 290 M 356, 964 P2d 756, 55 St. Rep. 859 (1998), distinguishing U.S. v. Leon, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405 (1984).

Legal Qualifications of Justice of the Peace: According to applicable statutes and the rules of the Commission on Courts of Limited Jurisdiction, before a person is legally qualified to serve as a substitute Justice of the Peace, the following requirements must be met: (1) within 30 days of taking office, the elected or appointed Justice of the Peace must create a list of persons who are qualified to act in the sitting judge's absence when no other Justice or City Court Judge is available; (2) the sitting Justice of the Peace must request and obtain from the Commission a waiver of training for the substitute judge and show that the substitute judge is of good moral character and has good community support, a sense of community standards, and a basic knowledge of court procedure; and (3) the substitute judge must be sworn in by the County Commissioners. (See 1997 amendment.) A search warrant issued by a substitute judge in a case in which these qualifications were not met was held to be void ab initio because the statutory procedures to make him a judge and to vest him with the power to perform judicial functions had not been followed. Evidence seized pursuant to the warrant was suppressed. Potter v. District Court, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

Sitting Judge to Be Called Prior to Calling of Substitute Judge: In addition to the legal qualifications of a substitute judge, a sitting Justice of the Peace must first attempt to call in another Justice of the Peace, if there is one readily available, or a City Court Judge before resorting to calling in a qualified substitute judge from the list of substitute judges. A search warrant issued by a substitute judge in a case in which this procedure was not followed was held to be void ab initio because the statutory procedures to make him a judge and to vest him with the power to perform judicial functions had not been followed. Evidence seized pursuant to the warrant was suppressed. Potter v. District Court, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

Attorney General's Opinions

When Substitute Justice of the Peace May Be Called — Reliance on Letters of Unavailability: How a substitute Justice of the Peace is selected depends on the reasons for the absence of the sitting Justice of the Peace. If the sitting Justice of the Peace is disqualified pursuant to 3-1-803 or 3-1-805, only another Justice of the Peace may be called in and the substitute may not be a person qualified pursuant to subsection (2) of this section. If the sitting Justice of the Peace is sick, disabled, or absent, another Justice of the Peace or City Judge may be called in if available or a person may be called in who is qualified pursuant to subsection (2) of this section if another Justice of the Peace or City Judge is not readily available. If the sitting Justice of the Peace is on vacation or in training, the substitute is to be chosen in the same manner as if the sitting Justice of the Peace is sick, disabled, or absent, as long as there is not another Justice of the Peace from the county of the sitting Justice of the Peace. In determining who is available to act as a substitute, the sitting Justice of the Peace may rely on letters from other Justices of the Peace and City Judges that they are unavailable. However, after a reasonable time, the sitting Justice of the Peace should contact those who wrote the letters to determine if they are still unavailable. 48 A.G. Op. 11 (2000). See also 40 A.G. Op. 26 (1983), and Potter v. District Court, 266 M 384, 880 P2d 1319 (1994).

County Residency Not Required of Acting Justice of the Peace: An acting Justice of the Peace who is called to act pursuant to this section and who is otherwise qualified to serve under 3-10-202 need not be a resident of the county where the court sits. 43 A.G. Op. 51 (1990).

Authority to Select Substitute Justice of the Peace — Substitution Choices: A Justice of the Peace has the primary authority to select his substitute during temporary absences. In the event the justice is sick, disabled, or absent and is unable to call in a substitute, one may be called in by the County Commissioners. The Justice of the Peace or the County Commissioners must look to the following substitution choices: (1) another justice, if available; (2) a city judge; or (3) a qualified person from the list provided for in subsection (2) of this section. In the event the Justice of the Peace is on vacation or attending a training session, if there is no other justice in the county, the Justice of the Peace must look to the same substitution choices. 43 A.G. Op. 49 (1989).

Qualifications for List of Temporary Substitute Justices: In order to be eligible for the list of persons provided by a Justice of the Peace as temporary substitute justices, persons must meet the qualifications set forth in 3-10-202(2) and the residency requirements of 3-10-204. 42 A.G. Op. 4 (1987).

No Requirement of Specific Length of Time of Absence of Justice Prior to Appointment of Substitute: There is no specific length of time for which a regular Justice of the Peace must be absent before the County Commissioners can appoint an acting Justice of the Peace. (See 1985 amendment.) 40 A.G. Op. 26 (1983).

Acting Justice Not to Be Appointed in Advance: The Board of County Commissioners may not appoint an acting Justice of the Peace, in advance, to act whenever a Justice is sick, disabled, or absent. (See 1985 amendment.) 40 A.G. Op. 26 (1983).

"Other Qualified Person" Not to Replace Disqualified Justice: Prior to the 1985 amendment, in a county where there was only one Justice of the Peace and the Justice was disqualified under 3-10-231(1), a Justice from a neighboring county had to be called in as a replacement. Section 3-10-231 did not authorize calling in "some other qualified person" in this situation. 40 A.G. Op. 26 (1983).

Collateral References

Criminal Law *key* 90; Justices of the Peace *key* 52, 53, 57.

51 C.J.S. Justices of the Peace §§41, 47, 61.

3-10-233. Jurisdiction of acting justice.

Compiler's Comments

Section Not Codified: A part of 93-403, R.C.M. 1947, that was redundant with 3-10-233, MCA, was not codified. This provision was not repealed and is still valid law. Reference may be made to sec. 2, Ch. 92, L. 1933.

3-10-234. Expenses of acting justice.

Compiler's Comments

Section Not Codified: A part of 93-403, R.C.M. 1947, that was redundant with 3-10-234, MCA, was not codified. This provision was not repealed and is still valid law. Reference may be made to sec. 2, Ch. 92, L. 1933.

Attorney General's Opinions

Compensation of Substitute Justice of the Peace — Waiver of Compensation: A county is generally required to compensate a substitute Justice of the Peace; however, a substitute justice may elect to waive compensation. 43 A.G. Op. 49 (1989).

Part 3
Jurisdiction of Justices' Courts

Part Case Notes

Jurisdiction Required Before Judgment Effective: It is fundamental that a court rendering a decision in a particular case have jurisdiction over the parties. When the judgment roll on its face shows that the court was without jurisdiction to render the judgment, its pronouncement is in fact no judgment and cannot be enforced. No right can be derived from it. All proceedings founded upon it are invalid and ineffective for any purpose. Ciotti v. Hoover, 237 M 462, 774 P2d 406, 46 St. Rep. 969 (1989), following Apple v. Edwards, 123 M 135, 211 P2d 138 (1949).

Part Law Review Articles

The Effect of Lack of Jurisdiction, Slaight, 16 Mont. L. Rev. 54 (Spring 1955).

3-10-301. Civil jurisdiction.

Compiler's Comments

2003 Amendment: Chapter 470 inserted (1)(f) providing jurisdiction in cases involving violations of Title 75, chapter 7, part 1; inserted (1)(j) providing jurisdiction to order streambed restoration or payment of costs for restoration; and made minor changes in style. Amendment effective April 23, 2003.

Retroactive Applicability: Section 6, Ch. 470, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all notices of projects pending before a conservation district on [the effective date of this act]." Approved April 23, 2003.

1999 Amendment: Chapter 393 throughout (1) increased amounts from $5,000 to $7,000. Amendment effective October 1, 1999.

1995 Amendments — Coordination Instruction: Chapter 350 in (1)(h) deleted reference to subsection (3) of 40-4-121 and at end inserted "and orders of protection, as provided in Title 40, chapter 15"; and made minor changes in style.

The amendments to this section in Ch. 578, L. 1995, were rendered void pursuant to sec. 36, Ch. 578, L. 1995, a coordination section.

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

1991 Amendment: In seven places throughout (1) increased amounts subject to civil jurisdiction from $3,500 to $5,000.

1989 Amendment: Inserted (1)(h) authorizing issuance of temporary restraining orders.

1981 Amendment: Increased the jurisdictional limits from $1,500 to $3,500.

Case Notes

Remedy for Criminal Prosecution of Public Nuisance: Panasuk, convicted in City Court of misdemeanor criminal public nuisance charges under 45-8-111, contended that because Rule 4(B), M.R.Civ.P. (Title 25, ch. 20), 25-31-102, and this section preclude a nonrecord court from hearing actions involving the title to or possession of real property, jurisdiction for prosecution of the public nuisance charge must lie with the District Court. He cited 45-8-112 as authority that any action to abate a nuisance must be brought in the name of the state and that because abatement is a form of injunctive relief, the District Court has exclusive jurisdiction. He also argued that 27-30-202 provides the exclusive civil and criminal remedies for public nuisance. His claims were dismissed for the following reasons: (1) charges filed under 45-8-111 were criminal rather than related to a civil action involving title to or possession of real property, which is regulated by the sections cited by Panasuk; (2) the remedy created by 27-30-202 has been supplemented by subsequent legislative action regarding a City Court's jurisdiction over misdemeanors and by the enactment of 46-17-101, which requires that all prosecutions brought in City Court be commenced by a sworn complaint; and (3) because Panasuk's interpretation would result in a direct contradiction between 27-30-202 and statutes subsequently enacted, the argument that 27-30-202 provides the exclusive remedies for public nuisance is erroneous. Billings v. Panasuk, 253 M 403, 833 P2d 1050, 49 St. Rep. 499 (1992).

Prosecutor's Quasi-Judicial Immunity From Civil Action: Plaintiff's civil action against a County Attorney, based upon alleged unlawful arrest by certain policemen and challenging the legality of the criminal prosecution against him, must be dismissed because the County Attorney

enjoys absolute immunity for prosecutorial actions done in a quasi-judicial capacity. Hall v. Lympus, 478 F. Supp. 644, 36 St. Rep. 1692 (D.C. Mont. 1979).

Jurisdictional Amounts: The jurisdiction of a Justice of the Peace, in an action for a fine, penalty, or forfeiture, is not dependent upon the amount that the plaintiff might recover but upon the amount that he demands. Reynolds v. Smith, 48 M 149, 135 P 1190 (1913).

Actions Arising on Contract: This section does not clothe Justice's Courts with jurisdiction to entertain an action brought against a Sheriff for damages for nonperformance of an official duty and to recover a penalty imposed for its nonperformance, such an action not being one arising on contract. Oppenheimer v. Regan, 32 M 110, 79 P 695 (1905).

Attorney General's Opinions

Validity of Ordinance Allowing Escalating Penalty for Failure to Obtain Business License: A Lewistown city ordinance that allows an escalating monthly penalty for failure to obtain a local business license is valid despite Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983). The Shea case determined that escalating penalties for parking violations were criminal penalties and violative of Art. II, sec. 28, Mont. Const. In analyzing the Lewistown ordinance, the Attorney General observed that the crucial issue is whether the penalty imposed is civil or criminal in nature. Applying the five factors outlined in Brown v. Multnomah County District Court, 570 P2d 52 (Ore. 1977), he concluded that the instant ordinance imposed civil penalties and that the ordinance was valid. 40 A.G. Op. 75 (1984).

Collateral References

Justices of the Peace *key* 31, et seq., and specific titles.

51 C.J.S. Justices of the Peace §26, et seq.

47 Am. Jur. 2d Justices of the Peace §§25 through 34.

Jurisdiction of Justice of the Peace to order setoff as between judgments. 121 ALR 480.

When title to real property deemed involved within contemplation of statute providing that Justice of the Peace (or similar court) shall not have jurisdiction of matters relating to title to land. 115 ALR 504.

3-10-302. Jurisdiction over forcible entry, unlawful detainer, and residential landlord-tenant disputes.

Collateral References

Courts *key* 472(7); Forcible Entry and Detainer *key* 16(1), (3); Justices of the Peace *key* 36(7).

21 C.J.S. Courts §§487, 488, 490; 36A C.J.S. Forcible Entry and Detainer §§31, 32; 51 C.J.S. Justices of the Peace §30.

47 Am. Jur. 2d Justices of the Peace §30.

3-10-303. Criminal jurisdiction.

Compiler's Comments

1999 Amendment: Chapter 393 in (1)(a) at beginning inserted exception clause; inserted (2) concerning district court concurrent jurisdiction over certain misdemeanors; and made minor changes in style. Amendment effective October 1, 1999.

1993 Amendment: Chapter 223 in (2), before "violations", inserted "misdemeanor"; inserted (4) regarding concurrent jurisdiction of violations of fish and game statutes; and made minor changes in style.

1985 Amendments: Chapter 52 inserted (6) relating to misdemeanor violations of Title 81, chapter 8, part 2.

Chapter 318 in (3) substituted "punishable by a fine exceeding $500 or imprisonment exceeding 6 months or both such fine and imprisonment" for "punishable by a fine only not exceeding $1,500".

1983 Amendments: Chapter 601 inserted (5) relating to violations of Title 61, chapter 10.

Chapter 612, in (1), deleted from end "excluding jurisdiction in cases commenced under Title 45, chapter 9, except to act as examining and committing courts and to conduct preliminary hearings as provided in subsection (4)".

Case Notes

Jurisdiction Over Municipal Court Protection Order: The Missoula County District Court issued a permanent injunction, based on a stalking violation of 45-5-220, prohibiting Gillispie from contacting his former wife "by a third person, except by telephone or correspondence through her attorney of record". Gillispie admitted contacting his former wife's mother in Missoula and was charged with and convicted in Municipal Court of an order of protection violation pursuant to 45-5-626. On appeal, Gillispie contended that the Municipal Court did not

have jurisdiction over the offense. A Municipal Court has geographic jurisdiction over misdemeanors coextensive with the jurisdiction of Justices' Courts located in the same county. Although neither Gillispie nor the former wife was present in Missoula County at the time of the prohibited phone call, the former wife's mother received the call in Missoula County. Thus, the Municipal Court was vested with jurisdiction over the misdemeanor order of protection violation when the necessary result of Gillispie's third-party contact by telephone was committed within Missoula County. Missoula v. Gillispie, 1999 MT 268, 296 M 444, 989 P2d 401, 56 St. Rep. 1085 (1999).

Expungement of Two of Three Prior DUI and BAC Convictions — Lack of District Court Jurisdiction — Felony Charge Dismissed: Sidmore was arrested for DUI in March 1996. His driving record revealed that he had a 1988 Idaho DUI conviction, a 1994 Montana DUI conviction, and a 1990 Montana BAC conviction. Pursuant to 61-8-714, Sidmore was charged with felony DUI, fourth offense. Sidmore agreed that under 61-8-714, both BAC and DUI convictions can be counted to determine the total number of convictions that a defendant has received. However, under the 1989 version of 61-8-722, Sidmore did not receive a subsequent BAC conviction within the 5-year period following the 1990 BAC conviction nor did the 1994 DUI conviction prevent expungement of the 1990 BAC conviction, so the 1990 BAC conviction was expunged from the record. Further, under the 1987 version of 61-8-714, Sidmore did not receive a subsequent DUI conviction within the 5-year period following the 1988 Idaho DUI conviction nor did the 1990 BAC conviction prevent expungement of the 1988 Idaho DUI conviction, so the 1988 Idaho DUI conviction was also expunged from the record, making the 1994 DUI conviction the only prior conviction that could be counted to support the felony DUI charge. Thus, under this section, the Justice's Court retained jurisdiction of the misdemeanor 1996 offense and the District Court erred in denying Sidmore's motion to dismiss the felony DUI charge for lack of jurisdiction. St. v. Sidmore, 286 M 218, 951 P2d 558, 54 St. Rep. 1381 (1997).

Fish and Game Restitution Not Within Jurisdiction of Justice Court: The Justice Court imposed a $515 fine, suspended fishing privileges, and ordered restitution in an amount necessary to mitigate the effects of the violation to be paid by a plaintiff who had intentionally introduced fish into Lake Mary Ronan. On appeal, the Supreme Court vacated the conviction and sentence, holding that the potentially limitless fine that could be imposed to mitigate the effects of a violation of the fish and game statute is inconsistent with the statute that grants Justices' Courts jurisdiction over violations of fish and game statutes that are punishable by a fine not exceeding $1,000. (See 1993 amendment.) Moseley v. Lake County Justice Court, 256 M 206, 845 P2d 732, 50 St. Rep. 28 (1993).

Misdemeanor Criminal Contempt — Jurisdiction Properly Exercised — Denial of Application for Writ of Certiorari Proper: The District Court properly denied defendant's application for a Writ of Certiorari to review his Justice's Court criminal contempt conviction. The Justice's Court clearly had jurisdiction under this section of a misdemeanor criminal contempt action. Thus, one of the three indispensable requisites to the granting of a Writ, that an inferior board has exceeded its jurisdiction, is absent. St. v. McAllister, 218 M 196, 708 P2d 239, 42 St. Rep. 1515 (1985).

Justice's Court — No Authority to Vacate Conviction and Order Alteration of Driver's Civil Records: A Justice's Court does not have authority to vacate a conviction or to direct alteration of the records of the Division of Motor Vehicles. Therefore, a Justice's Court could not order the Division to strike a prior DUI conviction and not consider it in revoking the driver's license on a second conviction. The District Court properly granted the Division's motion to quash a Writ of Mandate issued by the District Court staying the actions of the Division. Lancaster v. Dept. of Justice, 218 M 97, 706 P2d 126, 42 St. Rep. 1425 (1985).

Criminal Contempt and Contempt of Court Distinguished — District Court Without Jurisdiction to Try Criminal Contempt: Criminal contempt, a misdemeanor crime defined in 45-7-309, is an offense against society prosecuted by the state, whereas contempt of court is a judicial power arising out of Art. VII, sec. 1, Mont. Const., and Title 3 that allows a court to enforce its own judgments and maintain decorum in its proceedings. Thus, while only the District Court could have found the defendant in contempt of court for failure to pay a fine from a criminal proceeding of that court, it lacked jurisdiction to try a misdemeanor criminal contempt action for failure to pay the fine because criminal contempt, like most other misdemeanors, must be brought in Justice's Court. St. v. Abrams, 209 M 508, 680 P2d 585, 41 St. Rep. 871 (1984).

District Court Jurisdiction Over DWI Charge: Jurisdiction of the District Court over criminal matters depends on the maximum sentence that can be imposed for committing the crime. When the maximum sentence increases to give the District Court jurisdiction because of repeated DWI offenses, proof of prior offenses does not become an element that must be proved at trial and can

be proved at any time until sentencing. Thus, failure to introduce evidence of prior convictions at trial does not deprive the District Court of jurisdiction. St. v. Campbell, 189 M 107, 615 P2d 190, 37 St. Rep. 1337 (1980).

Jurisdiction Retained: Where District Court's jurisdiction is originally invoked by an information charging a felony, it is not lost by State subsequently reducing the charge to only a lesser included misdemeanor. St. v. Shults, 169 M 33, 544 P2d 817, 33 St. Rep. 20 (1976).

Justices of the Peace — Authority to Issue Search Warrants for Dangerous Drugs: Justices' Courts are constitutionally created, and when the Legislature has had the opportunity to limit their jurisdiction and has not seen fit to do so, a legislative intent to authorize the practice of Justices' Courts issuing search warrants is presumed as a Justice of the Peace meets the standard of "a neutral and detached magistrate" to examine the application for a search warrant and determine whether reasonable cause exists for its issuance. St. v. Snider, 168 M 220, 541 P2d 1204, 32 St. Rep. 1056 (1975).

Driving While Under Influence of Intoxicating Liquor: Since the offense of driving a vehicle on a highway while under the influence of intoxicating liquor is a misdemeanor, it falls within the jurisdiction of a Justice of the Peace under this section. Wilson v. Brodie, 148 M 235, 419 P2d 306 (1966).

Maximum Penalties: Prior to a 1985 amendment, a Justice of the Peace had no jurisdiction of a misdemeanor where the offense charged was punishable by a fine exceeding $500 or imprisonment of more than 6 months. State ex rel. Freebourn v. District Court, 105 M 77, 69 P2d 748 (1937).

Petit Larceny: Justices of the Peace have exclusive jurisdiction of petit larceny (no longer an offense in Montana; see, generally, Title 45, ch. 6, part 3). In re Jones, 46 M 122, 126 P 929 (1912).

Cohabitation: The offense of living together in open and notorious cohabitation in a state of fornication (no longer an offense in Montana) was a misdemeanor and fell within the jurisdiction of a Justice of the Peace. Hosoda v. Neville, 45 M 310, 123 P 20 (1912).

Venue of Justices: A Justice of the Peace elected in one township was held to have jurisdiction of an offense against local option committed in another township in the same county. St. v. O'Brien, 35 M 482, 90 P 514 (1907).

Constitutional Basis: In 1903, the sections of the statute enumerating the classes of cases of which a Justice of the Peace could take cognizance confined them strictly to the constitutional limitations in the 1889 Constitution. Shea v. Regan, 29 M 308, 74 P 737 (1903).

Attorney General's Opinions

Concurrent Jurisdiction Over Certain Misdemeanors: Misdemeanor prosecutions that are within the concurrent jurisdictions of both a City Court and a Justice's Court may at the election of the prosecuting officer be brought in either court. Prosecution of such offenses must be instituted in the name of the state. 37 A.G. Op. 42 (1977).

Private Citizen Without Power to Prosecute Complaint: Since the term "magistrate" includes Justices of the Peace in section 16-3101, R.C.M. 1947 (now 2-15-501, 7-4-2711 through 7-4-2713, and 7-4-2715 through 7-4-2717), the County Attorney is charged with the responsibility of prosecuting complaints in Justices' Courts and a Justice of the Peace cannot allow a private citizen to prosecute a complaint. However, a County Attorney is vested with normal discretion and need not file and prosecute every individual's complaint when there is insufficient evidence to warrant prosecution or when such a prosecution would not be in the interests of justice. 36 A.G. Op. 47 (1975).

District Court Jurisdiction Over Gambling Acts: Pursuant to 46-2-201, District Courts have exclusive jurisdiction over violations of the Montana Card Games Act, the Bingo and Raffles Law, and the sports pools law. 35 A.G. Op. 86 (1974).

Law Review Articles

Criminal Jurisdiction in Montana Indian Country, Wilson, 47 Mont. L. Rev. 513 (1986).

Collateral References

Criminal Law *key* 90.

22 C.J.S. Criminal Law §123; 92 C.J.S. Venue §22.

47 Am. Jur. 2d Justices of the Peace §§17 through 19.

Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state. 37 ALR 4th 852.

Justice of the Peace as a person in authority within rule excluding confession made under promise of immunity by person in authority. 7 ALR 431.

3-10-304. Territorial extent of civil jurisdiction.

Compiler's Comments

2001 Amendment: Chapter 515 near middle of first sentence substituted "intermediate" for "mesne" and at end of second sentence substituted "in any county of the state" for "as provided in 25-31-407". Amendment effective October 1, 2001.

Attorney General's Opinions

Enforcement of Out-of-County Justice's Court Judgments: An execution issued by a Justice's Court may be enforced only within the county in which the Justice's Court has territorial jurisdiction. To enforce a Justice's Court judgment in a different county, the procedures of 25-31-912 and 25-31-913 (both repealed) must be followed. Under those provisions, an abstract of the Justice's Court judgment may be entered in the judgment docket of the District Court and the Clerk of the District Court may then issue an execution directed to the Sheriff of any county in the state. An execution issued pursuant to 25-31-913 (now repealed) is enforceable in the same manner as an execution issued on a judgment of the District Court. 37 A.G. Op. 126 (1978).

Part 4
Contempts in Justices' Courts

Part Law Review Articles

The Increasing Use of the Power of Contempt, Hilts, 32 Mont. L. Rev. 183 (Summer 1971).

3-10-401. Contempts a justice may punish for.

Case Notes

Appearance of Accused Through Attorney Allowed Unless Personal Appearance Ordered: Section 46-16-120 clearly allows persons charged with misdemeanor offenses to appear through their attorney only, unless the court specifically requires a personal appearance by the accused. In this case, a Justice of the Peace specifically ordered the defendant to "make all court appearances" but did not order the defendant to appear in person. Therefore, an appearance by the defendant's attorney satisfied the statute, and it was error for the defendant to be held in contempt for failure to appear. St. v. Voth, 270 M 349, 892 P2d 537, 52 St. Rep. 225 (1995).

Crime of Criminal Contempt — Section Not a Limitation: The provisions of this section apply only to the judicial contempt power vested in the courts by Art. VII, sec. 1, Mont. Const., and Title 3; they do not limit a Justice's Court's power to try and sentence for the misdemeanor crime of criminal contempt found at 45-7-309. St. v. Abrams, 209 M 508, 680 P2d 585, 41 St. Rep. 871 (1984).

Criminal Contempt and Contempt of Court Distinguished — District Court Without Jurisdiction to Try Criminal Contempt: Criminal contempt, a misdemeanor crime defined in 45-7-309, is an offense against society prosecuted by the state, whereas contempt of court is a judicial power arising out of Art. VII, sec. 1, Mont. Const., and Title 3 that allows a court to enforce its own judgments and maintain decorum in its proceedings. Thus, while only the District Court could have found the defendant in contempt of court for failure to pay a fine from a criminal proceeding of that court, it lacked jurisdiction to try a misdemeanor criminal contempt action for failure to pay the fine because criminal contempt, like most other misdemeanors, must be brought in Justice's Court. St. v. Abrams, 209 M 508, 680 P2d 585, 41 St. Rep. 871 (1984).

Collateral References

Contempt *key* 1, et seq., 35.
17 C.J.S. Contempt §60.
17 Am. Jur. 2d Contempt §72.

3-10-402. Proceedings.

Compiler's Comments

2001 Amendment: Chapter 496 near beginning inserted "whether or not it is" and at end substituted statement that the procedures contained in a list of sections apply for "it may be punished summarily. To that end, an order must be made reciting the facts as they occurred and adjudging that the person proceeded against is thereby guilty of contempt and that he be punished as therein prescribed." Amendment effective October 1, 2001.

Case Notes

Contempt During Contempt Proceeding: Where relator disobeyed two subpoenas issued by a Justice of the Peace and, while in court to show cause why he should not be punished for

contempt, committed a contempt in the presence of the court, the court could fine him for the contempt in its presence. State ex rel. Mercer v. Woods, 116 M 533, 155 P2d 197 (1945).

Collateral References

Contempt *key* 52.
17 C.J.S. Contempt §§75, 78.

3-10-405. Conviction in docket.

Collateral References

Contempt *key* 63(1).
17 C.J.S. Contempt §§96 through 103.

Part 5
Records in Justices' Courts

3-10-501. Contents of docket — electronic filing and storage of court records.

Compiler's Comments

1995 Amendment: Chapter 174 inserted (2) allowing electronic filing or storage of documents; and made minor changes in style.

Case Notes

General Denial: A general denial has no "parts" within the meaning of subsection (4) (now (1)(d)) of this section; hence an entry that defendant interposed an oral general denial is sufficient. Malano v. Bressan, 76 M 366, 245 P 871 (1926).

Pleadings: Under the rule that the pleadings in a Justice's Court as well as the statutory requirements with relation thereto must be liberally construed, the requirements of section 9638, R.C.M. 1921 (25-31-501, now repealed), and of section 9703, R.C.M. 1921 (now 3-10-501), mean no more than that he shall enter such a recital thereof as would advise a person of common understanding of the nature of the pleadings. Malano v. Bressan, 76 M 366, 245 P 871 (1926).

Adjournment of Trial: While a Justice of the Peace may, with the consent of the parties, take a case under advisement, the adjournment of the trial must be to a time and place appointed for that purpose. State ex rel. Collier v. Houston, 36 M 178, 92 P 476 (1907), distinguished in In re Graye, 36 M 394, 93 P 266 (1907).

Collateral References

Justices of the Peace *key* 138.
51 C.J.S. Justices of the Peace §125.
47 Am. Jur. 2d Justices of the Peace §36.

3-10-502. How entries made — prima facie evidence.

Case Notes

Abstract of Judgment: An abstract of a judgment rendered in the Justice's Court and filed in the court, the docket itself having been lost, is not admissible as prima facie evidence of the validity of the judgment. Miller v. Miller, 47 M 150, 131 P 23 (1913).

Collateral References

51 C.J.S. Justices of the Peace §125.
47 Am. Jur. 2d Justices of the Peace §§36, 38.

3-10-503. Index to docket — electronic filing and storage of court records.

Compiler's Comments

1995 Amendment: Chapter 174 inserted (2) allowing electronic filing or storage of documents; and made minor changes in style.

3-10-511. Records delivered to successor.

Compiler's Comments

1995 Amendment: Chapter 174 inserted reference to electronically filed or stored documents; and made minor changes in style.

3-10-512. Proceedings when office becomes vacant.

Compiler's Comments

1995 Amendment: Chapter 174 inserted two references to electronically filed or stored documents; and made minor changes in style.

Attorney General's Opinions

Vacancy: An appointed Justice of the Peace will hold office for the remainder of the unexpired term. 36 A.G. Op. 67 (1976).

Collateral References

Justices of the Peace *key* 11, 138.

51 C.J.S. Justices of the Peace §§10, 45 through 47.

3-10-513. Who is the successor.

Attorney General's Opinions

Vacancy: An appointed Justice of the Peace will hold office for the remainder of the unexpired term. 36 A.G. Op. 67 (1976).

Collateral References

Justices of the Peace *key* 3, 8.

51 C.J.S. Justices of the Peace §§6, 8.

3-10-514. Docket of predecessor.

Collateral References

Justices of the Peace *key* 56.

51 C.J.S. Justices of the Peace §§46, 47.

3-10-518. Youth matters cited in justice's court — public record.

Compiler's Comments

Effective Date: Section 11, Ch. 466, L. 1995, provided that this section is effective April 14, 1995.

Part 6
Fines, Penalties, Forfeitures, Fees, and Costs in Justices' Courts

3-10-601. Collection and disposition of fines, penalties, forfeitures, and fees.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 470 at beginning of (1) inserted exception clause; near beginning of (2) and (3) in exception clauses inserted references to 75-7-123; and made minor changes in style. Amendment effective April 23, 2003.

Chapter 510 in (4)(c) inserted second sentence requiring fee incurred by justice's court to be added to judgment amount. Amendment effective October 1, 2003.

Retroactive Applicability: Section 6, Ch. 470, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all notices of projects pending before a conservation district on [the effective date of this act]." Approved April 23, 2003.

2001 Amendments — Composite Section: Chapter 257 in (3)(a) substituted reference to department of revenue for reference to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 449 in (3) at beginning inserted exception clause; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 515 in (1) at beginning after "Each" substituted "justice's court" for "justice of the peace"; in (2) at beginning inserted exception clause; inserted (4) allowing contracts by a justice's court with a private person or entity for the collection of a final judgment; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1995 Amendments: Chapter 18 in former (4)(f), after "compensation", inserted "and assistance"; and made minor changes in style.

Chapter 509 in (3)(a) inserted "for deposit in the state general fund"; and deleted (4) that read: "(4) The state treasurer shall distribute money received under subsection (3) as follows:

(a) 44.81% to the state general fund;
(b) 9.09% to the fish and game account in the state special revenue fund;
(c) 11.76% to the state highway account in the state special revenue fund;
(d) 16.93% to the traffic education account in the state special revenue fund;
(e) 0.57% to the department of livestock account in the state special revenue fund;
(f) 15.9% to the crime victims compensation account in the state special revenue fund; and

(g) 0.94% to the department of family services special revenue account for the battered spouses and domestic violence grant program." Amendment effective July 1, 1995.

Chapter 546 in former (4)(g) substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Special Session Amendment: Chapter 39 in (4)(a) increased amount to general fund from 27.88% to 44.81%; in (4)(d) decreased amount to traffic education account from 33.86% to 16.93%; and made minor changes in style. Amendment effective July 1, 1994.

1991 Amendments: Chapter 296 at end of (2) inserted exception clause.

Chapter 667 in (4)(a) increased money to state general fund from 23% to 27.88%; in (4)(b) decreased money to fish and game account from 10% to 9.09%; in (4)(c) decreased money to state highway account from 12.5% to 11.76%; in (4)(d) decreased money to traffic education account from 36% to 33.86%; in (4)(e) decreased money to Department of Livestock account from 0.6% to 0.57%; in (4)(f) decreased money to crime victims compensation account from 16.9% to 15.9%; and in (4)(g) decreased money to Department of Family Services from 1% to 0.94%. Amendment effective July 1, 1991.

1987 Amendment: Deleted former (2) that read: "(2) He shall also file an itemized statement showing all fees received during the preceding month in his court. The statement shall state that all fees required by law to be paid during the preceding month in connection with matters pending before the court have been paid into the county treasury and listed in the itemized statement and that he has not received or been promised, nor has any one else received or been promised for him, any other moneys, emolument, or thing by virtue of or in connection with his office. The statement shall be subscribed and sworn to by the justice"; and inserted (2) through (4) relating to disposition of fines, penalties, and forfeitures by a Justice's Court, County Treasurer, and the State Treasurer.

Function Transfer: Pursuant to sec. 117, Ch. 609, L. 1987, the Governor by executive order transferred the function and authority contained in this section from the Department of Social and Rehabilitation Services to the Department of Family Services.

Attorney General's Opinions

Conviction Charge as Penalty — Distribution: The charge imposed on criminal defendants by 46-18-236 is a penalty or a forfeiture and is to be collected and distributed pursuant to subsections (2) through (4) of this section. (See 1995 amendments.) 42 A.G. Op. 63 (1988).

3-10-602. Penalty.

Collateral References

Justices of the Peace *key* 30.

51 C.J.S. Justices of the Peace §23.

Part 7
Constables

3-10-701. Constables to attend court.

Attorney General's Opinions

Mileage Reimbursement for Constables: Parties involved in civil litigation in Justice's Court who desire to have legal process served by a constable should prepay the cost of service based upon the estimated round-trip mileage involved and the mileage reimbursement rate established in 2-18-503. A constable should be reimbursed for travel only upon the amount of miles actually traveled at the legally established rate. Any difference between the amount paid by the parties to litigation for service of process by a constable and the amount that the constable is reimbursed accrues to the benefit of the local governing body providing the service. 42 A.G. Op. 15 (1987).

Collateral References

Sheriffs and Constables *key* 87, 95.

80 C.J.S. Sheriffs and Constables §§66, 80 through 88.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§54, 57, 63, 99.

Liability of sheriff or other officer executing process of execution or attachment for failure to seize sufficient property. 93 ALR 316.

Liability of public officer or his bond for the defaults and misfeasances of his clerks, assistants, or deputies. 1 ALR 222, supplemented by 102 ALR 174 and 116 ALR 1064; subdivision VIII, superseded by 71 ALR 2d 1140.

3-10-702. Governed by law prescribing sheriffs' duties.

Compiler's Comments

1991 Amendment: In (1) deleted reference to 25-31-408(3); and made minor changes in style.

1985 Amendment: Inserted (2) applying provisions of 7-32-2141(1) to constables and providing for payment of fees collected under 7-32-2141(1).

Collateral References

Sheriffs and Constables *key* 77.

80 C.J.S. Sheriffs and Constables §§52 through 54.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§46, 48, 49, 54.

3-10-703. Compensation.

Attorney General's Opinions

Mileage Reimbursement for Constables: Parties involved in civil litigation in Justice's Court who desire to have legal process served by a constable should prepay the cost of service based upon the estimated round-trip mileage involved and the mileage reimbursement rate established in 2-18-503. A constable should be reimbursed for travel only upon the amount of miles actually traveled at the legally established rate. Any difference between the amount paid by the parties to litigation for service of process by a constable and the amount that the constable is reimbursed accrues to the benefit of the local governing body providing the service. 42 A.G. Op. 15 (1987).

3-10-704. Deputy constables.

Case Notes

Persons Authorized to Serve Summons: This section did not affect section 93-6711, R.C.M. 1947 (pertinent part in 25-31-408, now repealed), authorizing a nonofficial person to serve a Justice's summons. State ex rel. Reagan v. Harrington, 31 M 294, 78 P 484 (1904).

Liability of Justice: An official act of a special officer, for which a Justice of the Peace will be liable, is what is done under color of or by virtue of his office but in excess of his authority. Ramsey v. Burns, 27 M 154, 69 P 711 (1902).

Proof of Service: When service of summons in an action pending in a Justice's Court is made by a person appointed by the Justice, proof of service must be made by affidavit. Layton v. Trapp, 20 M 453, 52 P 208 (1898).

Collateral References

Sheriffs and Constables *key* 8 through 14, 22.

80 C.J.S. Sheriffs and Constables §§34, 35, 45, 46, 57 through 60, 399.

3-10-705. Authority of deputy.

Collateral References

Sheriffs and Constables *key* 79 through 81.

80 C.J.S. Sheriffs and Constables §§20, 52 through 54, 57 through 60, 62.

3-10-706. Execution of process by retiring constable.

Collateral References

Sheriffs and Constables *key* 84, 157.

80 C.J.S. Sheriffs and Constables §§57 through 60, 80 through 92.

Part 10
Small Claims Division

3-10-1001. Purpose.

Compiler's Comments

1981 Amendment: Deleted and reenacted reference to Title 25, chapter 35, to reflect enactment of new small claims act.

3-10-1004. Jurisdiction — removal from district court.

Compiler's Comments

1991 Amendment: In (1) and (2) increased amount from $2,500 to $3,000.

1989 Amendment: In (1) and (2) increased amount of a claim that may be heard in Small Claims Court from $1,500 to $2,500.

1981 Amendment: Increased amount in (1) from $750 to $1,500 and in (2) from $500 to $1,500.

CHAPTER 11
CITY COURTS

Chapter Law Review Articles

Montana's Judicial System—A Blueprint for Modernization, Mason & Crowley, 29 Mont. L. Rev. 1 (Fall 1967).

Chapter Collateral References

Montana Judges Deskbook for Municipal, Justice, and City Courts (1999).

Part 1
Creation and Jurisdiction

Part Case Notes

No Error in City Court's Denial of Motion for Continuance After Similar Motions Granted: Over 2 years after charges were filed and after numerous motions of continuance were granted, a trial date was set pursuant to Robertson's motion for continuance to permit him to make travel arrangements after moving to California. Three weeks before trial, Robertson again moved for a continuance on the same grounds, but the City Court declined to grant it, and Robertson was tried in absentia. However, it was Robertson, not the court, who caused the trial to go forward without him. Not only did he have ample time to arrange for an appearance in Montana, but rescheduling trial dates upon motion is within the trial court's discretion and will be affirmed absent a showing that the court abused its discretion by acting arbitrarily without conscientious judgment or exceeding the bounds of reason, resulting in substantial injustice. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000). See also Campbell v. Canty, 1998 MT 278, 291 M 398, 969 P2d 268 (1998).

City Not Liable for City Judge's Civil Rights Violations — City Judge Acts Under State Authority: Claims of the indigent defendants, who were not effectively informed by a City Judge of their right to appointed counsel, were properly dismissed. Under Montana law, a City Judge's acts and decision in advising defendants of their right were performed under the state's authority rather than the city's authority, thereby precluding imposition of civil rights liability on the city. Further, the indigent defendants did not have standing to seek declaratory and injunctive relief. There are other remedies for indigent defendants in future situations—they can file a complaint with the state body charged with overseeing judicial conduct, they can appeal their convictions to a higher court, and they can sue a judge individually because a judge does not enjoy judicial immunity for unconstitutional behavior when the facts are sufficient to grant declaratory or injunctive relief. Eggar v. Livingston, 40 F3d 312 (9th Cir. 1994).

Jurisdiction Required Before Judgment Effective: It is fundamental that a court rendering a decision in a particular case have jurisdiction over the parties. When the judgment roll on its face shows that the court was without jurisdiction to render the judgment, its pronouncement is in fact no judgment and cannot be enforced. No right can be derived from it. All proceedings founded upon it are invalid and ineffective for any purpose. Ciotti v. Hoover, 237 M 462, 774 P2d 406, 46 St. Rep. 969 (1989), following Apple v. Edwards, 123 M 135, 211 P2d 138 (1949).

Part Law Review Articles

The Effect of Lack of Jurisdiction, Slaight, 16 Mont. L. Rev. 54 (Spring 1955).

3-11-101. City court established.

Compiler's Comments

1995 Amendment: Chapter 292 deleted (2) that read: "(2) Police court is hereby renamed city court, and all references to police court or police judges in the Montana Code Annotated shall be considered amended to read city court or city judge"; and made minor changes in style.

1987 Amendment: In (1) inserted second sentence requiring the judge to establish regular sessions.

Case Notes

Limited Jurisdiction: Police courts (now city courts), like Justices' Courts, were courts of limited jurisdiction and had only such authority as was expressly conferred upon them. State ex rel. Marquette v. Police Court, 86 M 297, 283 P 430 (1929).

Attorney General's Opinions

Legality of Evening City Court Hours: A City Judge is not prohibited by 3-1-301, 3-1-302, or this section from establishing regular sessions of the court during evening hours as long as regular sessions are not convened on Sundays or other legal holidays and the court is open for business on judicial days. These sections place no limitations on the hours of business. Although 7-4-102 requires that City Court offices be open for business continuously from 8 a.m. until 5 p.m. on weekdays, this does not prohibit a City Judge from setting office hours after 5 p.m. on weekdays. As long as the office is open during the required hours for the transaction of business, such as the filing of court documents with the clerk, the City Judge may set additional hours for regular court sessions. 43 A.G. Op. 61 (1990).

3-11-102. Concurrent jurisdiction.

Compiler's Comments

1987 Amendment: In (1), near middle after "misdemeanors", deleted "punishable by a fine not exceeding $500 or by imprisonment not exceeding 6 months or by both fine and imprisonment" and inserted remainder of subsection giving court concurrent jurisdiction over proceedings under chapter 10, part 3, of this title.

Case Notes

Authority of City Court to Try DUI Charge Under State Statute — No Error in District Court Failure to Dismiss: McCarvel was charged in Billings City Court with DUI in violation of 61-8-401. McCarvel moved to dismiss on the grounds that he was charged with a violation of a state statute rather than a city ordinance. The City Court refused to dismiss. McCarvel was convicted by a jury and took a de novo appeal to the District Court. The District Court refused to dismiss and McCarvel pleaded guilty. The Supreme Court held that the Billings City Court had jurisdiction over the DUI offense concurrent with the Justice's Court. Because McCarvel was charged with a violation of a state statute rather than a city ordinance, the language of the city ordinance was immaterial. Billings v. McCarvel, 262 M 96, 863 P2d 441, 50 St. Rep. 1460 (1993).

City Attorney's Authority to Try City Prosecution of Statutory DUI Violation Upheld: McCarvel was charged in Billings City Court with a violation of the state DUI statute. He was convicted by a jury and appealed to District Court in which, after the District Court refused to dismiss, he pleaded guilty. The Supreme Court held that the city attorney could lawfully prosecute a violation of a state statute in City Court because the City Court had concurrent jurisdiction with the Justice's Court and because it was the city attorney's duty to prosecute on behalf of the city offenses heard in that court. Billings v. McCarvel, 262 M 96, 863 P2d 441, 50 St. Rep. 1460 (1993).

City Court Jurisdiction Over Misdemeanor Public Nuisance Charges: Section 46-2-203 provides a City Court with jurisdiction over criminal misdemeanor charges as authorized by this section. A violation of 45-8-111, maintaining a public nuisance, is clearly a misdemeanor; therefore, a City Court has jurisdiction over a criminal prosecution for public nuisance. Billings v. Panasuk, 253 M 403, 833 P2d 1050, 49 St. Rep. 499 (1992).

Power of State to Enact and Courts to Enforce Laws Regulating Motor Vehicles: Appellant, appearing pro se, challenged as unconstitutional laws requiring driver's license, mandatory insurance, and vehicle registration. The Supreme Court held that the issues raised by the appellant were frivolous, unreasonable, and groundless in that the court had previously recognized the state's power to regulate motor vehicles in the interests of public safety at the expense of individual rights. Whitefish v. Hansen, 237 M 105, 771 P2d 976, 46 St. Rep. 657 (1989).

Search Warrants: Police magistrates (now City or Municipal Judges) have never been given authority by the Legislature to issue search warrants, and therefore a search warrant issued by such magistrate must be void. St. v. Tropf, 166 M 79, 530 P2d 1158 (1975), applied, with regard to substitute judges, in Potter v. District Court, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

Nature of Departments: Where the District Courts are divided into departments, the court presided over by each of the Judges is the District Court and not a departmental court; neither department is a court of concurrent jurisdiction with the other, and in the absence of rules either Judge has full authority to proceed in any matter properly before the court. State ex rel. P.S.C. v. Great N. Util. Co., 86 M 442, 284 P 772 (1930).

Misdemeanors: A Justice of the Peace had jurisdiction under this section, as it existed prior to 1903 amendment, over misdemeanors committed in a town or city within his township. In re Ryan, 20 M 64, 50 P 129 (1897).

Attorney General's Opinions

City Court Jurisdiction of Third Offense DUI: Prior to 1987, a city court had jurisdiction of a third offense DUI only if that offense was adopted as a city ordinance and prosecuted as such by the city attorney. The 1987 amendment to 3-11-102 enabled third offense DUI to be prosecuted in city court as a violation of state law as well. 42 A.G. Op. 34 (1987).

Jurisdiction Over DUIs: A City Court may issue an arrest warrant in the name of the state of Montana when a violation of 61-8-401 is charged. 41 A.G. Op. 95 (1986).

Responsibility to Prosecute Misdemeanors in City Court: The City Attorney has primary responsibility to prosecute in City Court offenses committed in the city limits and charged as violations of state law. 37 A.G. Op. 62 (1977).

Concurrent Jurisdiction Over Certain Misdemeanors: Misdemeanor prosecutions which are within the concurrent jurisdictions of both a City Court and a Justice's Court may at the election of the prosecuting officer be brought in either court. Prosecution of such offenses must be instituted in the name of the state. 37 A.G. Op. 42 (1977).

Necessity of Ordinance or Resolution to Implement City Court Misdemeanor Jurisdiction: Statutory jurisdiction granted City Courts by 3-11-102 is self-executing, and a city or town does not need to take any affirmative action by resolution or ordinance to effect such jurisdiction. 37 A.G. Op. 42 (1977).

3-11-103. Exclusive jurisdiction.

Compiler's Comments

1991 Amendment: In (2), (3), (4), and (5) increased amount from $2,500 to $5,000.

1985 Amendment: Substituted "$2,500" for "$300" throughout.

Case Notes

Penalty Assessment of Fines: Statute providing for penalty assessments in addition to fines was void for indirectly enlarging jurisdiction of Justices' courts and police courts (now city courts) in terms of maximum fine which might have been imposed. State ex rel. Sanders v. Butte, 151 M 171, 441 P2d 190 (1968).

Defect in Complaint: The mere fact that an action for the violation of a city ordinance was entitled in the name of the "town" did not deprive the police court (now city court) of jurisdiction. State ex rel. Moreland v. Police Court, 87 M 17, 285 P 178 (1930).

Limited Jurisdiction: Police courts (now city courts), like Justices' Courts, were courts of limited jurisdiction and had only such authority as was expressly conferred upon them. State ex rel. Marquette v. Police Court, 86 M 297, 283 P 430 (1929).

False Imprisonment: A police (now city court) magistrate had jurisdiction to determine the validity of a town ordinance for a violation of which he sentenced plaintiff in an action for false imprisonment to serve a term in the county jail. Shampagne v. Keplinger, 78 M 114, 252 P 803 (1927).

Exclusive Jurisdiction of J.P. Designated to Act: A Justice of the Peace designated by the Town Council to act as police judge (now city court judge) had exclusive jurisdiction of all cases arising under the ordinances, in addition to his jurisdiction as a Justice. State ex rel. Streit v. Justice Court, 45 M 375, 123 P 405 (1912).

Prosecution in Name of Municipality: Prosecutions for violations of local ordinances must be conducted in the name of the municipality. State ex rel. Streit v. Justice Court, 45 M 375, 123 P 405 (1912).

Removal of Snow and Ice: Noncompliance with an ordinance making it the duty of an occupant of premises within the limits of a city to keep a sidewalk free from snow and ice was not in its essence a crime or misdemeanor, and actions arising therefrom were properly prosecuted in the name of the city. State ex rel. Streit v. Justice Court, 45 M 375, 123 P 405 (1912); Helena v. Kent, 32 M 279, 80 P 258 (1905). See also State ex rel. Butte v. District Court, 37 M 202, 95 P 841 (1908).

Vagrancy: The police court (now city court) of a city or town had exclusive jurisdiction of all proceedings for the violation of an ordinance defining vagrancy. State ex rel. Butte v. District Court, 37 M 202, 95 P 841 (1908).

Attorney General's Opinions

District Court Jurisdiction Over Gambling Acts: Pursuant to 46-2-201, District Courts have exclusive jurisdiction over violations of the Montana Card Games Act, the Bingo and Raffles Law, and sports pools law. 35 A.G. Op. 86 (1974).

Collateral References

Courts *key* 188(1), et seq.; Criminal Law *key* 90(1).

21 C.J.S. Courts §249, et seq.; 22 C.J.S. Criminal Law §123.
Criminal jurisdiction of municipal or other local court. 102 ALR 5th 525.

Part 2
City Judges

3-11-201. Number of judges — term of office.

Compiler's Comments

1995 Amendment: Chapter 292 inserted (1) allowing a city governing body to determine the number of judges required to operate the City Court; and made minor changes in style.

1987 Amendment: In (2), near beginning, inserted "city or" and at end substituted "or until the agreement provided for in 3-11-205 terminates" for "unless the council terminates the designation".

1983 Amendment: In (1) after "An elected" inserted "or appointed".

1981 Amendment: Substituted "An elected" for "In cities of the first, second, and third class, the" at the beginning of (1); added (2) setting term of a Justice of the Peace acting as City Judge under 3-11-205.

Transition: Section 404, Ch. 571, L. 1979, is a transition section.

3-11-202. Salary — qualifications.

Compiler's Comments

1989 Amendment: Inserted (1)(b) requiring county residency for a City Judge; at beginning of (1)(c) inserted "satisfy"; and made minor changes in punctuation.

1987 Amendment: Inserted (1) relating to required qualifications; and at end of (2) inserted "or resolution".

Transition: Section 16, Ch. 528, L. 1979, provided: "A judicial officer, as defined in 1-1-202, who is occupying his judicial office on the effective date of this act shall continue to be paid expenses on the same basis as he is receiving them on the effective date of this act until the expiration of his term of office. All judicial officers who take office or begin a new term of office after the effective date of this act shall receive expenses as provided in this act."

Severability: Section 17, Ch. 528, L. 1979, was a severability section.

Attorney General's Opinions

Trustee of Community College District — Authority to Hold Office: A City Judge is prohibited by Art. VII, sec. 10, Mont. Const., from holding office as an elected trustee of a community college district. 44 A.G. Op. 21 (1991).

3-11-203. When substitute for judge called in.

Compiler's Comments

1987 Amendment: In (1), in introductory clause, and in (2), after "call in", inserted "a city judge" and after "some qualified" substituted "person" for "resident of the city or town"; and inserted (3) allowing City Judges and Justices of the Peace to sit as City Judge upon request.

Attorney General's Opinions

When Qualified Person May Be Called as Substitute for City Judge: A qualified person may be called in as a substitute City Judge when the acting City Judge is sick, absent, unable to act, or disqualified. There is no requirement to contact any City Judge or Justice of the Peace prior to calling in a qualified person. A substitute City Judge may be called in regardless of the availability of another City Judge or Justice of the Peace and whether or not the other justices have expressed that they are unavailable. 48 A.G. Op. 11 (2000).

Limitation on the Power of City Judge to Appoint Replacement: A Justice of the Peace who has been designated to act as a City Judge for a town must himself make the determination that he is "unable to act" under the provisions of this section. That determination does not, however, confer on a City Judge the authority to appoint a regular deputy or substitute City Judge with power and authority to act in all matters the same as the regular City Judge. The City Judge who has determined he is unable to act for any reason may call in a Justice of the Peace or a qualified resident of the town to act in his place, but the substitute may act only as long as the situations listed in this section exist. 38 A.G. Op. 113 (1980).

3-11-205. Justice of the peace or judge of another city as city judge.

Compiler's Comments

1989 Amendment: In first sentence of (1), at end, substituted "justice of the peace or the city judge of another city or town to act as city judge" for "justice court", at beginning of second sentence inserted "The justice of the peace or city judge shall reside in the", at beginning of the third sentence substituted "The city or town" for "to act as city court and", after "such" substituted "judge" for "court", after "county" inserted "the other city or town, or the justice of the peace or the judge", before "payment" deleted "proportionate", near beginning of fourth sentence, after "justice", substituted "of the peace or other city judge" for "court", after "commissioners" inserted "or governing body of the city or town", before "in all cases" substituted "judge" for "court", and near beginning of fifth sentence, after "peace", inserted "or city judge of another city or town"; and made minor changes in phraseology and punctuation.

1987 Amendment: In (1) substituted first two sentences, allowing council to designate Justice's Court to act as City Court and fix funding for the court and stating criteria for when the Justice's Court acts as City Court, for "In a town, the council may designate a justice of the peace of the county in which the town is situated to act as city judge and may by ordinance fix the compensation for his services. The justice of the peace so designated who agrees to act in that capacity shall act as city judge in all cases arising out of violations of ordinances in which the town is a party" and in last sentence, after "town", inserted "or city".

1981 Amendments: Chapter 56 inserted (2) allowing combination of offices of Justice of the Peace and City Judge.

Chapter 269 substituted "who agrees to act in that capacity shall act as city judge" for "may act as city judge" near the middle of (1).

Case Notes

Exclusive Jurisdiction of J.P. Designated to Act: A Justice of the Peace designated by the Town Council to act as police judge (now city court judge) had exclusive jurisdiction of all cases arising under the ordinances, in addition to his jurisdiction as a Justice. State ex rel. Streit v. Justice Court, 45 M 375, 123 P 405 (1912).

Attorney General's Opinions

Residency for Justice of the Peace Serving as City Judge: A Justice of the Peace may not be appointed to serve as a City Judge in a town in which he does not reside without violating Art. VII, sec. 9, Mont. Const. 41 A.G. Op. 82 (1986). (Annotator's note: However, see 1987 amendment note. The 1987 amendment allows the council to designate a Justice's Court of the county to act as City Court.)

Town Council to Designate City Judge From Justices of the Peace of Same County: The statutes concerning the selection of a City Judge for a town stand in stark contrast to those concerning cities. Title 7 has no provision that requires the appointment of a City Judge by a town in order to implement it. Therefore, a town is not authorized by 7-4-4103 to appoint a City Judge who is not a Justice of the Peace. Rather, 3-11-205 provides for the appointment by the Town Council of a Justice of the Peace of the county in which the town is situated to act as City Judge. The 1975 amendment, which changed the statute to read, "[t]he justice of the peace so designated may act as a police judge in all cases arising out of a violation of ordinances in which the town is a party" from "must act", simply provides a designated Justice of the Peace with some discretion in the performance of his duty as City Judge for a town, where formerly the duty was mandatory. The statute does not authorize the appointment of a City Judge who is not a Justice of the Peace of the county in which the town is situated. The City Judge must be designated by the Town Council. 38 A.G. Op. 80 (1980).

3-11-206. City to provide facilities — conduct of court business — electronic filing and storage of court records.

Compiler's Comments

2001 Amendment: Chapter 6 in (1)(a) substituted "city court" for "judge"; in (1)(a)(i) after "enable the" substituted "judge and the clerk of city court, if any, to conduct business" for "judge to perform the judge's duties"; in (1)(a)(ii) near end substituted "court" for "judicial office"; inserted (1)(b) allowing for a clerk of city court; in (2) at beginning substituted "The provisions of 3-6-302(1) and" for "Except as provided in subsection (2)(b), the provisions of 3-6-301 through"; deleted former (2)(b) that read: "(b) If the governing body of a city establishes by ordinance the position of clerk of city court, 3-6-301 does not apply to the city court"; and made minor changes in style. Amendment effective October 1, 2001.

1995 Amendment: Chapter 174 inserted (3) allowing electronic filing or storage of documents; and made minor changes in style.

1985 Amendment: Inserted (2) concerning conduct of City Court business.

Part 3
Procedure in City Courts

Part Compiler's Comments

Sections Not Codified: Sections 11-1605 through 11-1607, R.C.M. 1947, procedural references that are redundant or no longer applicable, were not codified in the MCA. The sections have not been repealed and are still valid law. Reference may be made to sec. 4914 through 4916, Pol. C., 1895, or to the R.C.M. 1947.

3-11-301. City attorney to prosecute.

Compiler's Comments

1989 Amendment: At beginning inserted exception clause and near end substituted "from the city court" for "therefrom".

Case Notes

Prosecution Conducted in Name of Municipality: Prosecutions for violations of local ordinances must be conducted in the name of the municipality and by its prosecuting officer. State ex rel. Streit v. Justice Court, 45 M 375, 123 P 405 (1912).

Attorney General's Opinions

Violations of State Law: The City Attorney has primary responsibility to prosecute in City Court offenses committed in the city limits and charged as violations of state law. 37 A.G. Op. 62 (1977).

3-11-302. Who named as plaintiff.

Compiler's Comments

1991 Amendment: In (4) corrected reference and citation to Montana Justice and City Court Rules of Civil Procedure.

1987 Amendment: At beginning of (1) and (2) substituted "A criminal action" for "An action"; inserted (3) relating to criminal actions for violation of a state law within the county; and inserted (4) relating to how a city court civil action is prosecuted and defended.

1983 Amendment: In (1), substituted "must" for "shall"; in (2), substituted "may" for "shall", inserted "either" and the clause referring to the city or town as plaintiff, and inserted "must be brought" before "against the accused".

Case Notes

Authority of City Court to Try DUI Charge Under State Statute — No Error in District Court Failure to Dismiss: McCarvel was charged in Billings City Court with DUI in violation of 61-8-401. McCarvel moved to dismiss on the grounds that he was charged with a violation of a state statute rather than a city ordinance. The City Court refused to dismiss. McCarvel was convicted by a jury and took a de novo appeal to the District Court. The District Court refused to dismiss and McCarvel pleaded guilty. The Supreme Court held that the Billings City Court had jurisdiction over the DUI offense concurrent with the Justice's Court. Because McCarvel was charged with a violation of a state statute rather than a city ordinance, the language of the city ordinance was immaterial. Billings v. McCarvel, 262 M 96, 863 P2d 441, 50 St. Rep. 1460 (1993).

Attorney General's Opinions

Misdemeanor Under State Law: A City Court can try misdemeanor cases under state law, brought in the name of the state. 37 A.G. Op. 62 (1977).

3-11-303. Contempts city judge may punish for — procedure.

Compiler's Comments

2001 Amendment: Chapter 496 inserted (2) stating that the procedures contained in a list of sections apply; and made minor changes in style. Amendment effective October 1, 2001.

Case Notes

Sanctions and Contempt Imposed on Attorney by City Court Invalid: A City Court imposed sanctions on an attorney for failing to appear to defend a client in a DUI case. The attorney argued that he had been required to attend a hearing in District Court and had diligently tried to inform the City Court of the conflict. The City Court refused to revoke the sanctions, adding instead a contempt charge. The Supreme Court ruled that the sanctions were improper in that

the City Court acted arbitrarily in imposing them. The Supreme Court went on to reverse the contempt, finding on the basis that the sanctions did not constitute a lawful order and therefore the attorney could not be found in contempt for failing to pay the sanctions. Doran v. City Court of Whitefish, 239 M 94, 779 P2d 68, 46 St. Rep. 1539 (1989).

Power of State to Enact and Courts to Enforce Laws Regulating Motor Vehicles: Appellant, appearing pro se, challenged as unconstitutional laws requiring driver's license, mandatory insurance, and vehicle registration. The Supreme Court held that the issues raised by the appellant were frivolous, unreasonable, and groundless in that the court had previously recognized the state's power to regulate motor vehicles in the interests of public safety at the expense of individual rights. Whitefish v. Hansen, 237 M 105, 771 P2d 976, 46 St. Rep. 657 (1989).

Law Review Articles

The Increasing Use of the Power of Contempt, Hilts, 32 Mont. L. Rev. 183 (Summer 1971).

CHAPTER 12
SMALL CLAIMS COURTS

Chapter Law Review Articles

Making Small Claims Courts Work in Montana: Recommendations for Legislative and Judicial Action, Alexander, 45 Mont. L. Rev. 245 (Summer 1984).

Small Claims Courts in Montana: A Statistical Study, Alexander, 44 Mont. L. Rev. 227 (Summer 1983).

Montana's Judicial System—A Blueprint for Modernization, Mason & Crowley, 29 Mont. L. Rev. 1 (Fall 1967).

Part 1
General Provisions

3-12-101. Purpose — liberal construction.

Compiler's Comments

1997 Amendment: Chapter 241 near beginning, after "of this chapter", deleted "and chapter 34 of Title 25"; and made minor changes in style. Amendment effective July 1, 1997.

Case Notes

Jurisdiction Required Before Judgment Effective: It is fundamental that a court rendering a decision in a particular case have jurisdiction over the parties. When the judgment roll on its face shows that the court was without jurisdiction to render the judgment, its pronouncement is in fact no judgment and cannot be enforced. No right can be derived from it. All proceedings founded upon it are invalid and ineffective for any purpose. Ciotti v. Hoover, 237 M 462, 774 P2d 406, 46 St. Rep. 969 (1989), following Apple v. Edwards, 123 M 135, 211 P2d 138 (1949).

3-12-107. Procedure.

Compiler's Comments

Effective Date: Section 5. Ch. 241, L. 1997, provided: "[This act] is effective July 1, 1997."

Part 2
Small Claims Court Judge

3-12-201. Appointment — salary and expenses — qualifications.

Compiler's Comments

Transition: Section 16, Ch. 528, L. 1979, provided: "A judicial officer, as defined in 1-1-202, who is occupying his judicial office on the effective date of this act shall continue to be paid expenses on the same basis as he is receiving them on the effective date of this act until the expiration of his term of office. All judicial officers who take office or begin a new term of office after the effective date of this act shall receive expenses as provided in this act."

Severability: Section 17, Ch. 528, L. 1979, was a severability section.

Collateral References

Validity of age requirement for state public office. 90 ALR 3d 900.

Validity and construction of constitutional or statutory provision making legal knowledge or experience a condition of eligibility for judicial office. 71 ALR 3d 498.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period. 65 ALR 3d 1048.

CHAPTER 15
JURIES AND JURORS

Chapter Law Review Articles

Civil Procedure (a Montana Supreme Court Survey), Williams, 45 Mont. L. Rev. 335, at 347 (Summer 1984).

Montana's Judicial System—A Blueprint for Modernization, Mason & Crowley, 29 Mont. L. Rev. 1 (Fall 1967).

Chapter Collateral References

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal. 38 ALR 4th 1170.

Propriety of order forbidding news media from publishing names and addresses of jurors in criminal cases. 36 ALR 4th 1126.

Part 1
Juries — Definitions and Composition

3-15-101. Jury defined.

Collateral References

Jury *key* 1.

50A C.J.S. Juries §§2, 3.

3-15-102. Kinds of juries.

Collateral References

Grand Jury *key* 1; Jury *key* 1.

38A C.J.S. Grand Juries §§1 through 12; 50A C.J.S. Juries §§2, 3.

3-15-104. Trial jury defined.

Compiler's Comments

2001 Amendment: Chapter 473 at beginning inserted exception clause; and made minor changes in style. Amendment effective on occurrence of contingency.

Preamble: The preamble attached to Ch. 473, L. 2001, provided: "WHEREAS, the Legislature finds that there are a large number of asbestos-related claims by Montana citizens that are primarily within the venue of the 19th Judicial District; and

WHEREAS, the large number of asbestos-related claims will impede the ability of the single District Court Judge in the 19th Judicial District to handle the normal case load of the District and will raise several potential conflicts of interest; and

WHEREAS, it is imperative that asbestos-related claims be dealt with expeditiously in order to allow Montana citizens with life-threatening illnesses to receive a speedy resolution of their claims; and

WHEREAS, Article VII, section 1, of the Montana Constitution allows additional courts to be provided by law."

3-15-106. Number of a trial jury.

Compiler's Comments

1989 Amendment: In (1), after "12 persons or", substituted "with the approval of the court, it may consist of" for "provided that, in civil actions and cases of misdemeanor, it may consist of 12"; and made minor changes in phraseology.

Collateral References

Jury *key* 4.

50A C.J.S. Juries §§264 through 267.

Validity and efficacy of accused's waiver of unanimous verdict. 97 ALR 3d 1253.

Statute reducing number of jurors as violative of right to trial by jury. 47 ALR 3d 895.

3-15-107. Number in justices' courts.

Compiler's Comments

1991 Amendment: Deleted language relating to number of jurors in justice's court in civil cases.

Part 2
Jurors' Fees

3-15-201. Fees in courts of record.

Compiler's Comments

1981 Amendment: Changed "juror" to "jury panel member" at the beginning of (1); added the last sentence of (1) relating to additional compensation of selected jurors; substituted "shall forfeit per diem and mileage" for "in the discretion of the court, may receive per diem and mileage" at the end of (2).

Attorney General's Opinions

Juror Fees as District Court Costs: Juror fees are District Court costs and may be paid out of the fund established by 7-6-2511. 38 A.G. Op. 31 (1979).

Compensation Only for Attendance: A juror ("juror" changed to "jury panel member" in 1981) is not in attendance before a court during any period that he is excused and thus may not be compensated for those periods. 27 A.G. Op. 34 (1957).

Travel Compensation: This section places no limitation on the number of trips a juror ("juror" changed to "jury panel member" in 1981) may be compensated for, and he should be compensated his travel mileage for each day he travels between his residence and the county seat. 27 A.G. Op. 34 (1957).

Collateral References

Jury *key* 77(1).

50A C.J.S. Juries §353.

3-15-203. Fees in courts not of record and coroner inquests.

Compiler's Comments

1991 Amendment: In (1), after "criminal actions", inserted "and coroner inquests"; deleted former (3) that read: "(3) Jurors in coroner's inquests shall receive a fee of $7.50 per day"; and made minor changes in style.

1985 Amendment: In (1) at beginning of first sentence, substituted "A jury panel member" for "Jurors in courts not of record" and near middle of first sentence, after "$12 per day" inserted "for attendance before a court not of record and a mileage allowance, as provided in 2-18-503, for traveling each way between his residence and the court. A jury panel member selected for a case shall receive an additional $13 per day while serving"; and inserted (4) relating to forfeit of per diem and mileage by a juror excused on his own motion or a special juror not sworn in.

Case Notes

Declaratory Judgment on Requiring Prepayment of Jury Fees by Party Demanding Jury: The Supreme Court took original jurisdiction of, and heard, a petition for a declaratory judgment that it was unconstitutional to require prepayment, by a party requesting a civil jury trial, of each day's jury fees at or before the end of the prior day. The requirement was contained in Rule 14F, M.J.C.R.Civ.P. (Title 25, ch. 22). There was a justiciable controversy of statewide impact in that the rule applied to all justice courts; delay could abridge vital constitutional rights of litigants; the purpose of the declaratory judgment would serve the office of a writ, and the court has jurisdiction to issue, hear, and determine writs; and it would promote judicial economy to accept jurisdiction rather than force piecemeal litigation on the constitutionality of the rule. The court said that the prepayment requirement was contained in the rule and 3-15-203, which provided that "In civil actions, the jurors' fees must be paid by the party demanding the jury and taxed as costs against the losing party", and declared both the statute and rule unconstitutional. Hammer v. Justice Court, 222 M 35, 720 P2d 281, 43 St. Rep. 1040 (1986).

3-15-204. Duties of clerk as to jurors.

Compiler's Comments

2003 Amendment: Chapter 152 in (2) near middle before "warrant" inserted "county"; and made minor changes in style. Amendment effective March 26, 2003.

2001 Amendments — Composite Section: (Version effective on occurrence of contingency) Chapter 473 inserted (4) requiring clerk of court in county where asbestos-related claim is tried to perform outlined duties and requiring costs incurred by clerks to be paid from asbestos claims administration fund; and made minor changes in style.

Chapter 585 in (3) substituted "The amount specified in the warrant must be paid by the state as provided in 3-5-901 and 3-5-902" for "On presentation of such warrant to the county treasurer, the amount specified in the warrant must be paid out of the general fund unless the county has a district court fund. If the county has a district court fund, the amount must be paid out of such fund"; deleted former (4) that read: "(4) The clerk must make a detailed statement containing a list of the jurors and the amount of fees and mileage earned by each and file the same with the clerk of the board of county commissioners on the first day of every regular meeting of the board. No quarterly salary must be paid the clerk until such statement is filed. The board must examine such statement and see that it is correct"; and made minor changes in style. Amendment effective July 1, 2002.

Preamble: The preamble attached to Ch. 473, L. 2001, provided: "WHEREAS, the Legislature finds that there are a large number of asbestos-related claims by Montana citizens that are primarily within the venue of the 19th Judicial District; and

WHEREAS, the large number of asbestos-related claims will impede the ability of the single District Court Judge in the 19th Judicial District to handle the normal case load of the District and will raise several potential conflicts of interest; and

WHEREAS, it is imperative that asbestos-related claims be dealt with expeditiously in order to allow Montana citizens with life-threatening illnesses to receive a speedy resolution of their claims; and

WHEREAS, Article VII, section 1, of the Montana Constitution allows additional courts to be provided by law."

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1985 Amendment: In (3) after "general fund", inserted requirement that payment be out of district court fund if there is one.

1983 Amendment: In (2), after "service, a" substituted "warrant" for "certificate taken from a book containing a stub with a like designation"; after "by himself" deleted "under seal"; and in (3), substituted "warrant" for "certificate" twice.

Case Notes

Payment of Jurors: This section is mandatory both as to the duty of the Clerk and of the Treasurer, for the word "must" indicates that the duty of the Clerk becomes imperative as soon as a juror is entitled to his pay. It also indicates that the duty of the Treasurer is imperative as soon as a certificate ("certificate" was changed to "warrant" by a 1983 amendment) properly issued by the District Court Clerk is presented to him. In re Farrell, 36 M 254, 92 P 785 (1907). See County of Silver Bow v. Davies, 40 M 418, 107 P 81 (1910).

3-15-205. Costs of impaneling jury.

Compiler's Comments

2001 Amendments — Composite Section: (Version effective on occurrence of contingency) Chapter 473 in (3)(a) inserted exception clause; inserted (3)(b) requiring costs collected by asbestos claims court to be deposited in asbestos claims administration fund; and made minor changes in style.

Chapter 585 in (3) substituted "Costs collected under this section must be forwarded to the state treasurer for deposit in the state general fund" for "Costs collected under this section must be deposited in the county general fund unless the county has a district court fund. If the county has a district court fund, the costs must be deposited in the district court fund." Amendment effective July 1, 2002.

Code Commissioner Instruction: Pursuant to sec. 47, Ch. 257, L. 2001, in (3) in version effective July 1, 2002, and in (3)(a) in contingent version the code commissioner changed "state treasurer" to "department of revenue".

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1997 Amendment: Chapter 356 in (1), near middle after "continuance and", inserted "then" and near end, after "3-15-201", deleted "and such other costs as may have been incurred by the court"; inserted (2) regarding assessment of certain reasonable public expenses; and made minor changes in style.

1985 Amendment: At end inserted requirement that payment be out of district court fund if there is one.

Part 3
Jurors — Competency and Excuses

3-15-301. Who competent.

Compiler's Comments

2003 Amendment: Chapter 441 in introductory language inserted first sentence providing that it is state policy that all qualified persons serve on juries and at beginning of second sentence inserted exception clause and after "person is" deleted "a registered elector whose name appears on the most recent list of all registered electors, as prepared by the county registrar"; inserted (1), (2), and (3) providing qualifications to be juror; and made minor changes in style. Amendment effective October 1, 2005.

Applicability: Section 10, Ch. 441, L. 2003, provided: "[This act] applies to combined jury lists compiled partly from the lists submitted under [section 1] [61-5-127] by the department of justice to the clerks of the district courts on and after the second Monday of May 2006."

Case Notes

Constitutionality: This section was held constitutional as providing a true cross section of the community and hence not violative of equal protection requirements. Defendants did not prove that the jury selection system was disadvantageous to a cognizable class or that the disadvantage, if any, was occasioned by discrimination in the selection process. St. v. Fitzpatrick, 174 M 174, 569 P2d 383 (1977).

Former Law — Jury Selection Based on Assessment Roll Not Violative of Equal Protection of the Law: Using the definition that an impartial jury is one where potential membership is drawn from a "cross section of the community", court held that the class of people who pay no property taxes is not such a definable class as to provide a basis for objection on an equal protection ground, as all persons who do not pay taxes are not necessarily poor. St. v. Taylor, 168 M 142, 542 P2d 100 (1975).

System for Juror Qualifications — Constitutional: Argument that since Legislature enacted different system for juror qualifications based on most recent list of registered electors rather than last assessment roll, without providing for jury selection commissions to meet after effective date of statute, and therefore no list of eligible jurors was available, failed because of Supreme Court's interpretation that various county jury selection commissions must meet as soon as possible after effective date of statute, invoking court's rulemaking power, under Art. VII, sec. 2(3), Mont. Const., by supplying a meeting and selection date. State ex rel. Bennick v. District Court, 167 M 389, 538 P2d 1369 (1975).

Taxpayers of School District: In an action by school district against fire insurers for loss of school building, taxpayers of district were not disqualified to act as jurors. School District v. Globe & Republic Ins. Co. of America, 142 M 220, 383 P2d 482 (1963).

Sanity of Juror: Under this section and section 93-1303, R.C.M. 1947 (now 3-15-303), a person is not qualified to act as a juror unless he is in possession of his natural faculties. St. v. Bucy, 104 M 416, 66 P2d 1049 (1937).

Attorney General's Opinions

Impaneling Coroner's Jury: The Coroner has the power to select jurors by any reasonable mode suitable to perform his duty to impanel a Coroner's jury. 37 A.G. Op. 87 (1977).

Responsibility to Prosecute Misdemeanors in City Court: The City Attorney has primary responsibility to prosecute in City Court offenses committed in the city limits and charged as violations of state law. 37 A.G. Op. 62 (1977).

Collateral References

Jury *key* 38 through 56.

50A C.J.S. Juries §§283 through 300.

38 Am. Jur. 2d Grand Jury §§3, 4; 47 Am. Jur. 2d Jury §159, et seq.

9 Am. Jur. POF2d Systematic Exclusion or Underrepresentation of Identifiable Group, pp. 407 through 493.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal. 38 ALR 4th 1170.

Validity of statutory classifications based on population—jury selection statutes. 97 ALR 3d 434.

Validity of requirement or practice of selecting prospective jurors exclusively from list of registered voters. 80 ALR 3d 869.

Validity of enactment requiring juror to be an elector or voter or have qualifications thereof. 78 ALR 3d 1147.

Competency of juror as affected by his participation in a case of similar character, but not involving the party making the objection. 160 ALR 753.

Conferring right to suffrage upon women as qualifying them as jurors. 157 ALR 461.

Constitutional provision prohibiting local or special legislation as applied to statutes relating to juries. 155 ALR 789.

Intelligence, character, religious, or loyalty tests of qualifications of juror. 126 ALR 506.

Unfamiliarity with English as affecting competency of jurors. 34 ALR 194.

Membership in secret order or organization for suppression of crime as ground of challenge of juror. 31 ALR 411, supplemented by 158 ALR 1361.

Purposeful inclusion of Negroes in grand or petit jury as unconstitutional discrimination justifying relief in federal court. 4 ALR Fed. 449.

3-15-302. Inhabitants of local government jurisdiction competent.

Collateral References

Jury *key* 89.

50A C.J.S. Juries §382.

3-15-303. Who not competent.

Case Notes

Taxpayers of School District: In action by school district against fire insurers for loss of school building, taxpayers of district were not disqualified to act as jurors. School District v. Globe & Republic Ins. Co. of America, 142 M 220, 383 P2d 482 (1963).

Sanity of Juror: Under this section and section 93-1301, R.C.M. 1947 (now 3-15-301), a person is not qualified to act as a juror unless he is in possession of his natural faculties. St. v. Bucy, 104 M 416, 66 P2d 1049 (1937).

Waiver of Objection: Where counsel had the opportunity to inquire into the qualifications of a juror and exercised that right but failed to inquire whether he had ever been convicted of a felony, he will be held to have waived any objection thereto even though knowledge of the juror's incompetency did not come to counsel until after the trial. Stagg v. Stagg, 96 M 573, 32 P2d 856 (1934).

Collateral References

Jury *key* 45.

50A C.J.S. Juries §292.

Jury: visual impairment as disqualification. 48 ALR 4th 1154.

3-15-312. Discharge by court or jury commissioner.

Compiler's Comments

1983 Amendment: In introductory clause, after "court" inserted "or jury commissioner with the approval of the court"; at end of (2), deleted "or 3-15-507".

1981 Amendment: In (2) substituted "when it satisfactorily appears that the person should be excused under 3-15-313" for "when it satisfactorily appears that the person is exempt and claims the benefit of exemption".

3-15-313. Who may be excused — affidavit to claim excuse — permanent exclusion for chronically incapacitated.

Compiler's Comments

1997 Amendment: Chapter 345 inserted (3) providing that a person who is chronically incapacitated may file an affidavit with the jury commissioner and, upon approval of the court, may be permanently excused from jury service; inserted (4) establishing what constitutes chronic incapacity for the purpose of being permanently excused from jury service; and made minor changes in style.

1983 Amendment: Near beginning of (1), after "The court" inserted "or jury commissioner with the approval of the court"; in (2), substituted "jury commissioner" for "clerk of the court" twice; in last sentence of (2), after "The court" inserted "or jury commissioner with the approval of the court"; and deleted former (3), which read: "A person may also be excused from jury service upon presentation of his excuse to the court as provided in 3-15-507."

1981 Amendment: Substituted subsections (1) and (2), mandating an excuse in a case of undue hardship and providing a procedure for an affidavit to claim the excuse, for former text that read: "A juror must not be excused by a court for a slight or trivial cause or for hardship or

inconvenience to his business but only when material injury or destruction to his property or property entrusted to him is threatened or when his own health or the sickness or death of a member of his family requires his absence."

Case Notes

Failure of Prospective Juror to File Affidavit to Be Excused From Particular Trial Not Violative of Right to Impartial Jury: Defendant argued that under this section, the submitting of affidavits by those jurors who claim an undue hardship is mandatory and that failure to do so created a material deviation in procuring a jury and was therefore a denial of defendant's constitutional right to an impartial jury. However, once a juror is drawn from the pool, he may, without filing an affidavit, attempt to demonstrate an undue hardship so as to be excused on a particular jury panel. Failure to file an affidavit at that stage of the jury selection process does not constitute a deviation in jury selection sufficient to warrant violation of the right to an impartial jury. St. v. Henry, 241 M 524, 788 P2d 316, 47 St. Rep. 476 (1990).

Improper Questioning and Excusing of Prospective Jurors by Court Clerk: In depositor's suit against bank, the court's clerks examined the prospective jurors, using questions given the clerks by depositor's counsel, without notice to bank's counsel. The clerks asked if the prospective jurors had business or transactions with the bank and released some prospective jurors based on their answers to the questions, thus excusing them for cause without notice to bank's counsel or a ruling by the court. This occurred before an initial jury panel was called. This action violated the procedure set out in 25-7-221, 25-7-224, and Rules 47(a) and 47(b), M.R.Civ.P. (Title 25, ch. 20); was outside the type of action permitted by 3-15-313; and constituted reversible error requiring a new trial. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Grounds for Excuse: A District Judge has the right to excuse jurors called for service who are incompetent for any of the reasons enumerated in section 93-1301, R.C.M. 1947 (now 3-15-301), but under this section (as it read prior to the 1981 amendment), a juror could not be excused for slight or trivial cause or for hardship or inconvenience to his business. State ex rel. School District v. Carroll, 87 M 45, 284 P 1008 (1930).

Collateral References

Jury *key* 75.

50A C.J.S. Juries §351.

Religious belief as ground for exemption or excuse from jury service. 2 ALR 3d 1392.

Excusing women from jury panel in criminal case as ground for reversal of conviction. 9 ALR 661.

3-15-321. Attachment and fine for failure to attend.

Collateral References

Jury *key* 74.

50A C.J.S. Juries §350.

Part 4
Jury Lists

3-15-401. Jury lists — by whom and when made.

Compiler's Comments

1981 Amendment: Changed "December" to "June" in the middle of the first sentence.

Section Not Codified: The last sentence of section 93-1401, R.C.M. 1947, a temporary provision, was not codified. The provision has not been repealed and is still valid law. Reference may be made to sec. 1, Ch. 86, L. 1959.

Case Notes

System for Juror Qualifications — Constitutional: Argument that since Legislature enacted different system for juror qualifications based on most recent list of registered electors rather than last assessment roll, without providing for jury selection commissions to meet after effective date of statute, and therefore no list of eligible jurors was available, failed because of Supreme Court's interpretation that various county jury selection commissions must meet as soon as possible after effective date of statute, invoking court's rulemaking power, under Art. VII, sec. 2(3), Mont. Const., by supplying a meeting and selection date. State ex rel. Bennick v. District Court, 167 M 389, 538 P2d 1369 (1975).

Irregularities in Jury List: A member of a jury commission who has rendered the making of the jury list irregular cannot take advantage of his own wrongdoing when called on to answer a

criminal charge presented by a grand jury selected from such jury list. State ex rel. Clark v. District Court, 31 M 428, 78 P 769 (1904).

Collateral References

Jury *key* 60 through 64.

50A C.J.S. Juries §§280, 305 through 311.

47 Am. Jur. 2d Jury §§100 through 105, 116, 117.

Confusion of name or identity in drawing, summoning, calling, or impaneling juror in civil case, as affecting verdict. 89 ALR 2d 1242.

Exclusion of attorneys from jury list in criminal cases. 32 ALR 2d 890.

Exclusion of eligible class from jury list. 52 ALR 919.

3-15-402. Selection of qualified persons.

Compiler's Comments

2003 Amendment: Chapter 441 throughout section substituted "combined list" for "list" or "jury list"; in (1) in first sentence in two places inserted "working with the office of the secretary of state" and inserted second sentence providing that the officers shall submit a combined list to the district court ensuring that a person's name does not appear more than once on the list; and made minor changes in style. Amendment effective October 1, 2005.

Applicability: Section 10, Ch. 441, L. 2003, provided: "[This act] applies to combined jury lists compiled partly from the lists submitted under [section 1] [61-5-127] by the department of justice to the clerks of the district courts on and after the second Monday of May 2006."

1999 Amendment: Chapter 241 in (1) deleted former third sentence that read: "The numbers must be consecutive from "1" to the total number of jurors." Amendment effective October 1, 1999.

1997 Amendment: Chapter 345 at beginning of (1) inserted "Subject to subsection (2)"; inserted (2) providing that the list of persons qualified to serve as jurors may not include a person permanently excluded from jury service under 3-15-313; and made minor changes in style.

1991 Amendment: Inserted fourth sentence providing that a person's name may not appear on a jury list for more than one court during a 1-year term.

Case Notes

Fair and Impartial Jury: The jury was selected in substantial compliance with the law, and defendant's claim that he was denied a fair and impartial jury must fail. Having more numbers in the jury box than names on the jury list does not destroy the validity of the panel drawn; notifying jurors by telephone is permissible; having less jurors appear than were drawn does not invalidate a trial, as a defendant has no right to select a particular juror. St. v. Coleman, 177 M 1, 579 P2d 732, 35 St. Rep. 560 (1978).

Jury Selection — Constitutionality: A variation between the percentage of Air Force personnel in the county and the percentage of their representation on the jury panel, as taken from the assessment roll, does not reflect a constitutional infirmity in the selection method. St. v. Stewart, 175 M 286, 573 P2d 1138 (1977).

Former Law — Jury Selection Based on Assessment Roll Not Violative of Equal Protection of the Law: Using the definition that an impartial jury is one where potential membership is drawn from a "cross section of the community", court held that the class of people who pay no property taxes is not such a definable class as to provide a basis for objection on an equal protection ground, as all persons who do not pay taxes are not necessarily poor. St. v. Taylor, 168 M 142, 542 P2d 100 (1975).

System for Juror Qualifications — Constitutional: Argument that since Legislature enacted different system for juror qualifications based on most recent list of registered electors rather than last assessment roll, without providing for jury selection commissions to meet after effective date of statute, and therefore no list of eligible jurors was available, failed because of Supreme Court's interpretation that various county jury selection commissions must meet as soon as possible after effective date of statute, invoking court's rulemaking power, under Art. VII, sec. 2(3), Mont. Const., by supplying a meeting and selection date. State ex rel. Bennick v. District Court, 167 M 389, 538 P2d 1369 (1975).

Duplication of Names: Allegation in challenge to the panel that many names were included more than once on the jury list was sufficient to require the court to hear the facts to determine whether there had been a material variation from the statutory procedure in making up the jury list. St. v. Chapman, 139 M 98, 360 P2d 703 (1961).

Presumption of Regularity: The presumption that jury lists were made up according to law prevails until an offer of proof to the contrary is actually made. St. v. Bowser, 21 M 133, 53 P 179 (1898).

3-15-403. Lists delivered to clerk.

Compiler's Comments

2003 Amendment: Chapter 441 in (1) deleted former first sentence that read: "A list of the names of the persons selected, showing the place of residence and other proper particulars regarding each of them, so far as those particulars can be conveniently ascertained, must be made out and signed by the officers or a majority of them" and at beginning of first sentence substituted "The combined list prepared under 3-15-402 must be delivered by the office of the secretary of state" for "Within 15 days after the meeting, the list must be delivered by those officers" and at end after "office" inserted "no later than 5 business days after the receipt of the combined list"; in (2) near beginning after "jury" substituted "lists filed under subsection (1) and compiled under 3-15-404 and 46-17-202" for "list"; deleted former (3) that read: "(3) If the clerk of court is satisfied that a person whose name is drawn is deceased or mentally incompetent or has permanently moved from the county, the name of the person must be omitted from the jury list. The reason for the omission must be entered in the minutes of the court"; and made minor changes in style. Amendment effective October 1, 2005.

Applicability: Section 10, Ch. 441, L. 2003, provided: "[This act] applies to combined jury lists compiled partly from the lists submitted under [section 1] [61-5-127] by the department of justice to the clerks of the district courts on and after the second Monday of May 2006."

1999 Amendment: Chapter 241 inserted (2) requiring retention of copy of latest jury list and description of approved computerized random selection process, if used; inserted (3) allowing clerk of court to omit certain names from jury list; and made minor changes in style. Amendment effective October 1, 1999.

1981 Amendment: Changed "5 days" to "15 days" at the beginning of the last sentence.

Case Notes

Delay in Filing of List: A jury drawn from the list for the prior year was drawn legally and properly. State ex rel. School District v. Carroll, 87 M 45, 284 P 1008 (1930).

3-15-404. Duty of jury commissioner — jury box or computer database.

Compiler's Comments

2003 Amendment: Chapter 441 in (3) at end of sixth sentence inserted "filed under 3-15-403"; in (4) near middle after "jurors" substituted "filed under 3-15-403" for "prepared under the provisions of 3-15-402"; inserted (5) providing that a person's name may not appear on more than one court's jury list during a 1-year term; inserted (6) requiring the clerk of court to prepare a jury list for each division of the district court; and inserted (7) providing procedure for the omission of a person's name from a jury list. Amendment effective October 1, 2005.

Applicability: Section 10, Ch. 441, L. 2003, provided: "[This act] applies to combined jury lists compiled partly from the lists submitted under [section 1] [61-5-127] by the department of justice to the clerks of the district courts on and after the second Monday of May 2006."

1999 Amendment: Chapter 241 inserted (1) providing that clerk of court is jury commissioner; and made minor changes in style. Amendment effective October 1, 1999.

1985 Amendment: Inserted (1) allowing County Jury Commissioner to use either a jury box or a computer database to select jurors; in (2) at beginning of first sentence, inserted "If a county uses a jury box for selection of jurors" and substituted "jury commissioner" for "clerk", and at end of first sentence, substituted "subsection" for "section"; and inserted (3) requiring Commissioner to have the juror list prepared under 3-15-402 entered into the data base if a computerized data base is used to select jurors.

Case Notes

Fair and Impartial Jury: The jury was selected in substantial compliance with the law, and defendant's claim that he was denied a fair and impartial jury must fail. Having more numbers in the jury box than names on the jury list does not destroy the validity of the panel drawn; notifying jurors by telephone is permissible; having less jurors appear than were drawn does not invalidate a trial, as a defendant has no right to select a particular juror. St. v. Coleman, 177 M 1, 579 P2d 732, 35 St. Rep. 560 (1978).

Duplication of Names: An allegation in a challenge to the panel that many names were included more than once on the jury list was sufficient to require the court to hear the facts to

determine whether there had been a material variation from the statutory procedure in making up the jury list. St. v. Chapman, 139 M 98, 360 P2d 703 (1961).

Use of Capsules: Where a jury venire was drawn from a jury box in which there had been inserted approximately 30,000 numbers enclosed in separate black capsules and approximately 15,000 numbered slips of unfolded paper not enclosed in capsules, it was proper to issue a Writ of Prohibition restraining the Judge from calling civil and criminal cases to be tried before the jury venire. State ex rel. Henningsen v. District Court, 136 M 354, 348 P2d 143 (1959).

Collateral References

Jury *key* 65.

50A C.J.S. Juries §309.

3-15-405. Notice to jurors.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

3-15-411. Term of service of jurors.

Case Notes

Jurors Called But Not Serving: When a panel of 89 persons was called and sworn as jurors for the term but was discharged before serving at any trial, such jurors had not served within the meaning of this section and it was proper to return such names to jury box No. 1 and not jury box No. 2. St. v. Allison, 122 M 120, 199 P2d 279 (1948).

Expiration of Term: Under this section, the persons selected by the jury commissioners in January of one year are, after the filing of the list containing their names with the Clerk of the Court, the regular jurors, the persons liable to be drawn for jury service until a new list is selected in January of the next succeeding year and filed, upon which filing the list of the preceding year becomes functus officio and thereafter a panel may no longer be drawn from such list. State ex rel. Clark v. District Court, 86 M 509, 284 P 266 (1930), distinguished in State ex rel. Adami v. Lewis & Clark County, 124 M 282, 220 P2d 1052 (1950).

Action After Expiration of Term: A grand jury organized in one year could return a valid indictment the next year despite the fact the jury list for the latter year had been made and filed before the date of the indictment. The term of service in the statute referred to the term during which a jury could be selected from the jury list and not to the term during which the actual duties were to be performed. State ex rel. Clark v. District Court, 31 M 428, 78 P 769 (1904).

Collateral References

Jury *key* 76.

50A C.J.S. Juries §352.

Part 5
Trial Juries — District Court

Part Case Notes

Case Remanded Because Jury Improperly Summoned — Sufficient Evidence to Support Convictions for Felony Assault and Aggravated Burglary: Lopez was convicted of felony assault and aggravated burglary. On appeal, it was held that the District Court should not have denied Lopez's motion to strike the jury because under St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000), summoning a jury by telephone violates 3-15-505 (now repealed) and frustrates the random nature of the jury process. Lopez contended that the state did not meet its burden of proving the elements of either crime and that he should not be retried on those charges. The Supreme Court disagreed, finding that the state offered sufficient evidence to prove both offenses, and remanded for retrial. St. v. Lopez, 2001 MT 97, 305 M 218, 26 P3d 745 (2001).

Substantial Compliance Required With Statutes Providing for Method of Jury Panel Selection — Right to Speedy and Public Trial by Impartial Jury Implicated: Prior to Highpine's trial, the Clerk of District Court sent out questionnaires and summonses to potential jurors and then drew 200 names from the pool of those who returned the questionnaires. The clerk then served notice to the jurors by telephone. Those jurors who either failed to return the questionnaires or did so without including phone numbers were not contacted at all. Those who did not respond to the clerk's phone call were not contacted again once the requisite number of jurors had been contacted. Section 3-15-505 (now repealed) required that when "a person fails to respond to the notice, the clerk shall certify the failure to the sheriff, who shall then serve notice personally on such person and require a response to the notice". The District Court held that Highpine was not prejudiced by the clerk's method of selecting the jury panel. Highpine presented evidence to the

Supreme Court of the number of Native American households that do not have telephones and are therefore disproportionately excluded from the panel as a result of the procedure used by the clerk. The Supreme Court held that the practice of the clerk did not substantially comply with the requirements of statute and pointed out, citing St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000), that a defendant's right to challenge a jury panel for substantial noncompliance with statutory procedures is directly connected to that defendant's right to a speedy and public trial by an impartial jury. The Supreme Court held that the District Court erred when that court held that Highpine was not prejudiced by the actions of the clerk, reversed the District Court, and remanded the case for a new trial. St. v. Highpine, 2000 MT 368, 303 M 422, 15 P3d 938, 57 St. Rep. 1573 (2000).

3-15-501. Order directing that trial jury be drawn and summoned.

Compiler's Comments

1999 Amendment: Chapter 241 at beginning of (1) substituted "If" for "At least once each year in each county, when"; deleted former (3) that read: "(3) A district court may draw more than one trial jury in a given year if, in the opinion of the judge or judges thereof, the service of the trial jury in attendance has been unduly demanding, and in such case the trial jury in attendance may be excused by the court from further jury duty in that year"; and made minor changes in style. Amendment effective October 1, 1999.

1983 Amendment: In last sentence of (1), substituted "must be at the discretion of the court" for "which time may be at the same term in which the jurors are drawn or at the next succeeding term, in the discretion of the court".

Section Not Codified: The part of section 93-315, R.C.M. 1947, that is redundant with 3-15-501, MCA, was not codified in the MCA. This provision has not been repealed and is still valid law. Reference may be made to sec. 1, Ch. 144, L. 1959.

Case Notes

Failure to Summon Entire Panel by Telephonic Juror Summoning — New Trial Warranted: Of the 200-juror panel randomly drawn for Lamere's murder trial, over one-third of the prospective jurors were excluded from possible jury service by virtue of the manner in which a telephone-only notification method skewed the random nature and objectivity of the statutory jury selection procedures. By failing to summon the entire panel or array drawn for the trial, the purpose of juror notification was undermined. Jury duty cannot be lightly shirked, as a telephone summoning system allowed, without doing violence to the democratic nature of the jury system. Because the substantial failure to comply with the statutory requirements materially undermined the jury selection process, Lamere was granted a new trial. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), following Thiel v. S. Pac. Co., 328 US 217, 90 L Ed 1181, 66 S Ct 984 (1946), and applied retroactively in Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002). See also St. v. Groom, 49 M 354, 141 P 858 (1914), and State ex rel. School District v. Carroll, 87 M 45, 284 P 1008 (1930).

Substantial Compliance Standard Clarified With Regard to Statutory Process for Forming Jury: The objective statutory procedures established by the Legislature for the random selection of jurors are intended to protect a defendant's fundamental right to a fair and impartial jury and must be substantially complied with. Under Montana case law, the substantial compliance standard is not an absolute rule inasmuch as it permits minor deviations from statutory procedure. These technical deviations do not constitute a substantial failure to comply and therefore do not give rise to a presumption of prejudice. In clarifying the substantial compliance standard, the Supreme Court took guidance from federal case law developed under the federal Jury Selection and Service Act of 1968, 28 U.S.C. 1861, et seq. In order to establish a violation under the federal Act, a defendant must show that the government substantially failed to comply with the methods set forth by statute for jury selection. Substantial failure has been construed as a violation that contravenes one of two basic principles: (1) random selection of jurors; and (2) determination of juror disqualification, excuses, exemptions, and exclusion on the basis of objective criteria. A successful challenge to the jury panel may be founded only on a material departure from the law, a deviation amounting to more than a technical irregularity. Thus, a substantial or material statutory departure that affects the random nature or objectivity of the jury selection process establishes a violation independently of the departure's consequences in an individual case, while a technical or nonmaterial violation constitutes nonprejudicial error under the substantial compliance standard. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), overruling St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998).

Telephone Jury-Summoning Procedure Violative of Statutory Selection Process — Showing of Substantial Compliance, Not Prejudice, Required — Reversible Error: Lamere, charged with killing Brownlee, filed a pretrial motion to strike the jury panel, but the motion was denied. The question on appeal was whether the District Court erred in concluding that Lamere failed to show that the telephone-dependent summoning procedure used in Cascade County prejudiced Lamere's substantial rights to a jury drawn and summoned according to law. The Supreme Court applied St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998), in holding that the method of summoning jurors by telephone failed to comply with statutes governing the impaneling of a jury because jurors were neither served by mail nor served personally by the Sheriff. However, to warrant reversal, Robbins also required a showing of actual prejudice in addition to a substantial failure to comply with statutory law in drawing a jury panel. The Supreme Court chose to return to the per se rule of reversal for failure to substantially comply with statutes governing procurement of a trial jury, overruling the Robbins requirement of prejudice. The decision turned on the U.S. Supreme Court's contemporary distinction between trial error, to which harmless error review applies, and structural error, to which harmless error review is inapplicable (see Johnson v. U.S., 520 US 461, 137 L Ed 2d 718, 117 S Ct 1544 (1997), and its predecessors). In Lamere's case, the automatic rule of reversal prevailed because errors in the jury selection process are structural in nature, affecting the very framework within which a trial proceeds—errors that indelibly affect the essential fairness of the trial itself. A material failure to substantially comply with Montana statutes governing procurement of a trial jury may not be treated as harmless error because: (1) it precedes the presentation of evidence to the jury and cannot be analyzed as a mere trial error without resorting to speculation; (2) it precedes the trial process and cannot be quantitatively assessed for its prejudicial impact relative to the evidence introduced at trial; (3) it affects the very framework within which the trial proceeds; and (4) the impartiality of the jury goes to the very integrity of the justice system and because the right to an impartial jury is so essential to the concept of a fair trial that its violation cannot be considered harmless error. The substantial compliance standard vindicates not only the rights of the individual defendant but also the rights of the public in ensuring that the jury system remains inviolate, protecting a defendant's right to an impartial jury by encouraging reasonably strict compliance with statutory procedures intended to implement the fair cross-section guarantee of the sixth amendment of the U.S. Constitution. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), following Chapman v. Calif., 386 US 18, 17 L Ed 2d 705, 87 S Ct 824 (1967), Satterwhite v. Tex., 486 US 249, 100 L Ed 2d 284, 108 S Ct 1792 (1988), and Ariz. v. Fulminante, 499 US 279, 113 L Ed 302, 111 S Ct 1246 (1991), followed in St. v. Lopez, 2001 MT 97, 305 M 218, 26 P3d 745 (2001), and applied retroactively in Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002).

Improper Telephonic Notification of Jury Selection — Harmless Error: Rather than the statutory method of summoning jurors, the District Court Clerk sought to notify available jurors by telephone. If the juror was unavailable by telephone, the Clerk moved to the next name on the list. Robbins objected to the procedure, asserting that the 5-day mandate of 46-16-112 was not applicable to his motion to strike the venire and that the trial court erred by concluding that the challenge to the summoning process was untimely. The District Court found that the Clerk had substantially complied with the relevant statutes, but the Supreme Court disagreed, holding that the Clerk failed to comply with 3-15-505 (now repealed). However, because Robbins failed to adduce any actual prejudice in the summoning procedure, the error was held to be harmless. St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998), followed, with regard to improper use of telephonic summoning of jurors, but overruled, with regard to applicability of the harmless error standard in 46-20-701 and the requirement of an actual showing of prejudice to sustain a challenge to the jury panel under the substantial compliance standard, in St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000).

Right to Draw From Box No. 3: Where 70 jurors were drawn from jury box No. 1, there was no abuse of discretion in not drawing more, and no constitutional rights were violated by drawing from jury box No. 3 after the original panel was exhausted. St. v. Hay, 120 M 573, 194 P2d 232 (1948), distinguished in St. v. Porter, 125 M 503, 242 P2d 984 (1952).

Summoning Jury by Interested Sheriff: The facts that the victim of a homicide was a Deputy Sheriff and that the Sheriff was a witness for the state did not disqualify the latter or his deputies from summoning the jury on the theory that they were interested in the outcome of the prosecution. St. v. Heaston, 109 M 303, 97 P2d 330 (1939).

Summons for Jury Service: The fact that the summons under which jurors were ordered to appear for service as petit jurors contained a note appended thereto that if they had any reason why they should not serve they should return the summons personally to the judge and present

their excuses to him did not render the summons illegal. State ex rel. School District v. Carroll, 87 M 45, 284 P 1008 (1930).

Completion of Panel: A jury panel or array selected for the trial of cases in the District Court is not complete until the jurors are accepted for service and their names are placed in the trial juror box; only then can it be said that the array is impaneled. State ex rel. Clark v. District Court, 86 M 509, 284 P 266 (1930).

Nonprejudicial Irregularity: Where the trial court, instead of ordering a panel of regular jurors drawn in a number deemed by it sufficient for the term had them drawn under three successive orders as occasion required, defendant was not in position to complain of the procedure followed, he not having been prejudiced thereby. St. v. Vuckovich, 61 M 480, 203 P 491 (1921).

Mandatory Provisions: Provisions governing the drawing of a jury panel are mandatory. St. v. Landry, 29 M 218, 74 P 418 (1903).

Collateral References

Jury *key* 66(1) through (7).

50A C.J.S. Juries §§313 through 318, 324, 325.

Effect of juror's false or erroneous answer on voir dire in personal injury or death action as to previous claims of actions for damages by himself or his family. 38 ALR 4th 267.

3-15-503. Drawing — how conducted.

Compiler's Comments

1999 Amendment: Chapter 241 in (1)(b) deleted last sentence that read: "A copy of the latest jury list and a description of the approved computerized random selection process must be kept in the office of the clerk of court and be available for public inspection during normal business hours"; deleted former (3) and (4) that read: "(3) If the jury commissioner is satisfied that any person whose name is drawn is deceased or mentally incompetent or has permanently moved from the county, the name of the person shall be omitted from the list and another name shall be drawn in its place. The reason for the omission shall be entered upon the minutes of the court. The same procedure shall be followed as often as may be necessary, until the number of names of jurors required has been drawn.

(4) No person may be asked to serve for more than one term during any year unless all persons on the list established under 3-15-402 have been drawn and there are no other qualified jurors available"; and made minor changes in style. Amendment effective October 1, 1999.

1985 Amendment: At beginning of (1)(a) inserted "If the drawing of jurors is conducted by means of a jury box" and substituted "jury commissioner" for "clerk"; inserted (1)(b) providing computerized database drawing procedure and requiring a copy of the latest jury list and description of selection process to be kept in Clerk of Court's office and available for public inspection; at end of (2) after "jury box", inserted alternative relating to computerized selection; and in (4) after "all", substituted "persons on the list established under 3-15-402" for "the numbers in the jury box".

1981 Amendment: Changed "judge" to "jury commissioner" in the last sentence of (1); changed "court" to "jury commissioner" at the beginning of (3).

Case Notes

Use of Capsules: When a jury venire was drawn from a jury box in which there had been inserted approximately 30,000 numbers inclosed in separate black capsules and approximately 15,000 numbered slips of unfolded paper not enclosed in capsules, it was proper to issue a Writ of Prohibition restraining the Judge from calling civil and criminal cases to be tried before the jury venire. State ex rel. Henningsen v. District Court, 136 M 354, 348 P2d 143 (1959).

Waiver of Irregularities: Appellant's objection was waived by failure to challenge the panel with knowledge or means of knowledge at hand of the alleged illegal procedure in drawing the jury. Ledger v. McKenzie, 107 M 335, 85 P2d 352 (1938).

Judge's Functions: The judge ordered the drawing of the jury and directed the Clerk during its progress under 3-15-502 (now repealed), as it read prior to the 1981 amendment. State ex rel. Breen v. District Court, 34 M 107, 85 P 870 (1906).

Collateral References

Jury *key* 65, 66 (1) through (7).

50A C.J.S. Juries §§309, 313 through 318, 324, 325.

47 Am. Jur. 2d Jury §§100 through 105, 116, 117.

Confusion of name or identity in drawing, summoning, calling, or impaneling juror in civil case, as affecting verdict. 89 ALR 2d 1242.

Irregularity in drawing names for a jury panel as ground of complaint by defendant in criminal prosecution. 92 ALR 1109.

3-15-506. Obtaining additional jurors when necessary.

Compiler's Comments

1999 Amendment: Chapter 241 near beginning of (1) after "needed for" substituted "a trial" for "any term or trial"; and made minor changes in style. Amendment effective October 1, 1999.

1985 Amendment: In (1) near middle of first sentence, after "many", substituted "jurors" for "numbers from the jury box" and in second sentence, substituted "jurors" for "numbers"; in second sentence of (2), after "If, in the selection of the additional jurors", substituted "a juror is drawn who is a resident of an area outside the area designated by the court order, that juror's name or number shall be returned to the jury box or reinstated on the computer database and a new juror drawn" for: "a number is drawn and the jury list shows the person represented by the number to be a resident of an area outside the area designated by the court order, that number shall be returned to the jury box and a new number drawn."

1981 Amendment: Changed "judge" to "jury commissioner" in the middle of the first sentence of (1); substituted "Before the jury commissioner draws the numbers" for "Before drawing the numbers" in the last sentence of (1); changed "clerk of the court" to "jury commissioner" at the end of (3).

3-15-507. Clerk to call list of jurors summoned.

Compiler's Comments

1999 Amendment: Chapter 241 at beginning of (1) deleted "At the opening of court"; deleted former (2) that read: "(2) The names of the jurors present and not excused must be written on separate ballots with the names concealed. The clerk shall deposit the ballots in a box large enough to hold all of the ballots without crowding. The box shall be so arranged that the judge or clerk drawing the ballots from the box is unable to see the ballots he is about to draw"; and made minor changes in style. Amendment effective October 1, 1999.

1983 Amendment: At end of (1) substituted "and not excused" for "and the court may hear the excuses of prospective jurors summoned. The court shall excuse any person satisfying the requirements of 3-15-313(1)"; and in (2) substituted "The names of the jurors present and not excused must be written on separate ballots with the names concealed. The clerk shall deposit the ballots in a box large enough to hold all of the ballots without crowding. The box shall be so arranged that the judge or clerk drawing the ballots from the box is unable to see the ballots he is about to draw." for "The clerk shall write the names of the jurors present and not excused on separate ballots, fold the ballots so that the names are concealed, and place them in black capsules. In the presence of the court, the clerk shall deposit the capsules containing the ballots in a box large enough to hold all of the capsules without crowding. The box shall be so arranged that the judge drawing the capsules from the box is unable to see the capsules he is about to draw. The box must be kept sealed or locked until ordered by the court to be opened."

1981 Amendment: Inserted "prospective" before "jurors" in (1); and at end of (1) inserted "The court shall excuse any person satisfying the requirements of 3-15-313(1)."

Collateral References

Jury *key* 66 (1) through (7), 79 (1) through (3).

50A C.J.S. Juries §§319 through 323.

Part 6
Grand Juries

3-15-601. When and how drawn and summoned.

Compiler's Comments

1985 Amendment: In (2) in first sentence, after "jury box", deleted "mentioned" and inserted "or the computer database provided for" and inserted second and third sentences relating to the process of computerized selection of jurors; in (3) near beginning of second sentence, inserted "names or" and at end, inserted alternative relating to database.

Collateral References

Grand Jury *key* 7 through 9.

38A C.J.S. Grand Juries §§13 through 67, et seq.

38 Am. Jur. 2d Grand Jury §§10, 12.

Exclusion of attorneys from jury list in criminal cases. 32 ALR 2d 890.

Constitutional provision prohibiting local or special legislation as applied to statutes relating to juries. 155 ALR 789.

3-15-602. Who constitutes jury.

Compiler's Comments

1985 Amendment: Throughout (2) substituted "jury commissioner" for "clerk"; and in (3) after "drawn" substituted "as provided in 3-15-601(2)" for "from the jury box".

Collateral References

Grand Jury *key* 8.
38A C.J.S. Grand Juries §§20 through 34.

3-15-603. Manner of impaneling.

Collateral References

Grand Jury *key* 20.
38A C.J.S. Grand Juries §§51 through 58, et seq.

Part 7
Juries in Courts of Limited Jurisdiction

3-15-701. When and by whom jurors summoned.

Compiler's Comments

1991 Amendment: In introductory clause, after "any", deleted "justice's or city court or any other"; in (1), before "judge", deleted "justice or of the"; inserted (2) concerning summoning jurors by judge of court of limited jurisdiction or by Clerk of Court; and made minor changes in style.

Collateral References

Jury *key* 67 (1) through (3).
50A C.J.S. Juries §§319 through 325.

3-15-702. How to be summoned.

Compiler's Comments

1991 Amendment: Near end, after "orally", inserted "or by mail".

3-15-703. Officer's return.

Collateral References

Jury *key* 68.
50A C.J.S. Juries §§322, 323.

3-15-704. Forming jury.

Collateral References

Jury *key* 66 (1) through (7).
50A C.J.S. Juries §§313 through 318, 324, 325, 340.

3-15-705. Manner of impaneling.

Compiler's Comments

1991 Amendment: In (2) substituted reference to Rule 18B of the Montana Justice and City Court Rules of Civil Procedure for reference to Rule 47 of the Montana Rules of Civil Procedure; and made minor change in style.

Collateral References

Jury *key* 143 through 150.
50A C.J.S. Juries §492.

Part 8
Juries of Inquest

3-15-801. Summoning the juries.

Attorney General's Opinions

Impaneling Coroner's Jury: The Coroner has the power to select jurors by any reasonable mode suitable to perform his duty to impanel a Coroner's jury. 37 A.G. Op. 87 (1977).

CHAPTER 20
ASBESTOS CLAIMS COURT

Part 1
General Provisions

Part Compiler's Comments

Preamble: The preamble attached to Ch. 473, L. 2001, provided: "WHEREAS, the Legislature finds that there are a large number of asbestos-related claims by Montana citizens that are primarily within the venue of the 19th Judicial District; and

WHEREAS, the large number of asbestos-related claims will impede the ability of the single District Court Judge in the 19th Judicial District to handle the normal case load of the District and will raise several potential conflicts of interest; and

WHEREAS, it is imperative that asbestos-related claims be dealt with expeditiously in order to allow Montana citizens with life-threatening illnesses to receive a speedy resolution of their claims; and

WHEREAS, Article VII, section 1, of the Montana Constitution allows additional courts to be provided by law."

Part Collateral References

63 Am. Jur. 2d Products Liability §§69 through 72, 168, 192, 598, 1907.

Products Liability: inhalation of asbestos. 39 ALR 4th 399.

3-20-103. Asbestos claims court — venue — jury pool.

Compiler's Comments

2003 Amendment: Chapter 114 in (2) at end of third sentence deleted "and make the statement provided for in 3-15-204(4)". Amendment effective October 1, 2003.

TITLE 4
RESERVED

TITLE 5
LEGISLATIVE BRANCH

CHAPTER 1
CONGRESSIONAL, SENATORIAL, AND REPRESENTATIVE DISTRICTS

Chapter Compiler's Comments

1993 Reapportionment Plan: The reapportionment plan submitted to the 1993 Legislature by the Montana Districting and Apportionment Commission provided for 100 House Districts and 50 Senate Districts. The final districting and apportionment plan was filed with the Secretary of State on February 24, 1993, and became law.

Materials prepared for reapportionment are:

A Report of the Montana Districting and Apportionment Commission, A Report to the 53rd Legislature, December 1992, published by the Montana Legislative Council.

House Joint Resolution No. 5, A Joint Resolution of the Senate and the House of Representatives of the State of Montana Making Recommendations to the Montana Districting and Apportionment Commission for the Redrawing of the Plan for Legislative Districts. (See page 3011, Laws of Montana 1993, published by the Montana Legislative Council.)

Final Districting and Apportionment Plan of the Montana Districting and Apportionment Commission, filed February 24, 1993, with the Montana Secretary of State.

Maps showing district makeup and boundaries are available from the Montana Secretary of State.

1983 Reapportionment Plan: The reapportionment plan submitted to the 1983 Legislature by the Montana Districting and Apportionment Commission provided for 100 House districts and 50 Senate districts. The final districting and apportionment plan was filed with the Secretary of State on March 4, 1983, and became law.

Materials prepared for reapportionment are:

Report and Recommendations of the Montana Districting and Apportionment Commission, A Report to the 48th Legislature, December 1982, published by the Montana Legislative Council.

Senate Resolution No. 4, A Resolution of the Senate of the State of Montana Transmitting Recommendations to the Montana Districting and Apportionment Commission Regarding Its Redistricting Plan Submitted Under Article V, Section 14, of the Montana Constitution. (See page 1924, Laws of Montana 1983, published by the Montana Legislative Council.)

House Resolution No. 2, A Resolution of the House of Representatives of the State of Montana Transmitting Recommendations to the Montana Districting and Apportionment Commission Regarding Its Redistricting Plan Submitted Under Article V, Section 14, of the Montana Constitution. (See page 1933, Laws of Montana 1983, published by the Montana Legislative Council.)

Final Districting and Apportionment Plan of the Montana Districting and Apportionment Commission, filed March 4, 1983, with the Montana Secretary of State.

Maps showing district makeup and boundaries are available from the Montana Secretary of State.

Chapter Attorney General's Opinions

Reapportionment — Holdover Senators: Article V, sec. 3, Mont. Const., provides that state Senators be elected to 4-year terms on a staggered basis. The constitution and statutes provide no authority for changing Senators' terms after reapportionment. The reapportionment plan is the responsibility of the Montana Districting and Apportionment Commission. The Commission has the inherent authority under Art. V, sec. 14, Mont. Const., to do what is necessary to implement a plan that complies with the state's laws. How to deal with holdover Senators is the responsibility of the Commission. The terms of office of members of the Montana State Senate who were elected in 1982 may not be shortened as a result of reapportionment and redistricting. 40 A.G. Op. 2 (1983).

Reapportionment Commission — Exclusive Power to Apportion Legislative and Congressional Districts: The Reapportionment Commission has the exclusive power to determine the size of the legislative houses and the geographical makeup of the legislative and congressional districts, subject only to the restrictions of Art. V, Mont. Const. 35 A.G. Op. 12 (1973).

Constitutional Grant of Power to Apportion — Historical and Current: Prior to the adoption of the 1972 Montana Constitution, the apportionment power was granted to the Legislature. See Art. VI, 1889 Mont. Const. However, with the adoption of the new Constitution, the people of this state divested the Legislature of all power concerning apportionment of the Legislature, except for the power of recommendation in Art. V, sec. 14, 1972 Mont. Const. 35 A.G. Op. 12 (1973).

Reapportionment Plan Becomes Law: Upon submission of the apportionment plan, proposed by the Reapportionment Commission, to the Secretary of State, the plan becomes law and all previous statutory provisions in conflict with that plan are, in effect, repealed. 35 A.G. Op. 12 (1973).

Legislative Determination of Size of Legislative Assembly — Not Controlling: The Reapportionment Commission was not bound by a legislative determination of the size of the legislative assembly, and sections 43-106.6 and 43-106.7, R.C.M. 1947 (repealed by sec. 1, Ch. 14, L. 1975), enacted prior to the adoption of the 1972 Montana Constitution, are not controlling. (See 1987 amendment to 5-1-101.) 35 A.G. Op. 12 (1973).

Chapter Law Review Articles

Apportionment—Past to Future, Dudis, 33 Mont. L. Rev. 101 (1972).

100 Years of Reapportionment in Montana, Waldron, 28 Mont. L. Rev. 1 (1966).

Chapter Collateral References

Constitutional Law *key* 68(3), 225.3, 274.2(3); States *key* 27.

81A C.J.S. States §§62 through 78; 91 C.J.S. United States §13.

14 Am. Jur. 2d Census §2; 25 Am. Jur. 2d Elections §§21 through 25.

Final Legislative Redistricting Plan Based on the 2000 Census, submitted to the Secretary of State by the Montana Districting and Apportionment Commission (2003).

Legislative Redistricting Plan Based on the 2000 Census, submitted to the 58th Legislature by the Montana Districting and Apportionment Commission, Mont. Leg. Serv. Div. (2003).

Report of the Montana Districting and Apportionment Commission, submitted to the 53rd Montana Legislature, Mont. Leg. Council (1992).

Report and Recommendations of the Montana Districting and Apportionment Commission to the 48th Legislature, Mont. Leg. Council (1982).

Report of the Montana Districting and Apportionment Commission, submitted to the 1974 Montana Legislature, Mont. Leg. Council (1974).

Part 1
Districting and Apportionment Commission

Part Compiler's Comments

Contingent Effective Date: Section 7, Ch. 477, L. 1983, provided: "This act becomes effective October 1, 1985, if House Bill No. 151, which requires a constitutional amendment to accelerate Montana's congressional redistricting, is passed by the legislature and approved by the electorate. If the legislature does not pass House Bill No. 151 or the electorate does not approve the constitutional amendment, this act is void." House Bill No. 151 (Ch. 421, L. 1983) was approved by the electorate as Constitutional Amendment No. 14 at the election held Nov. 6, 1984, by a vote of 214,956 to 109,813.

Part Case Notes

2002 Redistricting Plan — Legislative Attempts to Change Plan Unconstitutional: Following legislative action pertaining to legislative redistricting, the Commission tendered its plan to the Secretary of State for filing, but the Secretary of State refused to file it. The District Court found that the legislative enactments were unconstitutional and void. The Secretary of State is required to file the Commission's plan, and refusal to do so violates the Montana Constitution. The Secretary of State does not have standing to seek a declaratory judgment on the constitutionality of the Commission's plan. Brown v. Mont. Districting & Apportionment Comm'n, Cause No. ADV-2003-72, First Judicial District Decision and Order, July 2003.

1992 Redistricting Plan — Totality of Circumstances — Lower Court Decision Not Clearly Erroneous: The District Court did not clearly err in determining that the totality of circumstances did not establish vote dilution in the districts where plaintiffs resided. Old Person v. Brown, 312 F3d 1036 (9th Cir. 2002).

1992 Redistricting Plan — No Vote Dilution — Unavailability of Adequate Remedy: On remand to District Court, the court found that plaintiffs had limited standing and failed to show vote dilution in specific legislative districts where they resided. Even if vote dilution had been shown, the claim failed because of unavailability of an adequate remedy because of

fast-approaching 2002 elections, the last elections to be conducted under the 1992 plan. Old Person v. Brown, 182 F. Supp. 2d 1002 (D.C. Mont. 2002), affirmed in 312 F3d 1036 (9th Cir. 2002).

1992 Redistricting Plan — District Court Error in Application of Third Prong of Gingles Test: American Indian plaintiffs filed an action in District Court alleging that the 1992 redistricting plan for Montana's state House of Representatives and Senate diluted the voting strength of American Indians in violation of sec. 2 of the Voting Rights Act of 1965 and that the Montana Districting and Apportionment Commission adopted the plan with a discriminatory purpose, also in violation of the Voting Rights Act. In Old Person v. Cooney, No. CV-96-00004-PGH (D.C. Mont. 1999), the District Court rejected all claims by the plaintiffs, ruling that the Commission did not discriminate against Montana Indians and that the 1992 redistricting plan did not have the effect of discriminating against the state's Indian voters because the plaintiffs had not proved that non-Indians voted as a bloc to defeat Indian-preferred candidates. On appeal, the Ninth Circuit Court affirmed the District Court's ruling that the plaintiffs had not demonstrated that Montana's 1992 redistricting plan was adopted with a discriminatory purpose in violation of the Voting Rights Act. However, the Ninth Circuit Court reversed and remanded the lower court's decision, ruling that the District Court erred in its application of the third prong of the Gingles test and that this error resulted in a clearly erroneous finding that white bloc voting was not legally significant. The Ninth Circuit Court also concluded that the District Court erred in finding proportionality between the number of legislative districts in which American Indians constituted an effective majority and the American Indian share of the voting age population in Montana. Because this error may have affected the District Court's ultimate finding that, in the totality of circumstances, no dilution of American Indian voting strength had occurred, the Ninth Circuit Court reversed the District Court's judgement and remanded the case for further proceedings. On remand, a trial date of November 2001 was set to consider evidence pertaining strictly to the Ninth Circuit Court's remand relating to the District Court's previous finding of proportionality and whether, considering the totality of the circumstances, Montana's 1992 redistricting plan diluted American Indian voting strength. Old Person v. Cooney, 230 F3d 1113, (9th Cir. 2000) (Old Person I).

Application of 1983 Reapportionment Commission Criteria — Balancing of Criteria: The 1983 Montana Districting and Apportionment Commission established five criteria to follow in redistricting that addressed governmental boundaries, geographic boundaries, communities of interest, consideration of existing district boundaries, and an attempt to stay within a 5% plus or minus deviation from the ideal district population. The court held that these criteria were considerations and that conflicts between them as they existed within a district or between districts must be balanced in arriving at a plan embracing the entire state. The Commission had to interpret its own criteria, such as what constituted a community of interest and the possible ripple effects of any particular change; thus, when the Commission made a good faith effort to balance the criteria, the reapportionment plan could not be struck down on the contention that the Commission failed to exactly follow its own criteria. McBride v. Mahoney, 573 F. Supp. 913, 40 St. Rep. 1907 (D.C. Mont. 1983).

1983 Reapportionment Plan — Total Population Deviation Over Ten Percent Upheld — Legitimate State Interests: In the 1983 reapportionment plan, the total population deviation between House districts was 10.94% and between Senate districts was 10.18%, which created a prima facie case of discrimination because the totals exceeded 10%. To be upheld, the deviations must be justified by legitimate state objectives. The court determined that legitimate state objectives were stated in criteria established by the Montana Districting and Apportionment Commission. The criteria addressed governmental boundaries, geographic boundaries, communities of interest, consideration of existing district boundaries, and an attempt to stay within a 5% plus or minus deviation from the ideal population. McBride v. Mahoney, 573 F. Supp. 913, 40 St. Rep. 1907 (D.C. Mont. 1983).

Projected Population as Basis for Reapportionment: A reapportionment plan will not be struck down for failure to consider projected population growth when the Montana Districting and Apportionment Commission did not consider population projections and it was not presented with data that would have enabled it to apply population projections in a systematic manner. McBride v. Mahoney, 573 F. Supp. 913, 40 St. Rep. 1907 (D.C. Mont. 1983).

Part Attorney General's Opinions

When Plan to Be Submitted — Recess and Reconvening: The Districting and Apportionment Commission is required under 5-1-109 to submit its plan to the 47th Legislature if census data is available in December 1980. The Legislature may recess and reconvene at a later date and still

be within its regular session to receive and make recommendations, according to 5-1-110, on the Commission's plan. 38 A.G. Op. 99 (1980).

Procedure for Submitting Reapportionment Plan: The reapportionment plan should be submitted, with a cover letter signed by each Commission member, to each house of the Legislature by the 10th day of the legislative session, and within 30 days of the return of the reapportionment plan from the Legislature, the final plan should be submitted, with a cover letter signed by each Commission member, to the Secretary of State for filing. 35 A.G. Op. 50 (1973).

Reapportionment Commission — Exclusive Power to Apportion Legislative and Congressional Districts: The Reapportionment Commission has the exclusive power to determine the size of the legislative houses and the geographical makeup of the legislative and congressional districts, subject only to the restrictions of Art. V, Mont. Const. 35 A.G. Op. 12 (1973).

Constitutional Grant of Power to Apportion — Historical and Current: Prior to the adoption of the 1972 Montana Constitution, the apportionment power was granted to the Legislature. See Art. VI, 1889 Mont. Const. However, with the adoption of the new Constitution, the people of this state divested the Legislature of all power concerning apportionment of the Legislature, except for the power of recommendation in Art. V, sec. 14, 1972 Mont. Const. 35 A.G. Op. 12 (1973).

Reapportionment Plan Becomes Law: Upon submission of the apportionment plan, proposed by the Reapportionment Commission, to the Secretary of State, the plan becomes law and all previous statutory provisions in conflict with that plan are, in effect, repealed. 35 A.G. Op. 12 (1973).

Legislative Determination of Size of Legislative Assembly — Not Controlling: The Reapportionment Commission was not bound by a legislative determination of the size of the legislative assembly, and sections 43-106.6 and 43-106.7, R.C.M. 1947 (repealed by sec. 1, Ch. 14, L. 1975), enacted prior to the adoption of the 1972 Montana Constitution, are not controlling. (See 1987 amendment to 5-1-101.) 35 A.G. Op. 12 (1973).

Part Collateral References

81A C.J.S. States §64.

Report of the Montana Districting and Apportionment Commission, submitted to the 53rd Montana Legislature, Mont. Leg. Council (1992).

Report and Recommendations of the Montana Districting and Apportionment Commission to the 48th Legislature, Mont. Leg. Council (1982).

Report of the Montana Districting and Apportionment Committee, submitted to the 1974 Montana Legislature, Mont. Leg. Council (1974).

5-1-101. Commission to redistrict and reapportion — number of legislators.

Compiler's Comments

2003 Amendment Void: The amendments to this section made by Ch. 546, L. 2003, were rendered void by sec. 11, Ch. 546, L. 2003, a coordination section.

1987 Amendment: Inserted (2) requiring redistricting and reapportionment based on number of legislators to be determined in the session before the census.

1983 Amendment: After "prepare" substituted "the plans" for "a plan".

Collateral References

Federal decennial population census, 13 U.S.C. §141.

5-1-102. Composition of commission.

Compiler's Comments

2003 Amendment: Chapter 254 in (1) at end of first sentence after "commissioner" inserted "for the commission provided for in 5-1-101" and at beginning of second sentence substituted "Two commissioners" for "A commissioner"; in (2)(a) combined former districts 1 and 2 into district 1, near middle before "Powell" deleted "District 2: Lewis and Clark", near end after "Broadwater" deleted "Meagher", and at end after "Park" inserted "Sweet Grass, Stillwater, and Carbon"; in (2)(b) combined former districts 3 and 4 into district 2, at beginning substituted "District 2" for "District 3", near middle before "Wheatland" deleted "District 4" and inserted "Lewis and Clark, Meagher", and at end after "Yellowstone" deleted "Carbon, Stillwater, and Sweet Grass"; and made minor changes in style. Amendment effective October 1, 2003.

The amendments to this section made by Ch. 546, L. 2003, were rendered void by sec. 11, Ch. 546, L. 2003, a coordination section.

Saving Clause: Section 5, Ch. 254, L. 2003, was a saving clause.

1993 Amendment: Chapter 52 in (1) substituted second sentence concerning appointment from each district for "Two commissioners must be residents of the western congressional district and two commissioners must be residents of the eastern congressional district" and in third sentence inserted language allowing Senate majority leader first choice and House majority leader second choice; inserted (2) designating Commission districts; and made minor changes in style. Amendment effective July 1, 1993.

Saving Clause: Section 12, Ch. 52, L. 1993, was a saving clause.

Applicability: Section 13, Ch. 52, L. 1993, provided: "[This act] applies to appointments made after [the effective date of this act]." Effective July 1, 1993.

5-1-103. Vacancy on commission.

Compiler's Comments

1981 Amendment: Added subsection (2) relating to the method of appointment of a commissioner to fill a vacancy, when the appointing authority is of the opposite political party than the original appointing authority.

5-1-104. Compensation and expenses.

Compiler's Comments

1983 Amendment: Substituted "the same compensation and expenses as provided to members of the legislature in 5-2-302" for "compensation of $20 per day plus travel expenses, as provided for in 2-18-501 through 2-18-503".

5-1-106. Legislative services division to provide technical and clerical services.

Compiler's Comments

2003 Amendment Void: The amendments to this section made by Ch. 546, L. 2003, were rendered void by sec. 11, Ch. 546, L. 2003, a coordination section.

1995 Amendment: Chapter 545 near beginning, after "legislative", substituted "services division" for "council"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1983 Amendment: At end substituted "plans" for "plan".

5-1-108. Public hearing on plans.

Compiler's Comments

2003 Amendment Void: The amendments to this section made by Ch. 546, L. 2003, were rendered void by sec. 11, Ch. 546, L. 2003, a coordination section.

1983 Amendment: Inserted (1) requiring a public hearing on the Congressional redistricting plan; in (2) before "plan" inserted "legislative redistricting".

5-1-109. Submission of plan for legislative redistricting to legislature.

Compiler's Comments

2003 Amendment Void: The amendments to this section made by Ch. 546, L. 2003, were rendered void by sec. 11, Ch. 546, L. 2003, a coordination section.

1983 Amendment: Near beginning before "plan" inserted "legislative redistricting".

5-1-110. Recommendations of legislature.

Compiler's Comments

1983 Amendment: Near middle before "plan" inserted "legislative redistricting".

5-1-111. Final plan — dissolution of commission.

Compiler's Comments

2003 Amendment: Chapter 3 in (2) at end of first sentence deleted "and it shall become law", inserted second sentence concerning not accepting plan, and inserted third sentence concerning acceptance of plan and plan becoming law; in (3) after "Upon" inserted "the acceptance and"; and made minor changes in style. Amendment effective February 4, 2003.

Retroactive Applicability: Section 6, Ch. 3, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to any legislative redistricting plan of the districting and apportionment commission that was not filed with the secretary of state on [the effective date of this act]." Effective February 4, 2003.

2003 Amendment Void: The amendments to this section made by Ch. 546, L. 2003, were rendered void by sec. 11(1), Ch. 546, L. 2003, a coordination section.

2003 Amendment Repealed: Section 11(3), Ch. 546, L. 2003, a coordination section, repealed Ch. 3, L. 2003, effective October 1, 2003. However, sec. 12, Ch. 546, L. 2003, provides that Ch. 546, L. 2003, applies to proceedings begun after October 1, 2003, for the redistricting based on the 2010 decennial census. Therefore, the apparent result of sec. 11(3), Ch. 546, L. 2003, is to apply the repeal of Ch. 3, L. 2003, only to proceedings for redistricting based on the 2010 decennial census.

1983 Amendment: Inserted (1) relating to filing of the plan for Congressional districts; in (2) in two places before "plan" inserted "legislative redistricting", and near end of (2) after "secretary of state" deleted ". Upon filing, the plan" and inserted "and it"; at beginning of (3) inserted "Upon filing both plans"; and made minor changes in phraseology.

5-1-115. Redistricting criteria.

Compiler's Comments

Coordination — Applicability: Section 1, Ch. 3, L. 2003, and sec. 1, Ch. 546, L. 2003, both enacted redistricting criteria. The criteria contained in sec. 1, Ch. 3, L. 2003, are also contained in and expanded upon in sec. 1, Ch. 546, L. 2003. Therefore, the code commissioner has codified both sections as 5-1-115. Section 1, Ch. 3, L. 2003, was effective February 4, 2003, and applies retroactively to any legislative redistricting plan of the districting and apportionment commission that was not filed with the secretary of state on February 4, 2003. Section 11(3), Ch. 546, L. 2003, a coordination section, repealed Ch. 3, L. 2003, effective October 1, 2003. However, sec. 12, Ch. 546, L. 2003, provides that Ch. 546, L. 2003, applies to proceedings begun after October 1, 2003, for the redistricting based on the 2010 decennial census. Therefore, the apparent result of sec. 11(3), Ch. 546, L. 2003, is to apply the repeal of Ch. 3, L. 2003, only to proceedings for redistricting based on the 2010 decennial census.

Section 1, Ch. 3, L. 2003, provided: "Redistricting criteria. (1) In the drawing of legislative districts, the districting and apportionment commission shall comply with the following criteria:

(a) the districts must be compact and contiguous; and

(b) the districts must be as equal as practicable.

(2) For the purposes of this section, "as equal as practicable" means within a plus or minus 1% relative deviation from the ideal population of a district as calculated from information provided by the federal decennial census."

Preamble: The preamble attached to Ch. 278, L. 2003, provided: "WHEREAS, the Montana Constitution and the verbatim transcripts of the 1972 Constitutional Convention do not address the assignment of holdover senators to districts following the drawing of new legislative districts pursuant to Article V, section 14, of the Montana Constitution; and

WHEREAS, the Montana Supreme Court has consistently held that the Constitution is a limit on rather than a grant of legislative authority, beginning with State ex rel. Evans v. Stewart, 53 Mont. 18, 161 P. 309 (1916); and

WHEREAS, in spite of the lack of a constitutional limit on legislative authority, the Legislature has acquiesced in the assignment of holdover senators by the Districting and Apportionment Commission because of the fair and nonpartisan assignments that have traditionally occurred; and

WHEREAS, the districting plan submitted to the 58th Legislature for review and comment proposed to assign holdover senators on partisan basis for future partisan gain; and

WHEREAS, the Legislature enacted Senate Bill No. 258 as Chapter 4, Laws of 2003, to authorize the Legislature to assign holdover senators and prohibit the Districting and Apportionment Commission from assigning holdover senators prior to the Districting and Apportionment Commission's adoption of its final plan."

Repealer: Section 1, Ch. 278, L. 2003, provided: "Section 3 of the districting and apportionment plan of 2003, the transition provision assigning holdover senators to new legislative districts, is repealed." Effective April 9, 2003.

Retroactive Applicability: Section 3, Ch. 278, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the districting and apportionment plan adopted by the districting and apportionment commission on February 5, 2003."

5-1-116. Assignment of holdover senators.

Compiler's Comments

Effective Date: Section 3, Ch. 4, L. 2003, provided: "[This act] is effective on passage and approval." Approved February 4, 2003.

Preamble: The preamble attached to Ch. 278, L. 2003, provided: "WHEREAS, the Montana Constitution and the verbatim transcripts of the 1972 Constitutional Convention do not address the assignment of holdover senators to districts following the drawing of new legislative districts pursuant to Article V, section 14, of the Montana Constitution; and

WHEREAS, the Montana Supreme Court has consistently held that the Constitution is a limit on rather than a grant of legislative authority, beginning with State ex rel. Evans v. Stewart, 53 Mont. 18, 161 P. 309 (1916); and

WHEREAS, in spite of the lack of a constitutional limit on legislative authority, the Legislature has acquiesced in the assignment of holdover senators by the Districting and Apportionment Commission because of the fair and nonpartisan assignments that have traditionally occurred; and

WHEREAS, the districting plan submitted to the 58th Legislature for review and comment proposed to assign holdover senators on partisan basis for future partisan gain; and

WHEREAS, the Legislature enacted Senate Bill No. 258 as Chapter 4, Laws of 2003, to authorize the Legislature to assign holdover senators and prohibit the Districting and Apportionment Commission from assigning holdover senators prior to the Districting and Apportionment Commission's adoption of its final plan."

Repealer: Section 1, Ch. 278, L. 2003, provided: "Section 3 of the districting and apportionment plan of 2003, the transition provision assigning holdover senators to new legislative districts, is repealed." Effective April 9, 2003.

Retroactive Applicability: Section 3, Ch. 278, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the districting and apportionment plan adopted by the districting and apportionment commission on February 5, 2003."

2003 Amendment Void: The amendments to this section made by Ch. 546, L. 2003, were rendered void by sec. 11, Ch. 546, L. 2003, a coordination section.

CHAPTER 2
LEGISLATURE — COMPOSITION AND ORGANIZATION

Chapter Law Review Articles

The Legislative Assembly in a Modern Montana Constitution, Waldron, 33 Mont. L. Rev. 1 (1972).

Chapter Collateral References

Process *key* 114; States *key* 24 through 26, 28(2); Statutes *key* 2 through 4, 6.

29 C.J.S. Elections §59; 81A C.J.S. States §40; 82 C.J.S. Statutes §§4, 9.

72 Am. Jur. 2d States, Territories, and Dependencies §§38 through 60.

Rules of the Montana Legislature, published biennially by the Mont. Leg. Serv. Div.

Part 1
General

Part Case Notes

Absolute Common-Law Immunity Against Civil Suits for Legislative Actions: A consumer suit against several private electric and natural gas utilities and various state elected officials,

including 58 members of the Montana House of Representatives and 25 members of the Montana Senate during the 1997 legislative session, was properly dismissed as to state legislators because they have absolute common-law immunity against civil suits for legislative actions. Single Moms, Inc. v. Mont. Power Co., 331 F3d 743 (9th Cir. 2003).

Part Collateral References

States *key* 28, 47; Statutes *key* 216.

81A C.J.S. States §§42, 44, 45.

63C Am. Jur. 2d Public Officers and Employees §§25, 312 through 325; 72 Am. Jur. 2d States, Territories, and Dependencies §44.

Defamation: nature and extent of privilege accorded public statements, relating to subject of legislative business or concern, made by member of state or local legislature or council outside of formal proceedings. 41 ALR 4th 1116.

Service of process — immunity from service of process of public officers while attending court in official capacity. 45 ALR 2d 1100.

Campaign Practices and Finances, 1973 Interim Report, Montana Legislative Council (1973).

5-2-101. Composition of legislature.

Attorney General's Opinions

Reapportionment Commission — Exclusive Power to Apportion Legislative and Congressional Districts: The Reapportionment Commission has the exclusive power to determine the size of the legislative houses and the geographical makeup of the legislative and congressional districts, subject only to the restrictions of Art. V, Mont. Const. 35 A.G. Op. 12 (1973).

Constitutional Grant of Power to Apportion — Historical and Current: Prior to the adoption of the 1972 Montana Constitution, the apportionment power was granted to the Legislature. See Art. VI, 1889 Mont. Const. However, with the adoption of the new Constitution, the people of this state divested the Legislature of all power concerning apportionment of the Legislature, except for the power of recommendation in Art. V, sec. 14, 1972 Mont. Const. 35 A.G. Op. 12 (1973).

Reapportionment Plan Becomes Law: Upon submission of the apportionment plan, proposed by the Reapportionment Commission, to the Secretary of State, the plan becomes law and all previous statutory provisions in conflict with that plan are, in effect, repealed. 35 A.G. Op. 12 (1973).

Legislative Determination of Size of Legislative Assembly — Not Controlling: The Reapportionment Commission was not bound by a legislative determination of the size of the legislative assembly, and sections 43-106.6 and 43-106.7, R.C.M. 1947 (repealed by sec. 1, Ch. 14, L. 1975), enacted prior to the adoption of the 1972 Montana Constitution, are not controlling. 35 A.G. Op. 12 (1973).

Collateral References

Report of the Montana Districting and Apportionment Commission, submitted to the 53rd Montana Legislature, Mont. Leg. Council (1992).

Report and Recommendations of the Montana Districting and Apportionment Commission to the 48th Legislature, Mont. Leg. Council (1982).

Report of the Montana Districting and Apportionment Commission, submitted to the 1974 Montana Legislature, Mont. Leg. Council (1974).

5-2-102. Term of office.

Compiler's Comments

Section Not Codified: Section 43-202.1, R.C.M. 1947, stating that the purpose of the act was to implement Art. V, sec. 9, Mont. Const., was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 91, L. 1977.

Attorney General's Opinions

Applicability of Term Limit Provisions to Appointed Senators — Definitions: Regarding the status of state Senators appointed upon the death or resignation of the incumbent to fill an unexpired term of office that began in 1991, the word "terms" refers to time served in terms beginning or ending before or after January 1993. The word does not refer to a particular date and does not simply exclude or include years prior to the date, but rather includes time by reference to the beginning or ending date of a term of office. Further, the word "year" does not refer strictly to a calendar year of 12 months when used in the context of legislative terms of office because a term does not necessarily begin on the first day of a calendar year. Applying the word "year" in such a strict manner would lead to an unintended, absurd result. A term of office for a state Senator is 4 years beginning on the first Monday in January in the year following the

general election. If a Senator accedes to office by appointment or election, that Senator serves to complete the term of the person originally elected. Thus, for a Senator continually serving from the date of appointment or election to fill the unexpired portion of a term that began when the original incumbent took office in 1991, the first term of office counted toward the term limit is the term beginning in January 1995. 47 A.G. Op. 9 (1997).

Reapportionment — Holdover Senators: Article V, sec. 3, Mont. Const., provides that state Senators be elected to 4-year terms on a staggered basis. The constitution and statutes provide no authority for changing Senators' terms after reapportionment. The reapportionment plan is the responsibility of the Montana Districting and Apportionment Commission. The Commission has the inherent authority under Art. V, sec. 14, Mont. Const., to do what is necessary to implement a plan that complies with the state's laws. How to deal with holdover Senators is the responsibility of the Commission. The terms of office of members of the Montana State Senate who were elected in 1982 may not be shortened as a result of reapportionment and redistricting. 40 A.G. Op. 2 (1983).

Law Review Articles

Limits on Legislative Terms: Legal and Policy Implications, Corwin, 28 Harv. J. on Legis. 569 (1991).

Collateral References

Officers *key* 49 through 53.

67 C.J.S. Officers §§86 through 94; 81A C.J.S. States §43.

5-2-103. Time and place of meeting.

Attorney General's Opinions

Recorded Vote — Fulfills Requisites of a "Writing": The Legislative Assembly may reconvene itself in special session by a recorded vote of the majority of each house voting on the proposal. 35 A.G. Op. 7 (1973).

Collateral References

States *key* 32.

81A C.J.S. States §§48 through 50; 82 C.J.S. Statutes §§9, 10, 13.

72 Am. Jur. 2d States, Territories, and Dependencies §§43 through 46.

5-2-104. Appointment to or candidacy for other offices.

Case Notes

Constitutional Convention Delegate: State and local officers who are prohibited from holding more than one office may not serve as delegates to a State Constitutional Convention. A delegate to a constitutional convention is a "state officer" holding a public office of a civil nature. 42nd Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971).

Definition of "Civil Office": A position of employment is a civil office if: (1) it must be created by the Constitution or the Legislature or a municipality pursuant to authority delegated to it; (2) it must possess a delegation of a portion of the sovereign power of government to be exercised for benefit of the public; (3) the powers and duties must be defined, either directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, unless they are those of an inferior or subordinate office, created or authorized by the Legislature and by it placed under the control of a superior office or body; and (5) it must have permanency and continuity, and the incumbent must take and file an oath, hold a commission, and give an official bond, if required by proper authority. State ex rel. Barney v. Hawkins, 79 M 506, 257 P 411 (1927).

Attorney General's Opinions

Legislator Prohibited From Appointment to Board of Review: Membership on the Board of Review established in 30-16-302 is considered a public office of a civil nature pursuant to the five-part test in State ex rel. Barney v. Hawkins, 79 M 506, 257 P 411 (1927). Therefore, Art. V, sec. 9, Mont. Const., and this section prohibit the President of the Senate and the Speaker of the House of Representatives from appointing a legislator as a member of the Board of Review, including appointment as a nonvoting member. Because of the prohibition against the appointment of a legislator to a civil office during the legislator's term of office, the President and Speaker may appoint only a nonlegislator as a member of the Board of Review. 49 A.G. Op. 15 (2002).

Mayor Prohibited From Serving as Legislator: An elected Mayor holds a "public office of a civil nature" as defined in State ex rel. Barney v. Hawkins, 79 M 506, 257 P 411 (1927). The office

of Mayor is vested with a portion of the sovereign power of government which is executive in character. A Mayor is therefore prohibited by Art. V, sec. 9, Mont. Const., from serving as a member of the Legislature while serving as Mayor. 41 A.G. Op. 79 (1986).

Municipal Officer Holding "Public Office of Civil Nature" Disqualified From Service in Legislature: A municipal officer who holds "public office of a civil nature", as that phrase is defined in State ex rel. Barney v. Hawkins, 79 M 506, 257 P 411 (1927), is prohibited by Art. V, sec. 9, Mont. Const., from serving as a member of the Legislature during his continuance in municipal office. 40 A.G. Op. 46 (1984).

Collateral References

Officers *key* 30, 30.1, 30.3, 55(2).

67 C.J.S. Officers §37 through 45.

63C Am. Jur. 2d Public Officers and Employees §§57 through 69.

Incompatibility, under common-law doctrine, of office of state legislator and position or post in local political subdivision. 89 ALR 2d 632.

5-2-105. Facsimile signatures authorized.

Compiler's Comments

1991 Amendment: Near end of (1) inserted "facsimile transmission"; and in (2), near middle of second sentence, substituted "his manual or facsimile signature" for "both his manual and facsimile signatures". Amendment effective April 27, 1991.

Effective Date: Section 2, Ch. 318, L. 1989, provided that this section is effective March 27, 1989.

Retroactive Applicability: Section 3, Ch. 318, L. 1989, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to signatures affixed on or after January 2, 1989."

Part 2
Organization

Part Compiler's Comments

Study Authorized: Chapter 573, L. 1987, established a commission to study the reorganization and improvement of the Legislative Branch. The commission terminates December 31, 1988.

Part Case Notes

Political Caucuses Considered Person Subject to Suit: A political party caucus is by definition considered an unincorporated association or body of two or more persons having a joint or common interest. Drawing no distinction between presession and session caucuses, the Supreme Court held, on the basis of the plain language in Rule 4A, M.R.Civ.P. (Title 25, ch. 20), that a political party caucus is a person subject to court jurisdiction. Assoc. Press v. Mont. Senate Republican Caucus, 286 M 172, 951 P2d 65, 54 St. Rep. 1360 (1997).

Part Collateral References

States *key* 29, 30.

72 Am. Jur. 2d States, Territories, and Dependencies §§56 through 60.

5-2-201. Presession caucus.

Compiler's Comments

2001 Amendment: Chapter 57 inserted last sentence providing that the legislative council designate the time for holding presession caucuses. Amendment effective March 16, 2001.

Retroactive Applicability: Section 5, Ch. 57, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to November 7, 2000."

1987 Amendments: Chapter 385 at beginning of first sentence deleted "As soon after the official canvass as possible, but" and in middle of first sentence, before "parties", deleted "majority and minority".

Chapter 412 substituted present last sentence which reads: "The purpose of the caucus of each party of each house is to nominate officers and establish the basis for additional presession activity, including hiring staff and appointing committees" for former text that read: "The purpose of the caucus of each party of each house is to elect officers, appoint committees, and hire any necessary employees."

5-2-202. Presession activity.

Compiler's Comments

2001 Amendment: Chapter 57 in (1) near beginning inserted "provided for in 5-2-201" and near end substituted "regular session" for "session"; and in (2) near middle substituted "regular session" for "session". Amendment effective March 16, 2001.

Retroactive Applicability: Section 5, Ch. 57, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to November 7, 2000."

1987 Amendment: In (1), near beginning, substituted "nominated to leadership" for "elected to leadership" and inserted "nominated or" before "appointed"; in (2) substituted "prior to the session" for "at the presession caucus".

5-2-203. Compensation and expenses.

Compiler's Comments

2001 Amendment: Chapter 57 in (1) inserted "provided for in 5-2-201 and legislative orientation and training". Amendment effective March 16, 2001.

Retroactive Applicability: Section 5, Ch. 57, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to November 7, 2000."

1987 Amendment: In (2) substituted "members nominated to serve as officers of the legislature" for "members elected to leadership positions".

5-2-205. Authority for standing committees to meet during interim.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

5-2-212. Organization of senate.

Compiler's Comments

1981 Amendment: Deleted "the president of the senate, or in case of his absence or inability then" before "the senior member".

Collateral References

States *key* 53.

81A C.J.S. States §§41, 86.

5-2-213. Organization of house of representatives.

Collateral References

81A C.J.S. States §§41, 86.

5-2-214. Oath to be entered on journals.

Collateral References

States *key* 37.

67 C.J.S. Oaths and Affirmations §7; 81A C.J.S. States §54.

5-2-215. Election of officers.

Collateral References

81A C.J.S. States §41.

5-2-216. Tie vote.

Collateral References

72 Am. Jur. 2d States, Territories, and Dependencies §49.

5-2-221. Officers and employees of the senate and house of representatives.

Compiler's Comments

1981 Amendment: Substituted "a majority floor leader, a minority floor leader, a majority whip, and a minority whip" for language concerning the election or appointment of a secretary, chief clerk, chaplain, and sergeant-at-arms in (1) and (2). Rewrote subsection (3) relating to election of the President and President pro tempore of the Senate and the Speaker and Speaker pro tempore of the House; added (4) relating to election of majority and minority floor leaders and whips; and added (5) relating to appointment of the Secretary of the Senate, Clerk of the House, and the sergeant-at-arms and chaplain of each house.

Collateral References

72 Am. Jur. 2d States, Territories, and Dependencies §56.

5-2-222. Powers and duties of officers.

Collateral References

Perjury *key* 9(2); Officers *key* 36; States *key* 73, 74.

67 C.J.S. Oaths and Affirmations §§5, 6; 81A C.J.S. States §§88 through 91, 131.

58 Am. Jur. 2d Oath and Affirmation §§7 through 15, 23; 63C Am. Jur. 2d Public Officers and Employees §§230 through 232.

Validity, construction, and effect of state statutes restricting political activities of public officers or employees. 51 ALR 4th 702.

Validity of governmental requirement of oath of allegiance or loyalty. 18 ALR 2d 241, 268.

Part 3
Compensation and Expenses of Members and Officers

Part Collateral References

Officers *key* 97 through 101; States *key* 56 through 64.1.

81A C.J.S. States §§46, 47.

63C Am. Jur. 2d Public Officers and Employees §§271 through 300; 72 Am. Jur. 2d States, Territories, and Dependencies §58.

Misconduct as affecting right to pension or retention of position in retirement system. 76 ALR 2d 566.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements. 5 ALR 2d 1182.

5-2-301. Compensation and expenses for members while in session.

Compiler's Comments

2001 Amendment: Chapter 553 in (4) in fourth sentence substituted "legislators are entitled to a new daily rate for those days" for "the average is the new daily rate for legislators for those days" and inserted fifth sentence stating that the new daily rate is the daily rate for the prior session increased by the percentage increase determined by the survey, a cost of living increase, or 5%. Amendment effective July 1, 2001.

1999 Amendments — Composite Section: Chapter 44 in (1) at beginning deleted "Except as provided in subsection (8)"; and deleted former (8) that read: "(8) In lieu of the salary provided for in subsection (1) and the expense allowance provided for in subsection (4), a legislator may receive remuneration for services performed during a legislative session. A legislator choosing to receive remuneration for services performed shall file a request to receive payment under this subsection with the legislative services division. A legislator exercising the option to receive remuneration for services performed may not receive more remuneration than legislators paid pursuant to subsections (1) and (4). Remuneration for services performed must be reduced by an amount a day equal to the daily expense allowance for a legislator established under this section when the legislature recesses for more than 3 days". Amendment effective March 8, 1999.

Chapter 558 in (1) increased legislators' pay from grade 8 to grade 10; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendment: Chapter 417 in (3), near beginning, substituted "a daily allowance" for "$50 a day"; in (4), in first sentence after "November 15", deleted "1996, and prior to December 15, 1996" and inserted third sentence providing "The department shall include only states with specific daily allowances in the calculation of the average"; in (8), in fourth sentence, substituted "reduced by an amount a day equal to the daily expense allowance for a legislator established under this section" for "reduced $50 a day"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendments: Chapter 455 in (3) inserted "Subject to subsection (4)"; inserted (4) requiring Department of Administration to conduct salary survey; adjusted subsection references; and made minor changes in style.

Chapter 545 in (6), near end of introductory clause, substituted "legislative services division" for "office of the legislative council"; in (8), at end of second sentence, substituted "legislative services division" for "accounting office of the legislative council"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the

members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995.].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1991 Amendment: In (1) substituted "entry grade 8" for "grade 8, step 2"; and made minor change in style. Amendment effective April 29, 1991.

1989 Amendment: In (1), at beginning, inserted exception clause; and inserted (7) allowing legislator to receive remuneration in lieu of salary, requiring legislator to file request for such payment, limiting amount to total of salary and expenses, and allowing for reduction during recess. Amendment effective January 10, 1989.

Retroactive Applicability: Section 4, Ch. 1, L. 1989, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to January 1, 1989."

1986 Amendment: In first sentence of (1) substituted "grade 8" for "grade 10" and inserted "in effect when the regular session of the legislature in which they serve is convened under 5-2-103" (effective January 2, 1987).

Title and Effective Date of 1986 Amendment: The title to Ch. 9, Sp. L. June 1986, read: "AN ACT RETURNING THE SALARY OF LEGISLATORS TO THE LEVEL IN EFFECT PRIOR TO THE JANUARY 1, 1987, EFFECTIVE DATE OF THE SALARY RAISE ENACTED BY SECTION 3, CHAPTER 693, LAWS OF 1985; AMENDING SECTION 5-2-301, MCA; AND PROVIDING AN EFFECTIVE DATE." Under sec. 2, Ch. 9, the act was effective January 2, 1987. Thus Ch. 693, L. 1985, went into effect on January 1, 1987, but was nullified by Ch. 9, Sp. L. June 1986, on the next day.

1985 Amendments: Chapter 8 deleted former (3)(b) that provided mileage allowance "for one additional round trip to their place of residence during each session" without submittal of a claim; in (5) near beginning, inserted clause requiring submittal of claim to legislative council and deleted identical clause from end of (5)(a), thus making claim submittal applicable to (5)(b); in (5)(a) increased additional round trips subject to claim submittal requirement from two to three; and inserted (5)(b) relating to additional round trips during special session.

Chapter 693 in (1) increased salary rate from that commensurate to grade 8, step 2, to that commensurate to grade 10, step 2 (effective January 1, 1987); inserted (2) allowing legislators to serve for no salary; and in (3) increased legislative expense allowance from $45 to $50 per day during legislative session.

1981 Amendments: Chapters 7 and 605 increased legislative expense allowance from $40 to $45 during a session.

Chapter 144 inserted subsection (4) allowing two additional trips.

5-2-302. Compensation and expenses when legislature not in session.

Compiler's Comments

1989 Amendment: In (3), near beginning, changed reference to 5-2-301 to 5-2-301(1). Amendment effective January 10, 1989.

Retroactive Applicability: Section 4, Ch. 1, L. 1989, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to January 1, 1989."

1985 Amendment: Near beginning of section substituted "a member of the legislature" for "members of the legislative council, legislative subcommittees, and select and interim committees", substituted "legislative business" for "authorized committee business", and inserted "with prior authorization of the appropriate funding authority"; and in (3) substituted "legislative business" for "committee business" in two places.

1981 Amendment: Substituted "authorized committee business" for "business authorized by the legislative council"; in (3) changed the salary from one-fourth day's pay for each 6 hours to a

full day's pay for any portion of a day spent on authorized business; added the last sentence in (3) disallowing compensation when lengthened stay is result of business other than authorized committee business.

5-2-303. Participation in state benefits group — employer contribution made to other plan.

Compiler's Comments

1987 Amendment: Inserted (2) relating to payment for alternative disability insurance of a legislator.

5-2-304. Continued participation in public retirement systems.

Compiler's Comments

2001 Amendment: Chapter 99 in (2) at beginning of second sentence deleted "A legislator shall make an irrevocable election within 180 days of taking office whether" and after "system" inserted "a legislator shall, within 180 days of taking office and in a manner prescribed by the appropriate board, file an irrevocable written election with the teachers' retirement board or the public employees' retirement board" and deleted former third sentence that read: "A person who is a member of the Montana legislature on July 1, 1999, has until January 1, 2000, to file a written application with the teachers' or public employees' retirement board that is the irrevocable election required by this section"; and made minor changes in style. Amendment effective March 21, 2001.

1999 Amendment: Chapter 111 in (2) in first sentence substituted "is a member of a public retirement system" for "is otherwise eligible to participate as a member or contributor of a public retirement system" and inserted second and third sentences requiring a legislator to make irrevocable election within 180 days of taking office on whether to continue participation in system and providing that a person who is a legislator on July 1, 1999, may file application for election until January 1, 2000; deleted former (3)(b) that read: "(b) continue his payments into the fund of the retirement system at the rate currently in effect in such system based on his monthly salary as a legislator"; and made minor changes in style. Amendment effective July 1, 1999.

Saving Clause: Section 28, Ch. 111, L. 1999, was a saving clause.

Retroactive Effect: Section 2, Ch. 333, L. 1977, read: "In its application to members of the 45th legislature, this act is retroactive to January 1, 1977."

Effective Date: Section 3, Ch. 333, L. 1977, provided the act should be effective upon its passage and approval.

Part 4
Vacancies

Part Collateral References

Officers *key* 5, 55 through 59.

81A C.J.S. States §87.

63C Am. Jur. 2d Public Officers and Employees §§135, 136.

Conviction — effect of conviction under federal law or law of another state or country, on right to vote or hold public office. 39 ALR 3d 303.

Infamous crime or one involving moral turpitude constituting disqualification to hold public office. 52 ALR 2d 1314.

5-2-402. Appointment by board of county commissioners — county central committee role — timeframes.

Compiler's Comments

2003 Amendment: Chapter 336 at beginning of (1) inserted exception clause; inserted (2)(a) relating to vacancy in single counties; in (2)(b) inserted reference to vacancy within multicounty district; inserted (2)(b)(iii) providing for selection of person receiving highest number of votes over 50 and for revote and final selection as provided in 5-2-404, if needed; in (2)(c) near beginning of first sentence inserted reference to subsection (2)(b)(ii) and inserted last sentence referring to subsection (2)(b)(iii); deleted former (2)(c) that read: "(c) The person selected to fill the vacancy is the one who receives the highest number above 50 that results from the calculation required by this subsection (2). If no candidate receives a number higher than 50 from that calculation, the selection board shall cast its votes again in the same manner for the persons receiving the two highest numbers"; in (3) in introductory clause substituted

"appointment process to fill a vacant legislative seat under this section is as follows" for "appointment of a legislator under this section must take place within 15 days after the vacancy occurs"; inserted (3)(a) providing timeframe for secretary of state to notify county commissioners and county central committee of vacancy; inserted (3)(b) providing timeframe for county central committees to propose and forward list of appointees; inserted (3)(c) providing timeframe for appointing board to make appointment and notify secretary of state; inserted (4) providing alteration of timeframes when legislature in session; inserted (5) providing for application of 13-10-326 and 13-10-327; inserted (6) allowing appointment prior to election if special legislative session called; and made minor changes in style. Amendment effective April 15, 2003.

1983 Amendment: Inserted introductory clause of (2); inserted (2)(b) relating to voting formula for assigning vacancy in seat of holdover Senators; and inserted (2)(c) relating to determination of election held under subsection (2)(b).

Attorney General's Opinions

Applicability of Term Limit Provisions to Appointed Senators — Definitions: Regarding the status of state Senators appointed upon the death or resignation of the incumbent to fill an unexpired term of office that began in 1991, the word "terms" refers to time served in terms beginning or ending before or after January 1993. The word does not refer to a particular date and does not simply exclude or include years prior to the date, but rather includes time by reference to the beginning or ending date of a term of office. Further, the word "year" does not refer strictly to a calendar year of 12 months when used in the context of legislative terms of office because a term does not necessarily begin on the first day of a calendar year. Applying the word "year" in such a strict manner would lead to an unintended, absurd result. A term of office for a state Senator is 4 years beginning on the first Monday in January in the year following the general election. If a Senator accedes to office by appointment or election, that Senator serves to complete the term of the person originally elected. Thus, for a Senator continually serving from the date of appointment or election to fill the unexpired portion of a term that began when the original incumbent took office in 1991, the first term of office counted toward the term limit is the term beginning in January 1995. 47 A.G. Op. 9 (1997).

Collateral References

Officers *key* 14.

63C Am. Jur. 2d Public Officers and Employees §91.

5-2-403. Appointee to be of same political party.

Compiler's Comments

2003 Amendment: Chapter 336 inserted (1)(a) relating to district within single county; in (1)(b) after "together" substituted "in a multicounty district, as described in 5-2-402" for "of the counties wherein a portion of the senate district lies"; in (2) near end of first sentence after "central" inserted "committee or"; and made minor changes in style. Amendment effective April 15, 2003.

5-2-404. Procedure upon failure of one candidate to receive majority vote.

Compiler's Comments

2003 Amendment: Chapter 336 near end after "5-2-403" deleted "(1)". Amendment effective April 15, 2003.

5-2-406. Elections to fill vacancies in senate.

Compiler's Comments

2003 Amendment: Chapter 336 in (1) at end of first sentence after "individual" inserted reference to appointment if legislature in special session and at beginning of second sentence inserted "However, the appointment may run only until a person" and at end inserted "and sworn into office"; and made minor changes in style. Amendment effective April 15, 2003.

1989 Amendment: Near beginning of (1) changed "75 days" to "85 days"; near end of (1)(b) changed "65th day" to "85th day"; and in (2) changed "75th day" to "85th day".

1985 Amendment: Throughout section substituted references to 75 days for references to 50 days; and near end of (1)(b) changed "40th day" to "65th day".

Attorney General's Opinions

Applicability of Term Limit Provisions to Appointed Senators — Definitions: Regarding the status of state Senators appointed upon the death or resignation of the incumbent to fill an unexpired term of office that began in 1991, the word "terms" refers to time served in terms beginning or ending before or after January 1993. The word does not refer to a particular date

and does not simply exclude or include years prior to the date, but rather includes time by reference to the beginning or ending date of a term of office. Further, the word "year" does not refer strictly to a calendar year of 12 months when used in the context of legislative terms of office because a term does not necessarily begin on the first day of a calendar year. Applying the word "year" in such a strict manner would lead to an unintended, absurd result. A term of office for a state Senator is 4 years beginning on the first Monday in January in the year following the general election. If a Senator accedes to office by appointment or election, that Senator serves to complete the term of the person originally elected. Thus, for a Senator continually serving from the date of appointment or election to fill the unexpired portion of a term that began when the original incumbent took office in 1991, the first term of office counted toward the term limit is the term beginning in January 1995. 47 A.G. Op. 9 (1997).

5-2-407. Anticipated vacancy.

Compiler's Comments

2003 Amendment: Chapter 336 in (2) after "appointee" deleted "and the 15-day period of 5-2-402(3)", substituted "term of office commences" for "vacancy occurs", before "day" deleted "first", and at end after "day" substituted reference to day appointee takes oath of office for "of the term to which his predecessor was elected"; and made minor changes in style. Amendment effective April 15, 2003.

Part 5
Legislative Branch Consolidation

Part Compiler's Comments

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

5-2-501. Declaration of policy and purpose.

Compiler's Comments

Effective Date: Section 83(2), Ch. 545, L. 1995, provided that this section was effective July 1, 1995.

5-2-502. Structure of legislative branch.

Compiler's Comments

Effective Date: Section 83(2), Ch. 545, L. 1995, provided that this section was effective July 1, 1995.

5-2-503. Consolidation of legislative branch entities for specified purposes.

Compiler's Comments

1999 Amendment: Chapter 19 in (1) near beginning after "consolidated" deleted "with the legislative council"; in (2) at beginning substituted "legislative services division" for "legislative council"; and in (2)(b) substituted "legislative branch budgets" for "the legislative council budget". Amendment effective February 17, 1999.

1997 Amendment: Chapter 20 in (3), in second sentence after "except", substituted "as provided in 2-17-108" for "upon approval of the respective house as provided in the rules of that house". Amendment effective February 12, 1997.

Effective Date: Section 83(2), Ch. 545, L. 1995, provided that this section was effective July 1, 1995.

5-2-504. Legislative branch consolidated.

Compiler's Comments

1999 Amendment: Chapter 19 in introduction after "section" deleted "with the legislative council established by 5-11-101"; inserted (2) referring to the legislative council; deleted former (7) that provided: "(7) the administrative code committee established by Title 5, chapter 14, part 1"; deleted former (9) that provided: "(9) the revenue oversight committee established by 5-18-102"; deleted former (10) that provided: "(10) the committee on Indian affairs established by 5-19-102"; and made minor changes in style. Amendment effective February 17, 1999.

1997 Amendment: Chapter 42 in introduction, after "consolidated", deleted "with the legislative council" and after "this section" inserted "with the legislative council established by 5-11-101"; deleted former (2) that read: "(2) the legislative council established by 5-11-101"; and made minor changes in style. Amendment effective March 12, 1997.

Effective Date: Section 83(2), Ch. 545, L. 1995, provided that this section was effective July 1, 1995.

CHAPTER 3
SPECIAL SESSIONS

Chapter Collateral References

Statutes *key* 5.

81A C.J.S. States §49; 82 C.J.S. Statutes §10.

72 Am. Jur. 2d States, Territories, and Dependencies §46.

Part 1
Call of Special Session

5-3-101. Convening of special session — limiting subjects — committee meetings — compensation.

Compiler's Comments

2001 Amendment: Chapter 35 inserted (2) allowing standing committees to meet prior to special session and requiring notice; inserted (3) allowing compensation for presession work prior to special session; and made minor changes in style. Amendment effective March 13, 2001.

Attorney General's Opinions

Power of Legislative Standing Committee to Meet During Special Session to Investigate Matter Not Within Call: There is no express or implied constitutional or statutory limitation circumscribing the interim investigative activity of a legislative standing committee, including activity during a special session. Therefore, a standing committee of the Legislature not formally discharged prior to the final adjournment of the preceding session may meet during a special session for the purpose of gathering information and taking testimony on a matter not within the call of the special session. 43 A.G. Op. 60 (1990).

Majority of Members, Not Majority of Each House, Required to Call Special Session: Under Art. V, sec. 6, Mont. Const., a majority of all of the members of the Legislature is required to request that the Legislature be convened in a special session. A majority of each house is not required to request that a special session be convened. 41 A.G. Op. 27 (1985), overruling 35 A.G. Op. 6 (1973).

Collateral References

73 Am. Jur. 2d Statutes §20.

5-3-102. Calling of a future special session when legislature is in session.

Attorney General's Opinions

Recorded Vote — Fulfills Requisites of a "Writing": The Legislative Assembly may reconvene itself in special session by a recorded vote of the majority of each house voting on the proposal. 35 A.G. Op. 7 (1973).

5-3-106. Procedure for polling legislators.

Compiler's Comments

1999 Amendment: Chapter 416 deleted former (2) that read: "(2) The secretary of state shall keep the ballots secret until all legislators have voted or until the day after the date set for return of the ballots, whichever occurs first"; and made minor changes in style. Amendment effective October 1, 1999.

5-3-107. Notice of time of approved special session.

Attorney General's Opinions

Majority of Members, Not Majority of Each House, Required to Call Special Session: Under Art. V, sec. 6, Mont. Const., a majority of all of the members of the Legislature is required to request that the Legislature be convened in a special session. A majority of each house is not required to request that a special session be convened. 41 A.G. Op. 27 (1985), overruling 35 A.G. Op. 6 (1973).

CHAPTER 4
BILLS

Chapter Case Notes

Statutory Expansion of Jurisdiction: When statutes are enacted by the Legislature that expand previously enacted statutes by broadening the jurisdiction of an administrative agency, the statutes are to be construed in relation to one another, and for construction purposes, considered as forming one consistent body of law. Gwynn v. Eureka, 178 M 191, 582 P2d 1262 (1978).

Chapter Attorney General's Opinions

Statement of Intent Not to Be Used in Interpretation of Clearly Written Statute: Chapter 452, L. 1981, made several substantive changes in the laws relating to health service corporations. The bill's statement of intent, adopted under 5-4-404 (now repealed), stated that certain provisions of the bill were to be implemented only if additional funds were appropriated for their implementation. The Attorney General applied the rule of statutory interpretation that when legislative intent can be determined from a reading of a statute, it is improper to go further in construing the meaning of that statute, and held that the clear meaning of the law must be carried out, regardless of the contents of the statement of intent. 39 A.G. Op. 68 (1982).

Chapter Collateral References

Statutes *key* 301 through 375.
82 C.J.S. Statutes §§5, 9, 18 through 75.
Bill Drafting Manual (Mont. Leg. Serv. Div.).
A Legislator's Handbook (Mont. Leg. Serv. Div.).

Part 1
General Provisions

5-4-101. Form of enacting clause.

Collateral References

73 Am. Jur. 2d Statutes §47.

5-4-102. Limitation on title of referred legislation.

Collateral References

82 C.J.S. Statutes §§120, 121, 140.

5-4-103. Rulemaking authority.

Compiler's Comments

Effective Date: Section 5, Ch. 11, L. 1997, provided: "[This act] is effective on passage and approval." Approved February 7, 1997.

Part 2
Fiscal Notes in Legislative Bills

Part Collateral References
82 C.J.S. Statutes §12.

5-4-201. Requirement of fiscal notes with committee reports.

Compiler's Comments
1983 Amendment: In middle of first sentence, after "state" inserted "or of a county or municipality".

5-4-203. Budget director to prepare note.

Compiler's Comments
1983 Amendment: In middle of first sentence, substituted "state or local agencies or officials or organizations representing local agencies or officials" for "agency or agencies".

5-4-204. Submission of fiscal note — sponsor's fiscal note — distribution to legislators.

Compiler's Comments
1985 Amendment: Substituted text (see 1985 Session Law) for former text that read: "A completed fiscal note shall be submitted by the budget director to the presiding officer who requested it, who shall refer it to the committee considering the bill. If the bill is printed, the note shall be reproduced and placed on the members' desks."

5-4-210. Estimate of fiscal impact on local government required.

Compiler's Comments
Saving Clause: Section 7, Ch. 416, L. 1995, was a saving clause.

Part 3
Action by Governor on Bills

Part Collateral References
Statutes *key* 25 through 35, 252, 254 through 256; Time *key* 10(3).
16 C.J.S. Constitutional Law §218; 82 C.J.S. Statutes §§47 through 59.
73 Am. Jur. 2d Statutes §32.

5-4-301. Bills received by governor — how endorsed.

Compiler's Comments
1999 Amendment: Chapter 51 at end of second sentence substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

Collateral References
73 Am. Jur. 2d Statutes §§32 through 37.

5-4-302. Approval of bills.

Collateral References
Statutes *key* 31.
82 C.J.S. Statutes §51.
73 Am. Jur. 2d Statutes §33.

5-4-303. Line item veto.

Collateral References
Statutes *key* 33.
73 Am. Jur. 2d Statutes §§32, 34.

5-4-304. Amendatory veto.

Collateral References
73 Am. Jur. 2d Statutes §34.

5-4-305. Bills returned without approval.

Collateral References
Statutes *key* 32, 35.
73 Am. Jur. 2d Statutes §34.

5-4-306. Return when legislature not in session.

Compiler's Comments

1991 Amendment: In (2), at beginning of second sentence, inserted "If the bill was not approved by two-thirds of the members voting on the final vote on the bill", near middle, after "5", substituted "working days of receipt of the bill and veto message" for "days", and before "bill" inserted "title of the", in third sentence, after "members", substituted "voting on the final vote on the bill" for "of each house present", in fourth sentence, after "shall", inserted "within 5 working days of receipt of the bill and veto message send by certified mail to each legislator, at an address provided by the legislator" and after "veto message" inserted "instructions for casting a vote, and notice of", in fifth sentence, after "veto message", inserted "and voting instructions", and inserted sixth and seventh sentences concerning casting and returning vote and tally of results by Secretary of State; and made minor changes in style. Amendment effective April 27, 1991.

1989 Amendment: In (2) substituted "within 5 days" for "immediately" and inserted "The secretary of state shall include with the bill and the veto message the date by which each legislator shall return his vote. The date for return must be within 30 days after the date on which the bill and veto message are sent"; and made minor change in phraseology. Amendment effective March 27, 1989.

1985 Amendment: In (2) inserted last sentence referring to legislative override of veto; and in (3) substituted "vetoed by the governor when the legislature is not in session" for "so vetoed".

Collateral References

Statutes *key* 30, 32.

73 Am. Jur. 2d Statutes §37.

5-4-307. Bills remaining with governor.

Compiler's Comments

1997 Amendment: Chapter 42 in (1) and (2) substituted language requiring that a bill becomes law after remaining with the Governor for 10 days regardless of whether or not the Legislature is in session for former language relating to 5-day period during session or 25-day period after the Legislature is adjourned; and made minor changes in style. Amendment effective March 12, 1997.

Collateral References

Statutes *key* 29, 34, 35.

82 C.J.S. Statutes §57.

74 Am. Jur. 2d Time §18.

5-4-308. Transmittal of veto messages to legislative services division.

Compiler's Comments

1997 Amendment: Chapter 42 at end substituted "legislative services division" for "legislative council". Amendment effective March 12, 1997.

Part 5
Family Impact Notes for Legislative Bills (Terminated)

Part Compiler's Comments

Effective Date: Section 7, Ch. 339, L. 1999, provided that this part is effective on passage and approval. Approved April 19, 1999.

Termination: Section 8, Ch. 339, L. 1999, provided: "[This act] terminates October 1, 2003."

CHAPTER 5
LEGISLATIVE PROCEDURES

Chapter Collateral References

States *key* 31, 33, 35, 37; Statutes *key* 11, 12, 15 through 23, 65; Witnesses *key* 297(7), 298.

53 C.J.S. Libel and Slander §105; 81A C.J.S. States §§50 through 53, 56.

72 Am. Jur. 2d States, Territories, and Dependencies, §§50, 51.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family. 88 ALR 3d 304.

Sufficiency of witness' claim of privilege against self-incrimination. 51 ALR 2d 1157.

A Legislator's Handbook (Mont. Leg. Serv. Div.).

Rules of the Montana Legislature, published biennially by Mont. Leg. Serv. Div.

Legislative Branch Computer System Plan, A Report to the 57th Legislature from the Legislative Branch Computer System Planning Council, Mont. Leg. Serv. Div. (2000).

Appropriate Minutes of All Meetings Required...to Be Open Shall Be Kept, A Report to 55th Legislature on Senate Joint Resolution No. 4, Mont. Leg. Serv. Div. (1996).

A Study on the Use of Computers by Legislators, Report to the 53rd Montana Legislature From the Legislative Branch Computer System Planning Council, Mont. Leg. Council (1992).

Legislative Branch Computer System Plan, Report to the 53rd Montana Legislature From the Legislative Branch Computer System Planning Council, Mont. Leg. Council (1992).

Legislative Improvement, 1977-78 Interim Report, Montana Legislative Council.

Legislative Modernization, 1971-72 Interim Report No. 44, Montana Legislative Council.

Roll Call and Sound System, House of Representatives, 1971-72 Interim Report No. 47, Montana Legislative Council.

Part 1
Witnesses Before Legislature

Part Collateral References

Arrest *key* 9; Libel and Slander *key* 37, 48, 51; Perjury *key* 8; Process *key* 116; Witnesses *key* 201(2).

81A C.J.S. States §§57 through 60; 98 C.J.S. Witnesses §§363, 365, 527.

50 Am. Jur. 2d Libel and Slander §§294 through 296.

5-5-101. Subpoenas.

Collateral References

States *key* 34, 39 ½.

5-5-103. Contempt.

Collateral References

Contempt *key* 36; States *key* 40.

17 Am. Jur. 2d Contempt §§121 through 124.

5-5-104. Compelling attendance.

Collateral References

States *key* 39 ½.

98 C.J.S. Witnesses §§6, 88.

5-5-105. Immunity of witness.

Collateral References

States *key* 34.

22 C.J.S. Criminal Law §46; 98 C.J.S. Witnesses §§7 through 13.

5 Am. Jur. 2d Arrest §135; 62B Am. Jur. 2d Process §§45, 46.

Part 2
Organization

Part Collateral References

States *key* 34, 73, 74; Statutes *key* 13.

81A C.J.S. States §§55, 61; 82 C.J.S. Statutes §23.

72 Am. Jur. 2d States, Territories, and Dependencies §§56 through 58; 73 Am. Jur. 2d Statutes §§90 through 92.

5-5-202. Interim committees.

Compiler's Comments

2003 Amendment: Chapter 565 inserted (2)(e) establishing the energy and telecommunications committee; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 22, Ch. 565, L. 2003, was a saving clause.

Severability: Section 23, Ch. 565, L. 2003, was a severability clause.

2001 Amendment: Chapter 210 in (1) in third sentence after "environmental quality council" inserted "and state-tribal relations committee"; in (2)(a) substituted "economic affairs

committee" for "business and labor committee"; in (2)(b) inserted "and local government"; in (2)(d) substituted "law and justice committee" for "law, justice, and Indian affairs committee"; in (2)(e) substituted "revenue and transportation committee" for "revenue and taxation committee"; in (2)(f) substituted "state administration and veterans' affairs committee" for "state administration, public retirement systems, and veterans' affairs committee"; and made minor changes in style. Amendment effective April 6, 2001.

1999 Amendment: Chapter 19 in (1) at end of first sentence substituted "the committees listed in subsection (2) are the interim committees of the legislature" for "all regularly appointed standing or select committees of either house not formerly discharged prior to the final adjournment of the preceding session shall continue as such committees", substituted second sentence concerning areas of responsibility for former second sentence that provided: "They are empowered to continue to sit as such committees and may act through their joint subcommittees", and inserted third sentence concerning functions of committees provided for in governing statutes; inserted (2) listing the interim committees of the legislature; inserted (3) providing a procedure for the transfer of an issue by an interim committee or the environmental quality council to another committee; inserted (4) providing that the legislative council shall determine disputes between committees as to jurisdiction over a subject; and made minor changes in style. Amendment effective February 17, 1999.

1981 Amendment: Deleted "as provided in this title" and added "and may act through their joint subcommittees" at the end of the section.

Attorney General's Opinions

Power of Legislative Standing Committee to Meet During Special Session to Investigate Matter Not Within Call: There is no express or implied constitutional or statutory limitation circumscribing the interim investigative activity of a legislative standing committee, including activity during a special session. Therefore, a standing committee of the Legislature not formally discharged prior to the final adjournment of the preceding session may meet during a special session for the purpose of gathering information and taking testimony on a matter not within the call of the special session. 43 A.G. Op. 60 (1990).

Collateral References

Interim Directory of Legislative Committees (Mont. Leg. Serv. Div.).

An Introduction to the Montana Legislative Council (Montana Legislative Council).

The Interim, a newsletter report of interim activity, published monthly during the interim by the Mont. Leg. Serv. Div. and available by subscription.

5-5-211. Appointment and composition of interim committees.

Compiler's Comments

2001 Amendment: Chapter 210 in (7) in first sentence after "may" deleted "with the approval of the legislative council". Amendment effective April 6, 2001.

1999 Amendment: Chapter 19 in (1) substituted "Senate interim committee" for "Senate joint subcommittee"; in (2) substituted "House interim committee" for "House joint subcommittee"; in (3) substituted present language requiring appointment to interim committees by the time of adjournment of the legislative session for former language that provided that the presiding officer of the committee on committees and the speaker of the house will make the appointments to joint subcommittees within 30 days of being notified that an interim joint subcommittee has been created unless otherwise indicated by the legislative council; in (4) substituted "interim committees unless no other legislator is available or is willing to serve" for "interim joint subcommittees"; in (5)(a) at beginning inserted "Subject to subsection (5)(b)" and substituted "interim committee" for "subcommittee"; inserted (5)(b) providing for the appointment of additional members to an interim committee; inserted (6) providing that interim committee membership be established by legislative rules and establishing criteria for the rules; inserted (7) allowing an interim committee to create subcommittees and allowing nonlegislative members on a subcommittee; and made minor changes in style. Amendment effective February 17, 1999.

1995 Amendment: Chapter 513 inserted (3) concerning appointment to joint subcommittees being made within 30 days of notification of creation of a subcommittee; and made minor changes in style. Amendment effective April 25, 1995.

Preamble: The preamble attached to Ch. 513, L. 1995, provided: "WHEREAS, the Legislative Council is assigned the responsibility of effectively and efficiently utilizing the staff and financial resources within its purview; and

WHEREAS, the Legislative Council is also assigned the responsibility of determining priorities for interim studies to be conducted by interim joint subcommittees; and

WHEREAS, the Legislative Council has diligently considered ways of improving certain procedures, including the appointment of members to interim joint subcommittees."

Preamble: The preamble attached to Ch. 301, L. 1993, provided: "WHEREAS, the Joint Interim Subcommittee on Children and Families, established by House Joint Resolution No. 54 of the 1991 Regular Session, studied the following issues: the existing and the ideal continuum of services for children and families, especially programs for those families that are at risk of out-of-home placement of their children; the feasibility of instituting early identification and intervention programs for at-risk families; interagency coordination of programs and services for at-risk children and families in Montana; and the feasibility of establishing a statutory legislative oversight committee to review and monitor public and private programs and services for children and families;

WHEREAS, the Joint Interim Subcommittee on Children and Families concluded its study assignments by recommending numerous policy and programmatic changes related to the above issues, including the establishment of an oversight committee that could monitor the implementation of legislative recommendations or coordinate further study of emerging issues related to programs for children and families in Montana.

THEREFORE, the Legislature of the State of Montana finds it is appropriate to establish a joint oversight committee on children and families."

Establishment of Joint Oversight Subcommittee on Children and Families: Section 1, Ch. 301, L. 1993, provided: "(1) There is a joint oversight committee on children and families [now children, families, health, and human services committee] composed of eight members appointed as follows:

(a) four members of the house of representatives, not more than two of whom may be from one political party, appointed by the speaker; and

(b) four members of the senate, not more than two of whom may be from one political party, appointed by the committee on committees.

(2) In case of a vacancy, a replacement must be selected in the manner of the original appointment.

(3) Members are entitled to salary and expenses as provided in 5-2-302.

(4) The oversight committee may request staff assistance from the legislative council, which may be provided within limits established by the council, given other priorities and responsibilities.

(5) Any agency providing services or funding for a program or activity for children and families shall provide assistance and information upon request of the oversight committee."

Duties of Joint Oversight Subcommittee on Children and Families: Section 2, Ch. 301, L. 1993, provided: "The oversight committee shall:

(1) examine public and private programs, services, and planning for children and families for the purpose of identifying duplications, inefficiencies, and any unmet needs within those programs, services, and plans;

(2) review federal, state, local, and private funds available to state and local jurisdictions for programs and services for children and families and consider feasible methods of refinancing of those resources to maximize overall funding for existing and new programs;

(3) monitor implementation of any legislation that mandates interagency coordination of programs and services for children and families and study ways to improve coordination and collaboration among public and private human service providers at all levels of government in Montana;

(4) monitor implementation of any pilot programs designed to provide early identification of and family-based support for families that may be at risk of child abuse and neglect and at risk of out-of-home placement of their children; and

(5) report the results of its study in a written report to the 54th legislature no later than November 30, 1994. The oversight committee shall also provide copies of its report to the governor and appropriate state agencies."

Appropriation: Section 3, Ch. 301, L. 1993, provided an appropriation to support the activities of the Joint Oversight Committee on Children and Families (now Children, Families, Health, and Human Services Committee).

Effective Date: Section 4, Ch. 301, L. 1993, provided: "[This act] is effective July 1, 1993."

Termination Date: Section 5, Ch. 301, L. 1993, provided: "[This act] terminates June 30, 1995."

1981 Amendment: Substituted "Senate joint subcommittee members shall be appointed by the committee on committees. House joint subcommittee members shall be appointed by the speaker" for "Joint subcommittee members shall be appointed by the legislative council. The

chairmen of the appropriate standing committees in each body shall recommend suggested members to serve on each subcommittee. The legislative council shall consider the recommendations, but is not bound thereby" at the beginning of the section; changed "shall" to "may" in the third sentence.

5-5-212. Implied resignation of member — vacancies.

Compiler's Comments

1999 Amendment: Chapter 19 at beginning substituted "interim committee" for "subcommittee"; and made minor changes in style. Amendment effective February 17, 1999.

5-5-213. Officers of interim committees.

Compiler's Comments

1999 Amendment: Chapter 19 at beginning substituted "interim committee" for "subcommittee"; and made minor changes in style. Amendment effective February 17, 1999.

5-5-214. Interim activity.

Compiler's Comments

1999 Amendment: Chapter 19 at beginning of first sentence substituted "interim committees shall" for "subcommittees may" and in second sentence after "division" inserted "and other appropriate legislative entities" and at end substituted "interim committees" for "subcommittees". Amendment effective February 17, 1999.

1997 Amendment: Chapter 42 near end substituted "legislative services division" for "legislative council"; and made minor changes in style. Amendment effective March 12, 1997.

5-5-215. Duties of interim committees.

Compiler's Comments

2001 Amendment: Chapter 210 at beginning of (1)(b) inserted "subject to 5-5-217(3)"; inserted (1)(d) requiring review of proposed legislation of assigned agencies or entities; and made minor changes in style. Amendment effective April 6, 2001.

1999 Amendment: Chapter 19 throughout section substituted "interim committee" for "subcommittee"; inserted (1)(a), (1)(b), and (1)(c) requiring an interim committee to review administrative rules, conduct interim studies, and monitor the operation of assigned executive branch agencies; and made minor changes in style. Amendment effective February 17, 1999.

1995 Amendment: Chapter 545 in (1), after "information", inserted "bearing upon its assignment and" and after "pertinent to" substituted "the adequate completion of its work" for "important issues of policy and questions of statewide importance, including but not limited to:

(a) the possibilities of consolidations of departments, commissions, boards, and institutions in state government for:

(i) the elimination of unnecessary activities and duplications in office personnel and equipment;

(ii) the coordination of activities;

(iii) the purpose of increasing efficiency of service or effecting economies; and

(iv) the purpose of studying and inquiring into the financial administration of state governments and subdivisions thereof, including the problems of assessment and collection of taxes; and

(b) all other matters pertaining to the function of the departments and branches of state government"; in (3), at beginning, substituted "The legislative services division" for "Each subcommittee" and at end inserted "of each subcommittee"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification,

legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

Collateral References

The Interim, a newsletter report of interim activity, published monthly during the interim by the Mont. Leg. Serv. Div. and available by subscription.

5-5-216. Recommendations of committees.

Compiler's Comments

2001 Amendment: Chapter 210 in first sentence substituted "An interim committee or a statutory committee" for "A subcommittee appointed for the purpose of" and in second sentence substituted "a report, if one is written" for "the study report"; and made minor changes in style. Amendment effective April 6, 2001.

1991 Amendment: At end substituted "as provided in 5-11-210" for "at the next regular session". Amendment effective March 20, 1991.

5-5-217. Selection and assignment of interim studies.

Compiler's Comments

2001 Amendment: Chapter 210 in second sentence in (2) after "council" deleted "shall group related studies together and", substituted "interim committees and statutory committees" for "number of subcommittees", and at end inserted "and shall assign related studies to the same committee"; in first sentence in (3) substituted "interim committees and statutory committees" for "committee on committees and speaker of the house" and after "which" substituted "interim committee or statutory committee" for "joint subcommittee", deleted former second sentence that read: "The committee on committees and speaker shall then proceed under 5-5-211 to appoint the subcommittees", and inserted last two sentences authorizing interim or statutory committee to recommend to council reassignment of study to another interim or statutory committee and authorizing legislative council to adopt, reject, or modify interim committee recommendation; and made minor changes in style. Amendment effective April 6, 2001.

1997 Amendment: Chapter 42 in (1), in two places, and in (3) substituted "legislative services division" for "legislative council"; and made minor changes in style. Amendment effective March 12, 1997.

1981 Amendment: Substituted "subcommittees to be assigned studies" for "committees to be appointed" at the end of (2); substituted "committee on committees and speaker of the house" for "chairmen of the appropriate standing committees in each body" in the first sentence of (3); added "and to which joint subcommittee each study has been assigned" to the first sentence of (3); substituted "The committee on committees and speaker" for "Following receipt of the recommendations from the standing committee chairmen, the legislative council" in the last sentence of (3).

Collateral References

Interim Directory of Legislative Committees (Mont. Leg. Serv. Div.).

5-5-223. Economic affairs interim committee.

Compiler's Comments

2003 Amendment: Chapter 565 deleted former (5) that read: "(5) department of public service regulation"; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 22, Ch. 565, L. 2003, was a saving clause.

Severability: Section 23, Ch. 565, L. 2003, was a severability clause.

2001 Amendments — Composite Section: Chapter 210 at beginning substituted "economic affairs interim committee" for "business and labor interim committee" and after "rule review" inserted "draft legislation review"; and made minor changes in style. Amendment effective April 6, 2001.

Chapter 483 in temporary version inserted (1)(g) and in January 1, 2003, version inserted (7) adding the office of economic development; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 489 inserted (2) regarding full cost accounting pilot program; and made minor changes in style. Amendment effective May 1, 2001, and terminates December 31, 2002.

Saving Clause: Section 7, Ch. 489, L. 2001, was a saving clause.

Severability: Section 8, Ch. 489, L. 2001, was a severability clause.

Effective Date: Section 52, Ch. 19, L. 1999, provided that this section is effective on passage and approval. Approved February 17, 1999.

Collateral References

Home Field Advantage: Government Competition and Other Issues Before the Business, Labor, and Agriculture Interim Committee, Mont. Leg. Serv. Div. (2001).

5-5-224. Education and local government interim committee.

Compiler's Comments

2001 Amendment: Chapter 210 inserted first sentence in (1) requiring committee to act as liaison with local governments and in second sentence after "education" inserted "and local government" and after "rule review" inserted "draft legislation review"; inserted (2)(h) through (2)(p) outlining committee responsibilities specifically related to local governments and conducting interim studies; and made minor changes in style. Amendment effective April 6, 2001.

K-12 Public School Funding Study: Section 1, Ch. 580, L. 2001, provided: "**Section 1. K-12 public school funding study — duties — hearings.** (1) The governor and the superintendent of public instruction shall, within the provisions of the Montana constitution, conduct a study of funding for K-12 public schools, including but not limited to:

(a) analyzing the factors currently in law that are used to compute budget authority for schools to determine if additional factors or changes in those factors are necessary to equitably provide budget authority to public schools;

(b) determining the appropriate allocation of funding to adequately fund elementary, middle school, seventh and eighth grade, and high school programs;

(c) determining if a statewide salary schedule for school staff is possible under the constitutional provision for trustee management of school districts;

(d) determining if the current budget computations are prohibiting or discouraging local decisions to consolidate school districts;

(e) determining the adequacy and equity of the current statutory authority for public schools to access the funds necessary to provide facilities for school districts and state support for school facility costs;

(f) determining the adequacy and equity of current funding for pupil transportation;

(g) determining if appropriate disparity exists in the current local tax effort necessary to fund school districts;

(h) analyzing the current allocation of state funds to public schools to determine its equity;

(i) analyzing the relationship between increasing staffing levels in the classroom in the face of declining enrollment and the resulting financial impacts to school districts and the state;

(j) analyzing appropriate means for school districts to calculate ANB regarding nontraditional, part-time, or distance-learning students;

(k) determining if issues not listed in this section are affecting the equity of school funding in Montana and analyzing those issues;

(l) analyzing the school district structure that currently exists and determining if reducing the number of districts could provide efficiency in the operations of the districts and make existing resources available for classroom activities; and

(m) determining if the existence of 25 budgeted and nonbudgeted funds unreasonably restricts local decisionmakers.

(2) The governor, after consultation with the superintendent of public instruction, shall prepare and submit a preliminary report by December 31, 2001, on the findings and recommendations of the study to the education interim committee.

(3) (a) The education interim committee shall hold hearings and take public comment on the preliminary report prepared and submitted by the governor. The hearings may be held at various locations around the state to facilitate public comment on the governor's report.

(b) by August 1, 2002, the education interim committee shall provide to the governor for the governor's consideration a summary of the hearings and recommendations for changes to the report.

(c) The education interim committee may make any other recommendations on school funding that the committee considers appropriate. The education interim committee shall

submit its recommendations and, if appropriate, prepare legislation for consideration by the 2003 legislature.

(4) Upon receipt of the summary and recommendations from the education interim committee, the governor shall issue a final report and, if appropriate, prepare legislation for consideration by the 2003 legislature.

(5) The governor may:

(a) appoint one or more advisory councils pursuant to 2-15-122 to assist in conducting the study;

(b) coordinate with any other legislative interim committee, as appropriate;

(c) request assistance from other legislative and executive branch agencies; and

(d) in addition to any legislative appropriation, accept donations for purposes of the study required in this section."

Effective Date: Section 52, Ch. 19, L. 1999, provided that this section is effective on passage and approval. Approved February 17, 1999.

Collateral References

Local Control: The Final Report to the 57th Legislature from the Education and Local Government Interim Committee, Mont. Leg. Serv. Div. (2000).

5-5-225. Children, families, health, and human services interim committee.

Compiler's Comments

2001 Amendment: Chapter 210 in middle after "rule review" inserted "draft legislation review"; and made minor changes in style. Amendment effective April 6, 2001.

Effective Date: Section 52, Ch. 19, L. 1999, provided that this section is effective on passage and approval. Approved February 17, 1999.

Collateral References

"Who Is Minding the Children?", A Report to the 57th Legislature From the Children, Families, Health, and Human Services Interim Committee, Mont. Leg. Serv. Div. (2000).

Chance and Choice in the Game of Life, Report to the Governor and the 56th Legislature of the Joint Oversight Committee on Children and Families, Mont. Leg. Serv. Div. (1998).

In the Absence of Federal Funding: The 1997-98 Activities of the Subcommittee on Welfare and Child Support Enforcement Programs, Report to the 56th Legislature, Mont. Leg. Serv. Div. (1998).

An Ounce of Prevention, A Pound of Cure, A Report to the Governor and the 55th Legislature of the Joint Oversight Committee on Children and Families, Mont. Leg. Serv. Div. (1997).

Working Together to Improve the Continuum of Services to Children and Families, Report to the 54th Legislature, Mont. Leg. Council (1994).

5-5-226. Law and justice interim committee.

Compiler's Comments

2001 Amendment: Chapter 210 at beginning of first sentence substituted "law and justice interim committee" for "law, justice, and Indian affairs interim committee" and after "rule review" inserted "draft legislation review" and at end of second sentence after "judiciary" deleted "and shall act as a liaison and forum for state and tribal relations"; and made minor changes in style. Amendment effective April 6, 2001.

Effective Date: Section 52, Ch. 19, L. 1999, provided that this section is effective on passage and approval. Approved February 17, 1999.

Collateral References

Jurisdictions, A Report of the Law, Justice, and Indian Affairs Interim Committee, Mont. Leg. Serv. Div. (2000).

Correctional Reference Guide and Final Report, Report to the Governor and the 56th Legislature of the Correctional Standards and Oversight Committee, Mont. Leg. Serv. Div. (1998).

The Tribal Nations of Montana, A Handbook for Legislators, Mont. Leg. Council (1995).

Forging a New Relationship: 1993-94 Activities of the Committee on Indian Affairs, Report to the 54th Legislature, Mont. Leg. Council (1994).

Improving State-Tribal Relations: 1991-92 Activities of the Committee on Indian Affairs, Report to the 53rd Montana Legislature, Mont. Leg. Council (1992).

5-5-227. Revenue and transportation interim committee — powers and duties — revenue estimating and use of estimates.

Compiler's Comments

2003 Amendment: Chapter 114 inserted (2) through (4) requiring the committee to prepare for each regular session an estimate of available projected revenue, providing that the estimate is the legislature's current estimate until amended or until final adoption of the estimate by both houses and that it is intended that the legislature's estimates and their underlying assumptions be used by all agencies with revenue or cost estimating duties, and requiring the legislative services division to staff the committee and allowing the committee to request assistance from the staffs of other legislative and executive branch agencies that have information regarding tax and revenue bases of the state. Amendment effective October 1, 2003.

2001 Amendment: Chapter 210 at beginning substituted "revenue and transportation interim committee" for "revenue and taxation interim committee" and after "rule review" inserted "draft legislation review"; and made minor changes in style. Amendment effective April 6, 2001.

Effective Date: Section 52, Ch. 19, L. 1999, provided that this section is effective on passage and approval. Approved February 17, 1999.

Collateral References

Recipes for Change: A Menu of Property Tax Alternatives, Report of the Interim Property Tax Committee to the 56th Legislature, Mont. Leg. Serv. Div. (1998).

Tax Expenditures in Montana: Concept, Reporting, and Review, A Report to the Governor and the 54th Legislature, Mont. Leg. Council (1994).

Special Improvement District Financing: Resolving a Crisis? and Other Issues Before the Revenue Oversight Committee, Report to the Governor and the 54th Legislature, Mont. Leg. Council (1994).

Senate Bill No. 226: The Taxation of Retirement Income in the Wake of Davis v. Michigan, Report to the 53rd Legislature, Mont. Leg. Council (1992).

A Revenue System in Transition: Montana's Movement Toward Lower Coal Severance Tax Rates and Enhancing the In-State Investment Program, Mont. Leg. Council (1990).

Property Taxation and Other Issues Before the Revenue Oversight Committee, Report to the 51st Legislature, Mont. Leg. Council (1988).

From Liquor Stores to Burlington Northern Railroad: Issues Before the Revenue Oversight Committee, A Report to the 50th Legislature, 1985-86 Interim Report, Montana Legislative Council.

Property Tax Delinquencies, Tax Sales, and Tax Deeds, Revenue Oversight Committee, A Report to the 50th Legislature, 1985-86 Interim Report, Montana Legislative Council.

5-5-228. State administration and veterans' affairs interim committee.

Compiler's Comments

2001 Amendment: Chapter 210 at beginning substituted "state administration and veterans' affairs interim committee" for "state administration, public retirement systems, and veterans' affairs interim committee", after "rule review" inserted "draft legislation review", and after "functions" inserted "for the public employee retirement plans and"; and made minor changes in style. Amendment effective April 6, 2001.

Effective Date: Section 52, Ch. 19, L. 1999, provided that this section is effective on passage and approval. Approved February 17, 1999.

Collateral References

Legislative Policy Objectives for Montana's Public Employee Retirement Systems: 1999-2000 Interim, Presession Consideration of Retirement Plan Proposals, A Report to the 57th Legislature by the State Administration, Public Retirement Systems, and Veterans' Affairs Interim Committee, Mont. Leg. Serv. Div. (2000).

The Party of the First Part: A Review of Montana's State Contracting Laws and Procedures, A Report to the 57th Legislature from the State Administration, Public Retirement, and Veterans' Affairs Interim Committee, Mont. Leg. Serv. Div. (2000).

Veterans' Services and Youth Challenge, The Anatomy of Federal and State Veterans' Services and the National Guard Youth Challenge Program, A Report to the 57th Legislature by the State Administration, Public Retirement Systems, and Veteran's Affairs Interim Committee, Mont. Leg. Serv. Div. (2000).

A Defined Contribution Retirement Plan: An Option for Members of the Public Employees' Retirement System, Final Recommendations of the Committee on Public Employee Retirement Systems, Mont. Leg. Serv. Div. (1998).

A View of Veterans' Issues, Report to the 56th Legislature by the Joint Subcommittee on Veterans' Needs, Mont. Leg. Serv. Div. (1998).

From the "On" Switch to Encryption, Report of the Joint Oversight Committee on State Management Systems, Mont. Leg. Serv. Div. (1998).

Preparing Government for the 21st Century: Initiating the Integration of State Management Systems, A Report to the Governor and the 55th Legislature of the Joint Interim Subcommittee on State Management Systems, Mont. Leg. Serv. Div. (1996).

Promoting Fair and Consistent Legislative Policy for Public Retirees, Report to the Governor and the 53rd Legislature, Mont. Leg. Council (1992).

5-5-229. State-tribal relations committee.

Compiler's Comments

Effective Date: Section 22, Ch. 210, L. 2001, provided that this section is effective on passage and approval. Approved April 6, 2001.

5-5-230. Energy and telecommunications interim committee.

Compiler's Comments

Saving Clause: Section 22, Ch. 565, L. 2003, was a saving clause.

Severability: Section 23, Ch. 565, L. 2003, was a severability clause.

Effective Date: Section 24, Ch. 565, L. 2003, provided that this section is effective July 1, 2003.

Part 3
Appointments by Governor

Part Collateral References

States *key* 46; Officers *key* 6, 8, 9, 12 through 17, 29.

16 C.J.S. Constitutional Law §135; 29 C.J.S. Elections §59; 67 C.J.S. Officers §§46, 47, 53 through 57.

63C Am. Jur. 2d Public Officers and Employees §§90, 91.

Power to appoint public officer for term commencing at or after expiration of term of appointing officer or body. 75 ALR 2d 1270.

5-5-302. Nominations to senate to be in writing.

Collateral References

States *key* 46.

81A C.J.S. States §§84 through 87.

Part 4
Impeachment

Part Law Review Articles

Impeachment: Lessons From the Mecham Experience, Glennon, 30 Ariz. L. Rev. 371 (1988). (1988 impeachment of Governor)

New York's Impeachment Law and the Trial of Governor Sulzer: A Case for Reform, Dunne & Balboni, 15 Fordham Urb. L.J. 567 (1986-87).

An Evaluation of Nebraska's Impeachment Standard—State v. Douglas, DeWald, 19 Creighton L. Rev. 357 (1985-86). (1984 impeachment of state Attorney General)

"The Awful Discretion": The Impeachment Experience in the States, 55 Neb. L. Rev. 91 (1975).

Part Collateral References

Arrest *key* 14; Bribery *key* 1; Elections *key* 1, 10; Officers *key* 31, 66, 73, 98, 120 through 122; States *key* 52; Witnesses *key* 293 ½.

11 C.J.S. Bribery §3; 16 C.J.S. Constitutional Law §§191 through 195; 21 C.J.S. Courts §11; 35 C.J.S. Extortion §13.

12 Am. Jur. 2d Bribery §§3, 12, 13; 20 Am. Jur. 2d Courts §34; 50 Am. Jur. 2d Libel and Slander §233; 63C Am. Jur. 2d Public Officers and Employees §§211, 214 through 217, 230, 358 through 370.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office. 10 ALR 5th 139.

Pardon as restoring public office or license eligibility therefor. 58 ALR 3d 1191.

Conviction — effect of conviction under federal law or law of another state or country, on right to vote or hold public office. 39 ALR 3d 303.

Official oppression, what constitutes offense. 83 ALR 2d 1007.

Bribery, solicitation, or receipt of funds by public officer or employee for political campaign expenses or similar purposes. 55 ALR 2d 1137.

Infamous crime or one involving moral turpitude constituting disqualification to hold public office. 52 ALR 2d 1314.

Service of process — immunity from service of process of public officer while attending court in official capacity. 45 ALR 2d 1100.

Conviction of crime — under federal law or law of another state or country, as vacating accused's holding of state or local office or as ground of removal. 20 ALR 2d 732.

Power of legislature or branch thereof as to time of assembling, and length of session. 56 ALR 721.

Pendency of impeachment proceeding as affecting power of officer. 30 ALR 1149.

5-5-401. Officers liable to impeachment.

Collateral References

63C Am. Jur. 2d Public Officers and Employees §§218 through 222; 72 Am. Jur. 2d States, Territories, and Dependencies §§57, 59, 60, 102.

5-5-404. Officers of the court.

Compiler's Comments

Section Not Codified: Section 93-106, R.C.M. 1947, was a cross-reference to all sections in Title 5, ch. 5, part 4 (sections 95-2801 through 95-2819, R.C.M. 1947) and was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 9, C. Civ. Proc. 1895.

Collateral References

Constitutional Law *key* 50.

5-5-413. Suspension pending trial — filling vacancy.

Collateral References

Officers *key* 58.

5-5-432. Effect of judgment of suspension.

Collateral References

63C Am. Jur. 2d Public Officers and Employees §218.

5-5-433. Criminal prosecution not barred.

Collateral References

Criminal Law *key* 163.

22 C.J.S. Criminal Law §240.

CHAPTER 6
LEGISLATIVE INTERNS

Part 1
Legislative Intern Program

5-6-102. Establishment of program.

Compiler's Comments

2001 Amendment: Chapter 38 substituted "university of Montana-western" for "western Montana college of the university of Montana". Amendment effective March 13, 2001.

1995 Amendment: Chapter 225 substituted first sentence listing mandatorily eligible institutions for former sentence that read: "It is the public policy of this state that there be a legislative intern program open to students attending the university of Montana, Montana state university, eastern Montana college, northern Montana college, western Montana college of the

university of Montana, and the Montana college of mineral science and technology"; in second sentence, after "education", inserted "or a tribally controlled community college"; and made minor changes in style.

1989 Amendment: After "western Montana college" inserted "of the university of Montana". Amendment effective March 22, 1989.

5-6-103. Term of service.

Compiler's Comments

1997 Amendment: Chapter 104 at end substituted "a period to be specified by the legislative council prior to each regular legislative session" for "10 weeks during the regular session of the legislature".

5-6-106. Intern qualifications.

Compiler's Comments

1995 Amendment: Chapter 225 in (1)(b), before "institution", inserted "4-year" and after "learning" inserted "or attainment of at least the level of a sophomore at a 2-year postsecondary institution"; and made minor changes in style.

1993 Amendment: Chapter 72 in (1)(a) substituted "course of "government"" for "quarter of "state government""; and made minor changes in style.

5-6-111. Funding not obligatory.

Compiler's Comments

Section Not Codified: Section 43-731, R.C.M. 1947, a severability clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 11, Ch. 305, L. 1974.

CHAPTER 7
LOBBYING

Chapter Compiler's Comments

1980 Initiative Title: The title to Initiative No. 85, 1980, read: "An act to require public disclosure of money spent to influence action of a public official. All individuals or businesses who employ lobbyists and spend more than $1000 a year to promote or oppose official action of a public official must give a complete accounting of all money spent. The proposal does not apply to individual citizens lobbying on their own behalf. Elected officials are required to publicly disclose their business interests. Criminal and civil penalties are provided for violations of the provisions of this initiative."

Severability: Section 21, Initiative No. 85, 1980, was a severability section.

Effective Date: Section 22, Initiative No. 85, 1980, provided: "This act shall be effective upon passage and approval by the voters of the state of Montana." Approved November 4, 1980.

Chapter Case Notes

Lobbying — Initiative 85 — Attorneys — Constitutionality: Initiative 85, as emended in Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981), is not so vague as to be unconstitutionally uncertain, nor does it intrude on the power of the Supreme Court to regulate the conduct of attorneys. The act applies equally to attorneys and nonattorneys acting in the nonlegislative lobbying field. The right of the court to supervise the conduct of the members of the bar is undiminished by any provision of the Initiative. St. Bar of Mont. v. Krivec, 193 M 477, 632 P2d 707, 38 St. Rep. 1322 (1981).

Ministerial Acts Not Covered: An attorney procuring the performance of a purely ministerial act by a public official, an act that could otherwise be required by mandamus, is not procuring an official to exercise a legislative function and is not acting within the intent and purpose of Initiative 85. St. Bar of Mont. v. Krivec, 193 M 477, 632 P2d 707, 38 St. Rep. 1322 (1981).

Public Service Commission — Quasi-Judicial: Attorneys acting on behalf of clients or for themselves in quasi-judicial proceedings before the Public Service Commission are not covered by Initiative 85. St. Bar of Mont. v. Krivec, 193 M 477, 632 P2d 707, 38 St. Rep. 1322 (1981).

Chapter Law Review Articles

Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities, Galston, 71 Tex. L. Rev. 1269 (1993).

Chapter Collateral References

Bribery *key* 1; Contracts *key* 123, 126; Statutes *key* 24.

16B C.J.S. Constitutional Law §§539 through 610.

51 Am. Jur. 2d Lobbying §§2 through 7, 14.

Use of compulsory bar association dues or fees for activities from which particular members dissent. 40 ALR 4th 672.

Validity and construction of state and municipal enactments regulating lobbying. 42 ALR 3d 1046.

Antitrust: application of doctrine exempting from federal antitrust laws joint efforts to influence legislative or executive action. 17 ALR Fed. 645.

Part 1
General Provisions — Licenses

5-7-101. Purposes of chapter — applicability.

Compiler's Comments

1991 Amendment: In (2), after "subjects", substituted "an individual" for "any citizen" and after "deprives" substituted "an individual" for "any such citizen".

1983 Amendment: Near end of (1), after "business" inserted "financial, and occupational"; in (2) after "subjects any" deleted "Montana" before "citizen".

1980 Initiative Amendment: Added ", to require elected officials to make public their business interests, and to require disclosure of the amounts of money spent for lobbying" at the end of subsection (1); and added subsection (2) exempting Montana residents from reporting requirements when lobbying on their own behalf.

Administrative Rules

ARM 44.12.101A Preamble and statement of applicability.

Case Notes

Exemptions for Montana Citizens Unconstitutional: Prior to 1983 amendment, the exemption provided in 5-7-101(2) and 5-7-102(5)(b)(i) from Initiative 85 for Montana citizens was constitutionally impermissible under the Privileges and Immunities Clause of the United States Constitution. There is no basis for creating an exception solely for individual Montana citizens. Citizens of other states may have an interest in some official action in Montana that warrants their efforts to influence the outcome of that action in Montana. The word "Montana" was void and without effect in both sections. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Collateral References

82 C.J.S. Statutes §6.

5-7-102. Definitions.

Compiler's Comments

2003 Amendments — Composite Section — Coordination: Chapter 52 inserted definitions of appointed state official, elected federal official, elected tribal official, and legislator; substituted elected local official for elected official as defined term and after "means" substituted "an elected officer of a county, a consolidated government, an incorporated city or town, a school district, or a special district. The term includes an individual appointed to fill the unexpired term of an elected local official and an individual who has been elected to a local office but who has not yet been sworn in" for "a public official"; in definition of elected state official near middle of first sentence after "limited to" deleted "legislators" and at end inserted "but not including legislators for the purposes of this chapter", inserted second sentence including in the definition an individual appointed to fill the unexpired term of an elected state official and an individual who has been elected to a statewide office but who has not yet been sworn in, and deleted former second sentence that read: "The term "official-elect" also applies to the offices"; in definition of lobbying at end of (a)(i) deleted "by a person other than a member of the legislature or a public official" and inserted (b) providing that the term does not include actions described in subsections (11)(a)(i) and (11)(a)(ii) when performed by a legislator, a public official, an elected local official, an elected federal official, or an elected tribal official while acting in an official governmental capacity; in definition of lobbying for hire at end after "principal" substituted "to lobby" for "and whose duties include lobbying. If an individual is reimbursed only for his personal living and travel expenses, which together are less than $1,000 per calendar year, that individual is not considered to be lobbying for hire"; in definition of payment to influence official

action at end of (a) after "expenses" deleted "excluding personal living expenses"; in definition of public official after "means an" substituted "elected state official or an appointed state official" for "individual, elected or appointed"; and made minor changes in style. Amendment effective February 26, 2003.

Chapter 572 deleted definition of lobbying for hire that read: ""Lobbying for hire" includes activities of the officers, agents, attorneys, or employees of a principal who are paid, reimbursed, or retained by the principal and whose duties include lobbying. If an individual is reimbursed only for his personal living and travel expenses, which together are less than $1,000 per calendar year, that individual is not considered to be lobbying for hire"; in definition of lobbyist in (a) after "lobbying" deleted "for hire", inserted (b)(iii) excluding an individual who receives payments in a calendar year that total less than the amount specified in 5-7-112, and in (c) near beginning after "this" substituted "chapter" for "section" and after "individual" substituted "who is not a lobbyist" for "not lobbying for hire"; in definition of payment inserted (a)(i) concerning rendering to a lobbyist to influence legislation or official action, in (a)(ii) at beginning substituted "directly or indirectly" for ""Payment to influence official action" means any of the following types of payment:

(a) direct or indirect payment" and near end after "reimbursement for" substituted "lobbying expenses" for "expenses, excluding personal living expenses", and inserted (b) excluding personal and necessary living expenses and travel expenses from the definition; in definition of principal after "lobbyist" inserted "or a person required to report pursuant to 5-7-208"; and made minor changes in style. Amendment effective May 5, 2003.

Pursuant to sec. 7(1), Ch. 572, L. 2003, a coordination section, the code commissioner in (12)(c) substituted "this chapter deprives an individual who is not a lobbyist" for "this subsection (13) deprives an individual not lobbying for hire".

Saving Clause: Section 9, Ch. 572, L. 2003, was a saving clause.

Retroactive Applicability: Section 11, Ch. 572, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all occurrences concerning filing or reporting on or after September 1, 2002. This section may not be construed to require a refund of any fee paid on or after September 1, 2002."

1991 Amendment: In definition of lobbying, near end of (a) after "official", deleted "acting in his official capacity" and in (b), after "public official", deleted "in the event the person engaged in such practice expends $1,000 per calendar year or more exclusive of personal travel and living expenses"; in definition of lobbyist, in (b)(i) after "individual", deleted "citizen" and in (c), after "deprives", substituted "an individual" for "any citizen"; in definition of lobbying for hire, in second sentence before $1,000, substituted "are less than" for "do not exceed"; in definition of unprofessional conduct, in (b) after "employment", deleted "in opposition thereto"; in definition of principal, after "who", substituted "employs" for "makes payments in excess of $1,000 per calendar year to engage"; in definition of docket, after "register", deleted "and reports"; in definition of business, in (a) after "self-employed", substituted "person" for "individual"; and made minor changes in style.

1983 Amendment: In (3), after "state" deleted "or local"; after "government" deleted "or any political subdivision thereof"; at end of (3) added "or performing ministerial acts"; in (5)(b)(i) after "individual" deleted "Montana"; in (5)(b)(ii) after "personal contact" inserted "involving lobbying"; deleted (7)(c)(i), which read: "(i) the promise of support or opposition at any future election;"; deleted (7)(c)(iv), (7)(c)(v), and (7)(d), which read: "(iv) any improper economic reprisal or other unlawful retaliation against any public official; or

(v) any means other than argument on the merits thereof;

(d) attempting to influence a decision or vote by a hearing examiner or quasi-judicial officer in any contested case proceeding under Title 2, chapter 4, part 6, except as provided therein;"; deleted (7)(f), which read: "(f) engaging in practices which reflect discredit on the practice of lobbying"; deleted (8)(b), which read: "(b) in the case of a person other than an individual, to solicit, directly, indirectly, or by an advertising campaign, the lobbying efforts of another person"; in (11)(a) after "compensation" inserted "or reimbursement"; after "expenses" substituted "excluding personal living expenses" for "or for any other purpose"; inserted (12)(b) which includes within definition of business any present or past employment from which benefits are received; and made minor changes in punctuation and phraseology.

1980 Initiative Amendment: Substituted "The following definitions apply in this chapter" for "The following words and phrases shall have the meanings respectively ascribed to them" at the beginning of the section; inserted definitions of individual, person, and public official; changed "means" to "includes" at the beginning of subsection (4) and added subsection (4)(b) which includes within the definition of lobbying the practice of promoting or opposing official action by

any public official in the event the person engaged in such practice expends $1,000 per calendar year or more exclusive of personal travel and living expenses; deleted "except in the manner authorized by 5-7-304" at the end of subsection (5)(a); inserted subsection (5)(b) relating to what the definition of lobbyist does not include; substituted "deprives" for "shall be construed to deprive", changed "his" to "the" before "constitutional right" and changed "members of the legislature" to "public officials" in subsection (5)(c); changed "shall include" to "includes", substituted "paid, reimbursed, or retained" for "paid a regular salary", changed "a person" to "an individual", inserted "which together do not exceed $1,000 per calendar year," after "expenses," and changed "be" to "that individual" in subsection (6); deleted former subsection (7)(b), which read: "(b) soliciting employment from any principal"; changed "the introduction of legislation" to "action by any public official" in subsection (7)(b); changed "vote of legislators" to "action of any public official" in subsection (7)(c); deleted "by any means other than argument on the merits thereof, or" at the end of subsection (7)(c)(i); inserted "any principal" in (7)(c)(iii); inserted subsections (7)(c)(ii) relating to promise of financial support; inserted (7)(c)(iv) relating to improper economic reprisal; inserted (7)(c)(v) relating to any means other than argument on the merits; inserted (7)(d) relating to influencing a decision by a hearing examiner or quasi-judicial officer in a contested case proceeding; inserted (7)(e) relating to deception or misrepresentation of pertinent facts of an official matter to any public official; deleted "or the legislature" after "lobbying" in subsection (7)(f); in (8) substituted ""Principal" means any person who makes payments in excess of $1,000 per calendar year for any of the following:

(a) to engage a lobbyist; or

(b) in the case of a person other than an individual, to solicit, directly, indirectly, or by an advertising campaign, the lobbying efforts of another person" for ""Principal" means: (a) any person, corporation, or association which engages a lobbyist or other person in connection with any legislation pending before the legislature or to be proposed affecting the pecuniary interest of such person, corporation, or association; or (b) any board, department, commission, or other agency of the state, any county, or municipal corporation which engages a lobbyist or other person in connection with any legislation pending or to be proposed affecting the statutory powers, duties, or appropriation of such agency, county, or municipal corporation"; substituted "register and reports of lobbyists and principals" for "register of licensed lobbyists" and changed "secretary of state" to "commissioner" in subsection (9); deleted former subsection (6), which defined "pecuniary interest"; added definitions of payment, payment to influence official action, business, commissioner, and elected official; and made minor changes in grammar, punctuation, and phraseology.

Administrative Rules

ARM 44.10.621 Business disclosure.
ARM 44.12.102 Lobbying — definitions and scope — reportable activities.
ARM 44.12.104 Personal living expenses — limitations and records.
ARM 44.12.106 Elected public officials.
ARM 44.12.106A Appointed public officials.

Case Notes

Quasi-Judicial Capacity — Public Service Commission: In general, when the law commits to any officer the duty of looking into facts and acting upon them, not in a way that is specifically directed but with discretion, the function is termed quasi-judicial; thus, attorneys acting on behalf of clients or for themselves in quasi-judicial proceedings before the Public Service Commission are not covered by Initiative 85. St. Bar of Mont. v. Krivec, 193 M 477, 632 P2d 707, 38 St. Rep. 1322 (1981).

Definition Subsections Impermissibly Vague: Subsections (7)(c)(iv), (7)(c)(v), and (7)(f) of 5-7-102, enacted by Initiative 85 (deleted in 1983 amendment), are impermissibly vague, unconstitutional, and therefore void. (Following U.S. v. Dupree, 544 F2d 1050 (9th Cir. 1976).) The court asks rhetorically: Is there a form of "proper" economic reprisal? How does a lobbyist determine when he may retaliate lawfully against a public official? Can conduct which is potentially criminal be defined as "any means other than" the permitted means of argument on the merits? To "reflect discredit" is not sufficiently definite to give a person of ordinary intelligence fair notice that his conduct is forbidden. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Prohibition Against Influencing Quasi-Judicial Public Officials — Void: Subsection (7)(d) of 5-7-102, contained in Initiative 85 (deleted in 1983 amendment), is void. It is inconsistent with the intention of a law enacted to regulate lobbying for it to also regulate conduct that is, by the

terms of the statute, not lobbying. (See subsection 5-7-102(4)(b), enacted by Initiative 85.) Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Prohibition Against Soliciting Lobbying Efforts as Unconstitutional: Subsection (8)(b) of 5-7-102 from Initiative 85 (deleted in 1983 amendment) is unconstitutional and void for vagueness. Facially, subsection (8)(b) constitutes a more drastic infringement on freedom of the press and freedom of speech than was present in Mills v. Alabama, 384 US 214 (1966). Further, the court is unable to find any compelling state interest which requires the inclusion of subsection (8)(b) in Initiative 85. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Prohibition Against Voters' Promise of Support as Unconstitutional: Section 5-7-102(7)(c)(i), contained in Initiative 85 (deleted in 1983 amendment), is an unconstitutional infringement of the right of free speech and is therefore void. The prohibited conduct is nothing more than a standard and accepted means of involvement in the political process. It is a free expression of the only real power an elector possesses. Criticism of government is at the very center of the constitutional protection of free speech. No law could stand that would prevent an elector from voting for or against an incumbent. Likewise, no law can stand that would prevent a voter from expressing to an elected official an intention to vote for or against that official if certain action is or is not taken. Further, the first amendment applies to associations as well as individuals and protects the right of associations to engage in advocacy on behalf of their members. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Unprofessional Conduct of Lobbyists and Principals Limited in Construction: The Supreme Court of Montana construes subsection (7)(a) of 5-7-102, enacted by Initiative 85, to limit "unprofessional conduct" to violations of any of the provisions of this chapter by a lobbyist or principal, not by an elected official. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Collateral References

51 Am. Jur. 2d Lobbying §1.

5-7-103. Licenses — fees — eligibility — waiver.

Compiler's Comments

2003 Amendment: Chapter 572 in (1) at end of fifth sentence after "lobbyist" inserted "except as provided in subsection (5) or unless the fee is waived for hardship reasons under this subsection"; in (2)(a) near middle of second sentence after "10" inserted "business" and at end after "application" inserted "excluding the date on which the application is filed"; inserted (5) providing that a lobbyist who receives payments in a calendar year that total less than the amount specified in 5-7-112 is not required to pay a license fee or file an application form; in (6) at end inserted reference to subsection (5); and made minor changes in style. Amendment effective May 5, 2003.

The amendments to this section in Ch. 52, L. 2003, were rendered void by sec. 7(2), Ch. 572, L. 2003, a coordination section.

Saving Clause: Section 9, Ch. 572, L. 2003, was a saving clause.

Retroactive Applicability: Section 11, Ch. 572, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all occurrences concerning filing or reporting on or after September 1, 2002. This section may not be construed to require a refund of any fee paid on or after September 1, 2002."

2001 Amendment: Chapter 557 in (1) in fifth sentence increased license fee from $50 to $150 and in last sentence after "waive" inserted "all or a portion of"; in (3) after "fines" deleted "and license fees"; inserted (4) relating to the distribution and deposit of the license fee; and made minor changes in style. Amendment effective July 1, 2001.

1993 Special Session Amendment: Chapter 18 in (1), in fourth sentence after "fee", deleted "of $10", inserted fifth sentence establishing $50 lobbyist license fee, and inserted last two sentences providing for license fee waiver; inserted (4) authorizing adoption of rules to implement fee waiver; and made minor changes in style. Subsections (1) through (3) effective January 1, 1994. Subsection (4) effective December 23, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 18, Sp. L. November 1993, provided: "A statement of legislative intent is necessary for this bill because 5-7-103 authorizes the commissioner of political practices to adopt rules implementing the waiver provisions of subsection (1) of that section.

The legislature intends that rules adopted by the commissioner specify the procedures to be used by a lobbyist when applying for a hardship waiver and the standards to be used by the

commissioner in determining whether a hardship exists. The commissioner may specify categories of licenses or lobbyists for which hardship waivers will be granted."

1991 Amendments: Chapter 91 in beginning of (2)(a) inserted exception clause; inserted (2)(b) concerning disapproval of application if applicant failed to file reports required under 5-7-208; and made minor changes in style.

Chapter 498 in (1), near beginning after "character", deleted "who is a citizen of the United States and".

1980 Initiative Amendment: In (1), changed the "secretary of state" to "commissioner" three times, substituted "application and receipt" for "application by the secretary of state and payment", and inserted "enumerated" before "principals" in the third sentence, and substituted the last sentence that read: "Each license shall expire on December 31 of each even-numbered year or may be terminated at the request of the lobbyist" for "Each license shall expire on December 31 of each odd-numbered year"; inserted "fines and" before "license fees", deleted "by the secretary of state" after "collected", and deleted "by him" after "deposited" in subsection (3).

Administrative Rules

ARM 44.12.212 Licenses — fees — waiver — hearing.

5-7-105. Suspension of lobbying privileges.

Compiler's Comments

2003 Amendment: Chapter 572 near end after "lobbying" deleted "for hire"; and made minor changes in style. Amendment effective May 5, 2003.

Saving Clause: Section 9, Ch. 572, L. 2003, was a saving clause.

Retroactive Applicability: Section 11, Ch. 572, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all occurrences concerning filing or reporting on or after September 1, 2002. This section may not be construed to require a refund of any fee paid on or after September 1, 2002."

1980 Initiative Amendment: Deleted "or revoked" after "suspended"; substituted "adjudged guilty" for "convicted"; inserted "for hire" after "engage in lobbying"; substituted "that person" for "he"; and deleted "of lobbying" after "practice".

5-7-108. Inspection of applications and reports — order of noncompliance — notification.

Compiler's Comments

2003 Amendment: Chapter 31 in (3) at beginning of first sentence after "person" inserted "notified of noncompliance" and at beginning of second sentence substituted "If the person notified of noncompliance fails" for "Upon failure" and near middle after "civil" deleted "or criminal"; and made minor changes in style. Amendment effective February 18, 2003.

5-7-111. Commissioner to make rules.

Compiler's Comments

Incorporation Into Existing Law: Section 17, Initiative No. 85, 1980 (5-7-111), was enacted without a codification instruction. It was apparently intended to become an integral part of Title 5, ch. 7, and the Code Commissioner has codified it accordingly.

Administrative Rules

ARM 44.10.621 Business disclosure.

Title 44, chapter 12, ARM Commissioner of Political Practices — lobbyist disclosure.

Title 44, chapter 12, subchapter 1, ARM General policy — lobbyist disclosure.

ARM 44.12.105 State government agencies — lobbying — definitions and reporting.

ARM 44.12.107 Local government lobbying — definitions and reporting.

Title 44, chapter 12, subchapter 2, ARM Reporting of lobbying expenditures by principals — right to hearing.

ARM 44.12.203 Principals — reporting of compensation paid to lobbyists.

ARM 44.12.205 Principals — reporting of reimbursed expenses of lobbyists.

ARM 44.12.207 Principals — reporting of office and miscellaneous expenses.

ARM 44.12.211 Allocation of time and costs — alternative reporting method.

Case Notes

Statute Requiring "Necessary" Rules Requires Rulemaking Hearing — Mandamus Proper Remedy: Pursuant to 2-4-315 and this section, Common Cause submitted a petition to the Commissioner of Political Practices requesting the adoption of a definition of "lobbying". When the Commissioner denied the petition, Common Cause brought a petition for mandamus. The

District Court dismissed pursuant to Rule 12(b)(6), M.R.Civ.P. (Title 25, ch. 20). The Supreme Court reversed, citing Commonwealth of Pa. v. Nat'l Ass'n of Flood Insurers, 520 F2d 11 (3d Cir. 1975), and holding that the language in this section requiring rules "necessary" to implement the statute mandated the Commissioner to hold a hearing to determine whether rules were necessary. The Supreme Court held that the discretionary authority contained in 2-4-315 to adopt or not adopt a particular rule does not give the Commissioner the authority to avoid altogether the rulemaking required by this section. For this reason, the Supreme Court also held that mandamus was a proper remedy because the Commissioner had a clear legal duty to conduct rulemaking procedures to determine what rules were necessary. Common Cause of Mont. v. Argenbright, 276 M 382, 917 P2d 425, 53 St. Rep. 386 (1996).

5-7-112. Payment threshold — inflation adjustment.

Compiler's Comments

Saving Clause: Section 9, Ch. 572, L. 2003, was a saving clause.

Effective Date: Section 10, Ch. 572, L. 2003, provided: "[This act] is effective on passage and approval." Approved May 5, 2003.

Retroactive Applicability: Section 11, Ch. 572, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all occurrences concerning filing or reporting on or after September 1, 2002. This section may not be construed to require a refund of any fee paid on or after September 1, 2002."

Part 2
Registration and Reports

5-7-201. Docket — contents.

Compiler's Comments

1991 Amendment: In last sentence substituted "date of the receipt of the principal's lobbying reports as required by 5-7-208" for "principal's required reports of payments to influence official action by a public official"; and made minor change in style.

1980 Initiative Amendment: Substituted "The commissioner ... but not limited to" for "The secretary of state shall prepare and keep a docket in which shall be entered"; deleted "of legislation" after "subjects"; added the last sentence requiring docket entry to indicate payments to influence official action; and made a minor change in grammar.

5-7-202. Docket — public record.

Compiler's Comments

1980 Initiative Amendment: Substituted "individual" for "citizen" and "commissioner" for "secretary of state".

5-7-203. Principal — name of lobbyist on docket.

Compiler's Comments

1985 Amendment: At beginning of first sentence deleted "Except as provided in 5-7-304".

5-7-207. Report to legislature.

Compiler's Comments

1993 Amendment: Chapter 349 near middle, after "shall", inserted "make available" and after "legislature" inserted "containing"; and made minor changes in style.

1980 Initiative Amendment: Changed "first week" to "first Tuesday" near the beginning; substituted "the first Tuesday of every month thereafter during which the legislature is in session" for "every Tuesday thereafter for the duration of such session"; substituted "commissioner" for "secretary of state"; inserted "member of each" before "house"; substituted "principals" for "persons"; substituted "each principal is" for "they are"; and made minor changes in grammar.

5-7-208. Principals to file report.

Compiler's Comments

2003 Amendment: Chapter 572 in (1) inserted second sentence providing that a principal is subject to reporting requirements only if payments in excess of the amount in 5-7-112 are made during a calendar year; and made minor changes in style. Amendment effective May 5, 2003.

Saving Clause: Section 9, Ch. 572, L. 2003, was a saving clause.

Retroactive Applicability: Section 11, Ch. 572, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all occurrences concerning filing or reporting on or after September 1, 2002. This section may not be construed to require a refund of any fee paid on or after September 1, 2002."

1991 Amendments: Chapter 91 throughout section substituted reference to report for reference to accounting; and made minor changes in style.

Chapter 498 in (1), after "commissioner", substituted "a report" for "an accounting"; in (2), in introductory clause after "action", substituted "a report must" for "such accounting shall"; in (2)(c), at beginning, substituted "no later than 30" for "within 60"; in (3), in introductory clause after "action", substituted "a report must" for "such accounting shall"; in (5), at beginning after "Each", substituted "report" for "accounting"; and made minor changes in style.

1983 Amendment: At end of (1), after "made" substituted "for the purpose of lobbying" for "to influence the official action of a public official"; deleted former (5)(a)(i) and (5)(a)(ii), which read: "(i) original and derivative research (for which the cost may be estimated if necessary) done to support a lobbying argument or presentation;

(ii) publication and distribution of each publication, except that the cost of a newsletter or leaflet distributed to the membership of a principal need not be reported unless over one-half of that newsletter or leaflet is devoted to lobbying matters;"; in (5)(a)(i) deleted "other" before "printing"; deleted former (5)(a)(iv), which read: "(iv) news media;"; in (5)(a)(iv) after "travel" deleted "and personal living"; in (5)(b)(i) increased amount of separate payment required to be itemized from $10 to $25; at end of (5)(b)(i) inserted "when the payment was made for the purpose of lobbying"; in (5)(b)(ii) after "benefit" inserted "when the payment was made for the purpose of lobbying"; in (5)(c) after "principal" deleted "regardless of whether it was paid solely"; deleted former (5)(d), which read: "(d) list each political contribution, including anything of value, paid to any candidate for elective public office, to any committee established to support or oppose a candidate for elective public office, or to any committee to support or oppose any initiative, referendum, or other ballot issue, whether such payment is made directly or indirectly by the principal or any lobbyist who received compensation or reimbursement for such payment from the principal;".

Incorporation Into Existing Law: Sections 11 through 16, Initiative No. 85, 1980 (5-7-208 through 5-7-213 (5-7-213 renumbered 2-2-106)), were enacted without a codification instruction. They were apparently intended to become integral parts of Title 5, ch. 7, and the Code Commissioner has codified them accordingly.

Administrative Rules

ARM 44.12.103 Lobbyists and lobbying support personnel — reporting of information to principal.

ARM 44.12.105 State government agencies — lobbying — definitions and reporting.

ARM 44.12.107 Local government lobbying — definitions and reporting.

ARM 44.12.201 Reporting of contributions and membership fees.

ARM 44.12.202 Principals — reports — maintenance of records.

ARM 44.12.203 Principals — reporting of compensation paid to lobbyists.

ARM 44.12.205 Principals — reporting of reimbursed expenses of lobbyists.

ARM 44.12.207 Principals — reporting of office and miscellaneous expenses.

ARM 44.12.209 Principals — reporting of costs of entertainment and social events.

ARM 44.12.211 Allocation of time and costs — alternative reporting method.

Case Notes

Accounting Requirements Void for Vagueness: Subsections (5)(a)(i) and (5)(a)(iv) of 5-7-208 (amended to cure unconstitutionality in 1983), enacted by Initiative 85, are void for vagueness. It is impossible to tell when "original and derivative" research is being performed; likewise, the court is unable to determine what additional information ought to be disclosed under the subheading of "news media". Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Language Requiring Nonlobbying Expenses to Be Disclosed — Unconstitutional: The words "regardless of whether it was paid solely" as used in subsection (5)(c) of 5-7-208 (phrase deleted in 1983 amendment) from Initiative 85 are void as a violation of the first amendment right of association which exists as a necessary corollary to the freedoms of speech and assembly. The forced disclosure of contributions and membership fees "regardless of whether . . . paid solely for the purpose of lobbying" compels revelation of information that has no relationship to the ends that the "Lobbying Act" and the Initiative seek to achieve. That some money is in fact spent for lobbying does not lessen the repugnance of 5-7-208(5)(c). Further, the forced disclosure of the

name of an individual who contributed $250 reaches too broadly and too blindly into an area that is essential to the exercise of our most basic freedoms. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Title Not Embracing a Bill Section as Rendering Section Void: Subsection (5)(d) of 5-7-208 from Initiative 85 (deleted in 1983 amendment) is not embraced in the title of Initiative 85 and is therefore void. There is insufficient substantive relationship between the title and this subsection. The "Lobbying Act" was not being transformed into a general campaign finances act. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

5-7-209. Payments prohibited unless reported — penalty for late filing, failure to report, or false statement.

Compiler's Comments

2003 Amendment: Chapter 31 near middle of second sentence after "report" inserted "within the time required by this chapter", after "subject to the" substituted "penalties" for "penalty", inserted reference to 5-7-306(1), and at end deleted "as well as any civil action provided for in that section". Amendment effective February 18, 2003.

5-7-211. Governmental responses not lobbying payments.

Administrative Rules

ARM 44.12.105 State government agencies — lobbying — definitions and reporting.

ARM 44.12.107 Local government lobbying — definitions and reporting.

5-7-212. Audit of lobbying reports.

Compiler's Comments

1991 Amendments: Chapter 91 in two places in (1) substituted "reports" for "accountings", near beginning, before "may audit", deleted "shall examine and", and near end reduced period of time lobbying records must be kept from 7 years to 3 years.

Chapter 498 in two places in (1) substituted "reports" for "accountings"; and made minor changes in style.

Administrative Rules

ARM 44.12.103 Lobbyists and lobbying support personnel — reporting of information to principal.

Part 3
Prohibitions — Enforcement

Part Collateral References

51 Am. Jur. 2d Lobbying §§8, 14.

5-7-301. Prohibition of practice without license and registration.

Compiler's Comments

1980 Initiative Amendment: Substituted "No individual" for "No person" at the beginning, substituted "that individual" for "he" before "has been licensed", deleted "unless he is" before "listed on the docket" in (1); substituted "that principal" for "him" after "employed by", deleted "in respect to any legislation affecting the pecuniary interest of the principal" after "practice lobbying", substituted "lobbyist and the principal are" for "lobbyist is" in (2); and made minor changes in grammar.

5-7-302. Unprofessional conduct.

Compiler's Comments

1983 Amendment: Deleted former (2), which read: "No person may be employed as a lobbyist for a compensation dependent in any manner upon the passage or defeat of any proposed or pending official action by a public official or upon any other contingency connected with such action."

1980 Initiative Amendment: Inserted subsection (1) prohibiting a lobbyist or principal from engaging in or authorizing any unprofessional conduct; substituted "official action by a public official" for "legislation", changed "the action" to "such action", and deleted "of the legislature, of either branch thereof, or of any committee thereof" in (2).

Incorporation Into Existing Law: Section 10, Initiative No. 85, 1980 (5-7-302(1)), was enacted without a codification instruction. It was apparently intended to become an integral part of Title 5, ch. 7, and the Code Commissioner has codified it accordingly.

Case Notes

Prohibited Compensation Provision Held Unconstitutional: Section 5-7-302 as amended by Initiative 85 is void because it violates the right to petition the government included in the first amendment to the United States Constitution and Art. II, sec. 6, Mont. Const. Section 5-7-302 unduly infringes the rights of those who, while contemplating neither illegal nor unethical conduct, need or desire to employ a lobbyist on a contingent fee basis in order to advance their interests before a public official. (Section 5-7-302 was amended to cure unconstitutionality in 1983.) Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

5-7-305. Penalties and enforcement.

Compiler's Comments

2003 Amendment: Chapter 31 deleted former (1) that read: "(1) Any person violating the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail not more than 6 months or by a fine not exceeding $200, or both"; in (1) near middle of third sentence after "provisions of this" substituted "chapter" for "act"; in (2) near middle after "bring" substituted "a civil action" for "criminal or civil actions" and near end after "appropriate" deleted "criminal or"; in (3) near beginning substituted "civil action penalty" for "prosecution", after "undertaken by" inserted "the attorney general or", and after "commissioner" deleted "or any county attorney"; in (4)(a)(i) at beginning after "attorney general" inserted "the commissioner" and near end substituted "90 days" for "40 days"; in (4)(a)(ii) at beginning substituted "the attorney general, the commissioner, or the county attorney fails" for "said attorneys then fail", after "10 days after" inserted "receiving", after "notice" deleted "delivered to them advising them", and near end after "brought if" substituted "the attorney general, the commissioner, or the county attorney does not" for "they do not"; and made minor changes in style. Amendment effective February 18, 2003.

1991 Amendment: In (6) reduced time for bringing action from 7 years to 3 years.

Incorporation Into Existing Law: Section 18, Initiative No. 85, 1980 (5-7-305(2) through (9)), was enacted without a codification instruction. It was apparently intended to become an integral part of Title 5, ch. 7, and the Code Commissioner has codified it accordingly.

Administrative Rules

ARM 44.12.213 Complaints — procedure.

ARM 44.12.215 Audits.

CHAPTER 11
LEGISLATIVE COUNCIL AND PUBLICATION OF LAWS

Chapter Compiler's Comments

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

Chapter Collateral References

States *key* 34; Statutes *key* 144 through 148.

82 C.J.S. Statutes §§215, 271 through 277.
73 Am. Jur. 2d Statutes §§38, 39, 224 through 230.
Rules of the Montana Legislature, published biennially by the Mont. Leg. Serv. Div.
An Introduction to the Montana Legislative Council (Montana Legislative Council).
The Interim, a newsletter report of interim activity, published monthly during the interim by the Mont. Leg. Serv. Div. and available by subscription.
Sources of Information and Publications (Mont. Leg. Serv. Div.).
A Legislator's Handbook (Mont. Leg. Serv. Div.).

Part 1
Composition — Powers and Duties — Personnel

5-11-101. Appointment and composition of council.

Compiler's Comments

1999 Amendment: Chapter 19 in (1) at beginning of second sentence inserted "Subject to subsection (3), the legislative council"; inserted (3) allowing a legislator who would be on the legislative council due to a leadership position and who will not serve the next legislative session due to term limits to designate another legislator to serve on the legislative council; and made minor changes in style. Amendment effective February 17, 1999.

1995 Amendment: Chapter 545 in (1), after "consists of", substituted remainder of section regarding Legislative Council membership for former (1) and (2) that read: "(1) four members of the house of representatives appointed by the speaker of the house with the advice of the majority and minority leaders of the house, no more than two of whom may be of the same political party; and

(2) four members of the senate appointed by the committee on committees of the senate, no more than two of whom may be of the same political party"; and made minor changes in style. Amendment effective April 27, 1995.

Case Notes

Constitutionality: The appointment of legislators to the council does not constitute an appointment to another civil office in violation of Art. V, sec. 9, Mont. Const. State ex rel. James v. Aronson, 132 M 120, 314 P2d 849 (1957), overruling State ex rel. Mitchell v. Holmes, 128 M 275, 274 P2d 611 (1954).

Method of Appointment: An appointment under this section by the Senate Committee on Committees was effective even though phrased in terms of recommending the appointment to the full Senate. State ex rel. James v. Aronson, 132 M 120, 314 P2d 849 (1957).

Appointments Do Not Need Senate Approval: Appointments under this section made by the Senate Committee on Committees need not be approved by the Senate even though a senate rule provides that committee appointments are subject to ratification by the Senate. State ex rel. James v. Aronson, 132 M 120, 314 P2d 849 (1957).

5-11-102. Term.

Compiler's Comments

1995 Amendment: Chapter 545 near beginning, after "2 years", substituted remainder of section concerning qualification and appointment for former language that read: "and terminates with the appointment of a new council or on the 50th legislative day of the next regular session following the one in which the appointment was made, whichever event occurs first. A new council shall be appointed no later than the 50th day of each regular session." Amendment effective July 1, 1995.

Case Notes

Constitutionality: This section does not violate the limit on the length of a legislative session prescribed by Art. V, sec. 6, Mont. Const. State ex rel. James v. Aronson, 132 M 120, 314 P2d 849 (1957), overruling State ex rel. Mitchell v. Holmes, 128 M 275, 274 P2d 611 (1954).

5-11-103. Vacancies.

Compiler's Comments

1995 Amendment: Chapter 545 near beginning, after "council", deleted "occurring when the legislature is not in session"; and made minor changes in style. Amendment effective July 1, 1995.

5-11-104. Officers — rules of procedure — records.

Collateral References

An Introduction to the Montana Legislative Council (Montana Legislative Council).

5-11-105. Powers and duties of council.

Compiler's Comments

2003 Amendment: Chapter 265 inserted (1)(f) requiring the legislative council to review proposed legislation for agencies or entities that are not assigned to an interim committee or to the environmental quality council; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 19 inserted (1)(e) requiring the legislative council to establish time schedules and deadlines for interim committees; in (2) near middle before "committee" inserted "interim", near end substituted "interim committee" for "subcommittee", and substituted "5-5-202" for "Title 5, chapter 5, part 2"; and made minor changes in style. Amendment effective February 17, 1999.

Interim Study of Government Competition With Private Sector: Section 1, Ch. 478, L. 1999, provided: "The legislative council shall designate an appropriate legislative interim committee to study the issue of government competition by political subdivisions of this state with the private sector. The study may include an examination of the impact on the private sector of the provision of goods, services, manufacturing, construction, and maintenance and repair by governmental entities in this state and an examination of the feasibility and desirability of privatizing the sale of goods, specific services, manufacturing, construction, and maintenance and repair activities conducted by political subdivisions. The appropriate committee shall prepare for submission to the 57th legislature a report of its findings and any recommendations or proposed legislation." Effective April 27, 1999.

1995 Amendment: Chapter 545 inserted (1) regarding Legislative Council duties; in (2), near middle, substituted "legislative committee has not been assigned" for "subcommittee has not been appointed"; and deleted (2) through (4) that read: "(2) The legislative council shall supervise the activities of the council staff.

(3) The legislative council shall assist in the preparation and submission of all standing and select committee and subcommittee reports and recommendations to the legislature.

(4) This section shall not be construed to permit the council to approve or disapprove of any substantive portions or recommendations of a standing or select committee or subcommittee report." Amendment effective July 1, 1995.

1987 Amendment: At end of (1) inserted final clause containing citation for subcommittees and authority for statutorily created committees.

Case Notes

Constitutionality: Prior to the 1973 amendment, this section (former section 43-710, R.C.M. 1947) did not violate Art. III, sec. 1, Mont. Const., providing for separation of powers. State ex rel. James v. Aronson, 132 M 120, 314 P2d 849 (1957), overruling State ex rel. Mitchell v. Holmes, 128 M 275, 274 P2d 611 (1954).

5-11-106. Authority to investigate and examine.

Compiler's Comments

2001 Amendment: Chapter 210 after "standing" inserted "committees" and after "select committees" inserted "or interim committees"; and made minor changes in style. Amendment effective April 6, 2001.

1995 Amendment: Chapter 545 near beginning, after "legislative", substituted "services division" for "council" and near middle, after "and examine", deleted "the costs of"; and made minor changes in style. Amendment effective July 1, 1995.

Case Notes

Constitutionality: This section does not violate Art. III, sec. 1, Mont. Const., providing for separation of powers. State ex rel. James v. Aronson, 132 M 120, 314 P2d 849 (1957), overruling State ex rel. Mitchell v. Holmes, 128 M 275, 274 P2d 611 (1954).

5-11-107. Powers relating to hearings.

Compiler's Comments

1999 Amendment: Chapter 19 in (1) near beginning after "duties" substituted "a statutory committee or an interim committee" for "or on behalf of statutory committees or subcommittees, the legislative council"; in (2) near beginning substituted "a statutory committee or an interim

committee" for "the council" and near middle before "compel" substituted "committee" for "legislative council"; and made minor changes in style. Amendment effective February 17, 1999.

1995 Amendment: Chapter 545 in (1), near beginning after "duties", inserted "or", after "behalf of" substituted "statutory" for "standing", and after "committees" substituted "or" for "and"; in (2), near beginning after "council", deleted "on behalf of a standing committee or subcommittee" and near middle, after "county", deleted "or a judge thereof"; and made minor changes in style. Amendment effective July 1, 1995.

5-11-111. Legislative services division.

Compiler's Comments

1995 Amendment: Chapter 545 substituted present language describing the Legislative Services Division for former language that read: "The legislative council may employ an executive director and such other personnel, not members of the council, as it considers necessary to assist in the preparation of proposed legislative acts and standing and select committee and subcommittee reports and recommendations and to carry out other council activities. The council shall fix the compensation of such employees. It may also employ the services of any research agency which it considers necessary in the discharge of its duties." Amendment effective July 1, 1995.

5-11-112. Functional organization and responsibilities.

Compiler's Comments

2001 Amendment: Chapter 557 inserted (1)(e) relating to broadcasting services; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 545 in (1), near beginning of first sentence after "functional", substituted "organization" for "divisions", after "within the" substituted "legislative services division" for "council staff", after "in order to" inserted "effectively and efficiently", and after "delegated to the" substituted "division" for "council"; in (1)(a) substituted "document services" for "legislative services division"; inserted (1)(a)(i) regarding bill drafting; in (1)(a)(iii) substituted "distribution of legislative bills and information" for "mailroom"; in (1)(a)(iv), at beginning, inserted "coordination of legislative"; inserted (1)(a)(v) regarding publication; deleted former (1)(d) that read: "(d) data processing"; in (1)(b), after "services", deleted "division"; deleted former (2)(c) that read: "(c) committee staffing, including staffing for interim committees organized under Title 5, chapter 5, part 2"; in (1)(c), after "services", deleted "division"; in (1)(c)(i) substituted "legal review of draft bills" for "bill drafting"; in (1)(c)(ii), after "counseling", inserted "on legislative matters"; in (1)(c)(iii) substituted "legal support for consolidated entities" for "committee staffing"; inserted (1)(c)(iv) regarding Code Commissioner support; inserted (1)(d) regarding committee services; in (1)(e), at end, deleted "division, which shall"; in (1)(e)(i) substituted "financial" for "maintain bookkeeping"; in (1)(e)(ii), at beginning, deleted "sign"; in (1)(e)(iii), at beginning, substituted "coordination of procurement of" for "order all"; in (1)(e)(iv) substituted "maintenance of property inventories" for "serve the house and senate during the session"; inserted (1)(f) regarding personnel and administrative services; inserted (1)(g) regarding information technology services; inserted (2) requiring collaborative fulfillment of responsibilities; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 302 inserted (1)(d) adding data processing to the Legislative Services Division; at end of (2)(b), after "information", deleted "including preparation and publication of the Legislative Review to be sold at the cost of the publication plus postage"; in (2)(c), after "committee staffing", deleted "when the legislature is not in session" and at end substituted "interim committees organized under Title 5, chapter 5, part 2" for "the revenue oversight committee"; and inserted (3)(c) adding committee staffing to the Legal Services Division. Amendment effective April 12, 1993.

1989 Amendment: In (2)(c) inserted "including staffing for the revenue oversight committee". Amendment effective July 1, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 608, L. 1989, provided: "A statement of intent is not required for this bill but is included to clarify the staffing arrangements anticipated under this bill.

As a matter of practice, the legislative council has provided staff to support the work of the tax committees of the legislature in session and in the interim. As such, council staff have supported the revenue oversight committee [now revenue and transportation interim committee] since its creation. It is the intent of the legislature that, in carrying out its revenue estimating duties under this bill, the revenue oversight committee [now revenue and transportation interim committee] will rely upon the staffs of the legislative council, the office of the legislative fiscal

analyst, the legislative auditor, the department of revenue, and any other agency that has information regarding any of the tax or revenue bases of the state. Legislative agencies shall cooperate in providing support to the committee."

Part 2
Dissemination of Laws and Proceedings

Part Collateral References

Reports *key* 1 through 6; States *key* 37, 38; Statutes *key* 14, 37 through 39, 256, 257, 283, 285.
82 C.J.S. Statutes §63.
72 Am. Jur. 2d States, Territories, and Dependencies §47; 73 Am. Jur. 2d Statutes §§38, 39.

5-11-201. Journals — how authenticated — filing.

Compiler's Comments

1995 Amendment: Chapter 545 at end of second sentence substituted "services division" for "council". Amendment effective July 1, 1995.

1993 Special Session Amendment: Chapter 22 inserted second and third sentences requiring filing of each authenticated journal with the Secretary of State and filing of a copy of each authenticated journal with the Legislative Council. Amendment effective December 23, 1993.

Case Notes

Judicial Recourse to Journal:

Except to determine whether on its final passage the names of those voting were entered on the legislative journals, courts may not go behind the duly authenticated enrolled bill. Therefore, recourse may not be had to such journals to ascertain whether a substantial provision and an arrangement of section numbers were embodied in a particular bill, different from the bill as it passed one of the houses. Barth v. Pock, 51 M 419, 155 P 282 (1915).

In determining whether an act has been passed, the enrolled bill, signed and approved by the proper officers, is conclusive upon the courts and recourse cannot be had to any other evidence except where the alleged infirmity of the act is based upon a failure to enter the names of those voting upon its final passage, in which case the journals may be consulted. State ex rel. Gregg v. Erickson, 39 M 280, 102 P 336 (1909).

Collateral References

81A C.J.S. States §54; 82 C.J.S. Statutes §45.
73 Am. Jur. 2d Statutes §43.

5-11-202. Printing of session laws.

Compiler's Comments

1995 Amendment: Chapter 545 at beginning of first sentence, after "legislative", substituted "services division" for "council". Amendment effective July 1, 1995.

1993 Special Session Amendment: Chapter 22 in first sentence, after "resolutions", deleted "and journals" and after "session" deleted "with proper indexes to the same" and inserted second sentence requiring delivery of session laws to the printer in proper form; and made minor changes in style. Amendment effective December 23, 1993.

5-11-203. Distribution of session laws — inspection of journals.

Compiler's Comments

1997 Amendment: Chapter 42 in (3)(f) deleted reference to subsection (8) of 2-2-102. Amendment effective March 12, 1997.

1995 Amendment: Chapter 545 in (1), near end, and in (2), in two places, substituted reference to Legislative Services Division for reference to Legislative Council. Amendment effective July 1, 1995.

1993 Special Session Amendment: Chapter 22 near beginning of (1), before "the session laws", deleted "the senate and house journals"; substituted present (2) regarding availability of journals for copying and allowing publication in an electronic format for former (2)(a) through (2)(e) that required that journals be distributed "(a) to each county clerk, one copy of each for the use of the county;

(b) to the Montana state library, 20 copies of each for the use of the library and distribution to depository libraries, of which two copies will be deposited with the state historical library for security purposes;

(c) to the state law librarian, two copies of each for the use of the library and such additional copies as may be necessary for the purposes of exchange;

(d) to the library of congress and each public officer as defined in 2-2-102, two copies of each; and

(e) to each member of the legislature, the secretary of the senate, and the chief clerk of the house of representatives from the session at which the journals were adopted, one copy of each"; at beginning of (3) substituted "The following entities may receive the number of copies of session laws listed at no cost" for "The council shall distribute the session laws as follows"; deleted former (3)(a) that read: "(a) to each cabinet level department of the executive branch of the United States, one copy each; to any agency, commission, conference, or corporation established by the United States government or any other subdivision thereof upon request and approval by the legislative council, one copy"; in (3)(j) changed from three to one the number of copies allowed to each County Clerk; and made minor changes in style. Amendment effective December 23, 1993.

1983 Amendment: In (3)(a), mandated one copy of session laws to each U.S. cabinet level department by inserting "cabinet level" before "department" and ", one copy each" after "United States" and inserted "to any" before "agency"; and inserted (3)(h) relating to distribution of session laws to agencies, boards, commissions, or offices or subdivisions of the state.

1981 Amendment: Substituted "public officer as defined in 2-2-102" for "state officer" in (2)(d); in (3)(a) substituted "to each department of the executive branch of the United States; agency, commission, conference, or corporation established by the United States government; or any other subdivision thereof upon request and approval by the legislative council, one copy;" for "to each department of the government at Washington and of the government of this state, one copy"; inserted "as defined in 2-2-102(8)" in (3)(g); substituted "community college districts of the state, as defined in 20-15-101" for "incorporated colleges of the state" in (3)(i); made minor changes in grammar.

5-11-204. Secretary of state to assign chapter numbers to new laws.

Compiler's Comments

1989 Amendment: Near middle of section, after "resolutions", deleted "and bills appropriating money".

Collateral References

82 C.J.S. Statutes §60.

5-11-205. Publication of laws — format.

Compiler's Comments

1995 Amendment: Chapter 545 near beginning of (1) and (5), after "legislative", substituted "services division" for "council". Amendment effective July 1, 1995.

1989 Amendment: Near beginning of first sentence of (2), after "session", deleted "other than appropriations" and at end of third sentence inserted "and deleted provisions must be shown as stricken"; deleted former (4) that read: "(4) Appropriations passed by each session of the legislature must be printed in a separate section of the Laws of Montana with the house bill number as a heading"; and made minor changes in form.

5-11-206. Index — list.

Compiler's Comments

1995 Amendment: Chapter 545 in (1), near beginning after "legislative", substituted "services division" for "council"; and made minor changes in style. Amendment effective July 1, 1995.

1989 Amendment: Inserted last sentence of (1) that read: "A separate index must be prepared for appropriation bills passed by each session of the legislature."

1987 Amendment: Near middle of (3) substituted ""code sections affected list"" for ""code index"".

Collateral References

States *key* 73.

5-11-207. Description of county boundaries included in session laws.

Compiler's Comments

1995 Amendment: Chapter 545 near beginning, after "legislative", substituted "services division" for "council". Amendment effective July 1, 1995.

Collateral References

20 C.J.S. Counties §5.

5-11-208. Expenses.

Compiler's Comments

1995 Amendment: Chapter 545 near beginning, after "legislative", substituted "services division" for "council", after "5-11-207" deleted "as amended", and after "money" deleted "specifically". Amendment effective July 1, 1995.

1987 Amendment: Near middle of section deleted reference to 5-11-204.

5-11-209. Codes — availability to legislators — reserved for use by legislative committees.

Compiler's Comments

1995 Amendments: Chapter 23 substituted present (1) concerning printed and CD-ROM code versions for former language that read: "Immediately after the Montana Code Annotated statute text and histories are bound following each legislative session, the legislative council shall make available one set of these volumes to each member of the legislature at a charge of $10"; in (2), before "Montana", inserted "printed versions"; and made minor changes in style. Amendment effective February 2, 1995.

Chapter 545 in (1), near middle, and in (2), near beginning after "legislative", substituted "services division" for "council"; and made minor changes in style. Amendment effective July 1, 1995.

1987 Amendment: At end of (2) substituted "use of the standing and select committees of the legislature" for "use of legislative committees appointed under 5-2-201".

1983 Amendment: Substituted reference to state special revenue fund for reference to revolving fund.

5-11-210. Clearinghouse for reports to legislature.

Compiler's Comments

2001 Amendment: Chapter 210 throughout section substituted reference to appropriate interim or statutory committee for references to executive director of the legislative services division, legislative council, and executive director. Amendment effective April 6, 2001.

1997 Amendment: Chapter 42 in five places, throughout section, substituted "legislative services division" for "legislative council". Amendment effective March 12, 1997.

1993 Amendments — Composite Section: Chapter 7 in (10)(a) deleted "5-17-103" from list of statutory references; and made minor changes in style.

Chapter 40 in (10)(a) deleted "5-18-203" from list of statutory references; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 274 in (10)(a) deleted "2-8-203", "2-8-207", and "2-8-208" from list of statutory references.

Chapter 349 deleted (1)(a) that read: "(a) a document required to be prepared for the legislature as required in any of the sections listed in subsection (10)" and before "report" substituted "a" for "(b) unless otherwise provided by law, any other"; in (2)(b) substituted "100 words" for "one page"; deleted (2)(f) that read: "(f) the date on which the entity will deliver the final, published copies of the report to the legislature"; in (7), at end of first sentence, deleted "available from the legislative council"; deleted (10)(a) that read: "(a) A report to the legislature includes a report required to be made by a board, bureau, commission, committee, council, department, division, fund, authority, or officer of the state or a local government in 1-11-204, 2-4-411, 2-7-104, 2-8-112, 2-8-203, 2-8-207, 2-8-208, 2-15-2021, 2-18-209, 2-18-811, 2-18-1103, 3-1-702, 3-1-1126, 5-5-216, 5-13-304, 5-17-103, 5-18-203, 5-19-108, 10-4-102, 15-1-205, 17-4-107, 17-5-1650, 18-7-303, 19-4-201, 20-9-346, 20-25-236, 20-25-301, 22-3-107, 23-7-203, 33-22-1513, 37-1-106, 39-6-101, 39-51-407, 44-2-304, 44-13-103, 46-23-316, 53-2-1107, 53-6-110, 53-20-104, 53-21-104, 53-24-204, 53-24-210, 53-30-133, 69-1-404, 72-16-202, 75-1-203, 75-1-1101, 75-7-304, 75-10-533, 75-10-704, 76-11-203, 76-12-109, 80-7-713, 80-12-402, 82-11-161, 85-1-621, 85-2-105, 87-2-724, 87-5-123, 90-3-203, or 90-4-111"; and made minor changes in style.

A style change in (9) was slightly different in Ch. 40 from Ch. 7 and Ch. 349. The codifier chose the prevailing style.

Effective Date: Section 65, Ch. 112, L. 1991, provided: "[This act] is effective on passage and approval." Approved March 20, 1991.

5-11-211. Definitions.

Compiler's Comments

1985 Amendment: In (2) at end inserted "together with such other related documents as the legislative council may choose to include".

5-11-212. Fees for proceedings.

Compiler's Comments

1997 Amendment: Chapter 42 in five places, throughout section, substituted references to Legislative Services Division for references to Legislative Council; in (1) inserted reference to proceedings of a special session; and made minor changes in style. Amendment effective March 12, 1997.

1985 Amendment: Throughout section substituted legislative council for secretary of state as source for purchasing proceedings; throughout section substituted authority of legislative council to set fees for proceedings rather than fees prescribed by joint rules of the legislature; and made minor changes in phraseology.

Collateral References

Rules of the Montana Legislature, published biennially by the Mont. Leg. Serv. Div.

5-11-213. Exclusions.

Compiler's Comments

1997 Amendment: Chapter 42 near middle substituted "legislative services division" for "legislative council" and near end substituted "proceedings of the legislature" for "legislative proceedings". Amendment effective March 12, 1997.

1985 Amendments: Substituted "Each general circulation newspaper published in Montana and each radio or television station broadcasting in Montana that has registered with the executive director of the legislative council is exempt from 5-11-212 and shall receive one complete set of the legislative proceedings for the ensuing biennium without charge" for former language that read: "Representatives of general circulation newspapers, radio, and television who shall have first registered with the secretary of state shall be exempt from 5-11-212 and shall receive one complete set of the proceedings of the legislature without charge."

Chapter 638 near middle substituted registration with the Executive Director of the Legislative Council for registration with the Secretary of State.

Part 3
Interstate, International, and Intergovernmental Cooperation

Part Compiler's Comments

Preamble: The preamble attached to Ch. 232, L. 2003, provided: "WHEREAS, current law is confusing regarding the Legislative Council's role relating to legislative appointments to interstate, international, and intergovernmental entities that are not otherwise provided for under law; and

WHEREAS, this legislation clarifies that the Legislative Council is the appointing entity for legislative membership for voting purposes in organizations that include but are not limited to the Council of State Governments, the National Conference of State Legislatures, and the Legislative Council on River Governance."

Part Collateral References

States *key* 5, 6.

81A C.J.S. States §§29 through 32.

72 Am. Jur. 2d States, Territories, and Dependencies §§5, 6.

5-11-303. Definitions.

Compiler's Comments

Effective Date: Section 7, Ch. 232, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 7, 2003.

5-11-304. Legislative council's role in interstate, international, and intergovernmental cooperation.

Compiler's Comments

Effective Date: Section 7, Ch. 232, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 7, 2003.

5-11-305. Legislative council appointments to interstate, international, and intergovernmental entities.

Compiler's Comments

Effective Date: Section 7, Ch. 232, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 7, 2003.

Part 4
Computer System Planning

Part Compiler's Comments

Preamble: The preamble attached to Ch. 687, L. 1989, provided: "WHEREAS, House Bill No. 65, the bill appropriating funds for the operation of the 51st Legislature and for startup costs for the 52nd Legislature, contains language stating that funds appropriated in the bill may be spent for the expansion or enhancement of computer equipment or systems only in accordance with a plan developed jointly by the several Legislative Branch agencies; and

WHEREAS, the appropriate application of computer technology in the Legislative Branch will enhance the ability of the Legislature to deliberate state policy through more timely delivery of higher quality legislative information, bills, and amendments; and

WHEREAS, there is no mechanism currently available whereby such a branchwide plan can be developed and implemented; and

WHEREAS, the establishment of a permanent mechanism for Legislative Branch planning is desirable, both to enhance service to the members of the Legislature and to promote effective and efficient systems that are economical and cost-effective."

Effective Date: Section 7, Ch. 687, L. 1989, provided that this part is effective May 18, 1989.

Part Collateral References

Proof of public records kept or stored on electronic computing equipment. 71 ALR 3d 232.

5-11-402. Legislative branch computer system planning council.

Compiler's Comments

2001 Amendment: Chapter 313 in (8) substituted "information technology responsibilities" for "data processing policy and planning functions". Amendment effective July 1, 2001.

1995 Amendment: Chapter 545 in (4), after "legislative", substituted "services division" for "council"; deleted former (7) that read: "(7) the executive director of the environmental quality council"; and made minor changes in style. Amendment effective July 1, 1995.

5-11-403. Duties of legislative branch computer system planning council.

Compiler's Comments

2001 Amendment: Chapter 313 in (2)(c) substituted "as expressed in the state strategic information technology plan provided for in 2-17-521" for "established under 2-17-501 through 2-17-503". Amendment effective July 1, 2001.

5-11-404. Technical support.

Compiler's Comments

1995 Amendment: Chapter 545 in (1), near beginning after "legislative", substituted "services division" for "council" and near end, after "legislative", substituted "services division" for "council staff"; in (2), after "legislative", substituted "entities" for "agencies"; and made minor changes in style. Amendment effective July 1, 1995.

5-11-405. Legislative branch computer system plan — adoption.

Compiler's Comments

1995 Amendment: Chapter 545 after "adopted" deleted "jointly" and after "legislative" substituted "council" for "administration committees of the senate and the house of representatives". Amendment effective July 1, 1995.

Part 7
Pacific Northwest Economic Region

Part Compiler's Comments

Effective Date: Section 7, Ch. 349, L. 2001, provided: "[This act] [5-11-705 through 5-11-708] is effective on passage and approval." Approved April 21, 2001.

5-11-707. Appointment to Pacific Northwest economic region — vacancy.

Compiler's Comments

2003 Amendment: Chapter 232 in (2) at end substituted "5-11-305" for "5-11-301". Amendment effective April 7, 2003.

Part 11
Broadcasting Services

Part Compiler's Comments

Preamble: The preamble attached to Ch. 557, L. 2001, provided: "WHEREAS, the citizens of Montana have an inherent right to watch their government at work; and

WHEREAS, public education about the Legislature and its processes is a vital public policy goal that is enhanced by the gavel-to-gavel broadcasting of legislative proceedings; and

WHEREAS, the experience of other states demonstrates that consistent, unedited broadcast coverage mitigates self-serving conduct and elevates the quality of debate among legislators and in related representative bodies; and

WHEREAS, the transparency and accountability of the Legislature and other state government agencies and officials to Montana citizens are increased by unedited, noncommercial public affairs programming; and

WHEREAS, video and related communications technologies provide an accurate and accessible record of legislative activities; and

WHEREAS, the statewide distribution of broadcast services can both alleviate the difficulties of direct participation in the legislative process caused by geographic distance and contribute to economic development initiatives in rural areas of Montana; and

WHEREAS, it is in the public interest to maximize the cost-effectiveness of a state government broadcasting service by including coverage of Legislative, Executive, and Judicial Branch activities."

Effective Date: Section 10, Ch. 557, L. 2001, provided that this part is effective July 1, 2001.

CHAPTER 12
LEGISLATIVE FINANCE ACT

Chapter Attorney General's Opinions

General Appropriation Bill — Budget Amendment — Federal Regulation Restricting Expenditure: The expenditure of $54,325 authorized by budget amendment No. 0534 does not violate the provisions of the general appropriation bill for the Department of Health and Environmental Sciences (now Department of Public Health and Human Services and Department of Environmental Quality). Federal regulations prohibiting the state from spending certain funds without federal government approval, irrespective of state law requiring expenditure, are controlling. 38 A.G. Op. 102 (1980).

Chapter Collateral References

States *key* 113 through 168.

81A C.J.S. States §§223 through 229.

Legislative Fiscal Analysis, 1965-66 Interim Report No. 17, Montana Legislative Council.

Part 1
General

Part Collateral References

81A C.J.S. States §§230 through 241.

72 Am. Jur. 2d States, Territories, and Dependencies §§76 through 84.

5-12-101. Title and purpose of chapter.

Collateral References

States *key* 122, 123, 129 through 133.

85 C.J.S. Taxation §1057.

63C Am. Jur. 2d Public Funds §§33 through 47.

Inherent power of court to compel appropriation or expenditure of funds for judicial purposes. 59 ALR 3d 569.

Part 2
Legislative Finance Committee

5-12-204. Vacancies.

Compiler's Comments

1995 Amendment: Chapter 545 inserted second sentence regarding appointment of members when there is a vacancy at the beginning of a legislative session. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

5-12-205. Powers and duties of committee.

Compiler's Comments

2001 Amendment: Chapter 313 inserted (4) relating to monitoring policies of the department of administration; inserted (5) relating to information for legislative purposes; inserted (6) relating to preparation of legislation; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendment: Chapter 347 inserted (4) requiring Committee prior to each special or regular legislative session involving budgetary matters to prepare recommendations to the House Appropriations and Senate Finance and Claims Committees, establishing minimum elements to be included in the recommendations, and allowing the Committee to make recommendations concerning other issues of major concern in the budgeting process; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 545 in (2), near beginning of first sentence after "employ and", inserted "in accordance with the rules for classification and pay adopted by the legislative council" and in second sentence, after "responsible", inserted "for providing services"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround"

process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

Part 3
Legislative Fiscal Analyst

Part Compiler's Comments

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

Part Collateral References

Mandamus *key* 100, 102; Officers *key* 111; States *key* 79.

5-12-301. Legislative fiscal division.

Compiler's Comments

1995 Amendment: Chapter 545 in first sentence substituted "a legislative fiscal division" for "an office of legislative fiscal analyst" and in second sentence, after "shall", inserted "manage the legislative fiscal division to support the legislative finance committee and". Amendment effective July 1, 1995.

5-12-302. Fiscal analyst's duties.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 19 deleted former (4) that read: "(4) for the legislative session convening in January 1997, following receipt of the information required in 17-7-122 from the governor and in 17-7-123 from the budget director in a mutually prescribed format, publish the governor's budget and incorporate the information required by 17-7-123 in a combined governor's budget and legislative fiscal analyst's budget analysis presentation. The combined budget and budget analysis presentation must be made available to the legislature prior to the convening date set for a regular session of the legislature. The cost of printing the combined budget and budget analysis presentation must be shared proportionally by the office of budget and program planning and the legislative finance division. This section does not prohibit the legislative fiscal analyst from including any analysis and comments on any portion of the executive budget in the combined budget and budget analysis presentation"; in (6) substituted "revenue and taxation interim committee [now revenue and transportation interim committee]" for "revenue oversight committee" and after "duties" deleted "under 5-18-107(5)"; and made minor changes in style. Amendment effective February 17, 1999.

Chapter 51 deleted former (4) that read: "(4) for the legislative session convening in January 1997, following receipt of the information required in 17-7-122 from the governor and in 17-7-123 from the budget director in a mutually prescribed format, publish the governor's budget and incorporate the information required by 17-7-123 in a combined governor's budget and legislative fiscal analyst's budget analysis presentation. The combined budget and budget analysis presentation must be made available to the legislature prior to the convening date set for a regular session of the legislature. The cost of printing the combined budget and budget analysis presentation must be shared proportionally by the office of budget and program planning and the legislative finance division. This section does not prohibit the legislative fiscal analyst from including any analysis and comments on any portion of the executive budget in the combined budget and budget analysis presentation"; and made minor changes in style. Amendment effective March 15, 1999.

1995 Amendment: Chapter 545 inserted (4) regarding duties of the Fiscal Analyst during the 1997 legislative session; and made minor changes in style. Amendment effective July 1, 1995.

Code Commissioner Change: The Code Commissioner has substituted a reference to the Legislative Finance Division for a reference to the Office of the Legislative Fiscal Analyst to reflect the name change in 5-12-301.

1989 Amendment: Inserted (6) requiring Legislative Fiscal Analyst to assist Revenue Oversight Committee in estimating revenue. Amendment effective July 1, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 608, L. 1989, provided: "A statement of intent is not required for this bill but is included to clarify the staffing arrangements anticipated under this bill.

As a matter of practice, the legislative council has provided staff to support the work of the tax committees of the legislature in session and in the interim. As such, council staff have supported the revenue oversight committee [now revenue and transportation interim committee] since its creation. It is the intent of the legislature that, in carrying out its revenue estimating duties under this bill, the revenue oversight committee [now revenue and transporation interim committee] will rely upon the staffs of the legislative council, the office of the legislative fiscal analyst, the legislative auditor, the department of revenue, and any other agency that has information regarding any of the tax or revenue bases of the state. Legislative agencies shall cooperate in providing support to the committee."

Collateral References

63C Am. Jur. 2d Public Officers and Employees §§312 through 325.

5-12-303. Fiscal analysis information from state agencies.

Compiler's Comments

1997 Amendment: Chapter 347 deleted former (4) that read: "(4) The budget director shall furnish the legislative fiscal analyst with copies of all budget requests, in a format agreed upon by both the office of budget and program planning and the legislative fiscal analyst, at the time of submission to the budget director as provided by law and, if requested, all underlying and supporting documentation. In preparing the executive budget for the next biennium for submission to the legislature, the budget director shall use the base budget, the present law base, and new proposals as defined in 17-7-102"; deleted former (5) that read: "(5) In the year preceding each legislative session, the budget director shall furnish the legislative fiscal analyst, in a format agreed upon by both the office of budget and program planning and the legislative fiscal analyst:

(a) by October 10, a preliminary budget reflecting the base budget and, by November 1, a present law base for each agency and a copy of the documents that reflect the anticipated receipts and other means of financing the base budget and present law base for each fiscal year of the ensuing biennium;

(b) by November 15, a preliminary budget that must meet the statutory requirements for submission of the budget to the legislature and a summary of the preliminary budget designed for distribution to members and members-elect of the legislature;

(c) by November 12, a paper copy and an electronic copy of the documents that reflect expenditures to the second level, as provided in 17-1-102(3), by funding source and detailed by accounting entity; and

(d) by December 15, all amendments to the preliminary budget"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 545 in (5), in introductory clause near middle after "analyst", deleted "on a confidential basis and"; and in (5)(b), at end, inserted "and a summary of the

preliminary budget designed for distribution to members and members-elect of the legislature". Amendment effective July 1, 1995.

1993 Special Session Amendment: Chapter 12 in (4), in first sentence, required the budget requests to be "in a format agreed upon by both the office of budget and program planning and the legislative fiscal analyst" and inserted last sentence requiring the budget director to use the base budget, present law base, and new proposals as defined in 17-7-102 in preparing the executive budget for the next biennium; in (5), at end of introductory paragraph, inserted "and in a format agreed upon by both the office of budget and program planning and the legislative fiscal analyst"; in (5)(a), at beginning, substituted "October 10, a preliminary budget reflecting the base budget and, by November 1, a present law base for each agency and" for "December 1" and near end substituted "base budget and present law base" for "budget"; in (5)(b) substituted "November 15" for "December 1"; in (5)(c) substituted "November 12" for "December 3"; in (6) inserted last sentence requiring the fiscal analyst to use the base budget, present law base, and new proposals as defined in 17-7-102 in preparing the budget analysis for the next biennium for submission to the Legislature; and made minor changes in style. Amendment effective December 23, 1993.

1993 Amendment: Chapter 20 in (3), at end of second sentence, substituted "removing names, addresses, occupations, social security numbers, and taxpayer identification numbers" for "a masking method that conceals the identity of the taxpayer" and substituted third and fourth sentences prohibiting altering data and restricting disclosure for former language that read: "The masking method may not destroy the statistical integrity of the individual income tax records. The masking method, including how data is masked, must be disclosed to the legislative fiscal analyst"; and made minor changes in style.

1991 Amendment: In (4) substituted "The budget director" for "Every state agency"; inserted (5)(c) relating to documents reflecting second level expenditures; inserted (6) requiring exchange of expenditure and disbursement recommendations; and made minor changes in style. Amendment effective July 1, 1991.

1986 Amendment: In (1) substituted "costs and revenues" for "costs" and inserted "and obtain copies of" before "the records"; and inserted (2) relating to unauthorized disclosure of confidential information by the Legislative Fiscal Analyst; inserted (3) relating to income tax data which the Legislative Fiscal Analyst may obtain; and inserted (6) providing that the section does not authorize otherwise unauthorized publication or disclosure of information.

Case Notes

Constitutionality: This section does not impose an unconstitutional burden upon state government, since power to approve appropriation bills and the budget is in the legislative branch, and the committee may require such information from other branches as is reasonably necessary to form a rational basis for budget determinations. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

Collateral References

16 C.J.S. Constitutional Law §§113 through 168.

5-12-304. Employees and consultants.

Compiler's Comments

1995 Amendment: Chapter 545 substituted present language concerning personnel and consultants for former section that read: "The legislative fiscal analyst may employ, fix the salaries, and define the duties of such staff and consultants as may be necessary, within the limits of his appropriation." Amendment effective July 1, 1995.

Part 4
Budget Amendments

Part Attorney General's Opinions

Applicability of Budget Amendment Process to Statutory Appropriations: Legislative history and case law support the conclusion that the scope of the budget amendment process is restricted to the expenditure of funds by state agencies in excess of their appropriations. The budget amendment process does not apply to "statutory appropriations", which are those appropriations accomplished by legislative enactment, either with or without specific appropriation laws. (Decided prior to enactment of Title 17, ch. 7, part 5.) 40 A.G. Op. 25 (1983).

Part Collateral References

73 Am. Jur. 2d Statutes §28.

16 C.J.S. Constitutional Law §§113 through 168.

5-12-401. Submission of budget amendments to committee.

Compiler's Comments

1983 Amendment: In first sentence, inserted "as soon as received by the budget director"; in second sentence substituted "which includes a lawfully approved and valid budget amendment" for "except under authority of a budget amendment"; and changed phraseology.

Case Notes

Constitutionality: Empowering the Finance Committee to approve budget amendments is an unconstitutional delegation of legislative power, because this power is properly exercisable only by either the entire Legislature or an executive officer or agency, and not by an interim committee. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

Collateral References

16 C.J.S. Constitutional Law §§113 through 168.

CHAPTER 13
LEGISLATIVE AUDIT ACT

Chapter Collateral References

States *key* 173, 181.

Part 1
General

5-13-101. Title and purpose of chapter.

Attorney General's Opinions

Vocational Education Audits: The auditing of postsecondary vocational-technical centers (now colleges of technology) is the responsibility of the Legislative Auditor, since the centers are best characterized for this purpose as "state agencies" as opposed to "school districts". 37 A.G. Op. 79 (1977).

Part 2
Legislative Audit Committee

Part Collateral References

Rules of the Montana Legislature, published biennially by the Mont. Leg. Serv. Div.

5-13-202. Appointment and term of members — officers — vacancies.

Compiler's Comments

1995 Amendment: Chapter 545 in (1), in first sentence in two places, increased from four to six the number of members appointed from each chamber and near middle, after "before the", substituted "end" for "60th legislative day" and in second sentence increased from two to three the number of appointees allowed from each political party; in (4) inserted second sentence regarding a vacancy on the Committee at the beginning of a legislative session; and made minor changes in style. Amendment effective April 27, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the

payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

Part 3
Legislative Auditor

Part Compiler's Comments

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

Part Collateral References

Mandamus *key* 101; States *key* 79.

81A C.J.S. States §134.

72 Am. Jur. 2d States, Territories, and Dependencies §§76, 77.

5-13-301. Legislative audit division.

Compiler's Comments

1995 Amendment: Chapter 545 in first sentence changed name from Office of the Legislative Auditor to the Legislative Audit Division and in second sentence, after "responsible", substituted "to manage the division in order to perform" for "for performing". Amendment effective July 1, 1995.

5-13-302. Appointment and qualifications.

Compiler's Comments

1995 Amendment: Chapter 545 in (1), at end, inserted "in accordance with the rules for classification and pay adopted by the legislative council"; and made minor changes in style. Amendment effective July 1, 1995.

5-13-303. Term and removal.

Compiler's Comments

1991 Amendment: In second sentence substituted "even-numbered" for "odd-numbered".

Transition: Section 2, Ch. 48, L. 1991, provided: "The legislative auditor appointed in 1991 must be appointed to a 1-year term."

5-13-304. Powers and duties.

Compiler's Comments

1997 Amendment: Chapter 377 in (7), in two places in first sentence, substituted "funds or property" for "grants" and near end, before "terms", substituted "applicable" for "grant" and in second sentence, after "agreement to", substituted "provide" for "grant" and near end, after "consent of the", substituted "recipient" for "grantee". Amendment effective July 1, 1997, and terminates July 1, 2001.

Termination Date: Section 4, Ch. 377, L. 1997, provided: "[This act] terminates July 1, 2001."

1995 Amendment: Chapter 545 in (3), at end, substituted "services division" for "council"; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 349 near end of (4), before "relative", substituted "available" for "in his possession"; deleted former (7) that read: "(7) report to the legislature as provided in 5-11-210. The report shall contain, among other things, copies of or summaries of audit reports on state agencies and any recommendations relating to such reports"; and made minor changes in style.

1991 Amendment: Near beginning of (7) substituted "as provided in 5-11-210" for "during the first week of each regular session". Amendment effective March 20, 1991.

1985 Amendment: In (1) substituted present language for "audit the financial affairs and transactions of every state agency"; and inserted (2) relating to special audits.

Attorney General's Opinions

State Grants to Regional Mental Health Centers — Conditions: State grants to regional mental health centers are properly conditioned upon each recipient center accounting for all of its funds through the state treasury and the Statewide Budget and Accounting System (SBAS). 37 A.G. Op. 127 (1978).

Vocational Education Audits: The auditing of postsecondary vocational-technical centers (now colleges of technology) is the responsibility of the Legislative Auditor, since the centers are best characterized for this purpose as "state agencies" as opposed to "school districts". 37 A.G. Op. 79 (1977).

Collateral References

63C Am. Jur. 2d Public Officers and Employees §§263 through 265.

5-13-305. Employees, consultants, and legal counsel — cure for impairment.

Compiler's Comments

1995 Amendment: Chapter 545 in (1), in first sentence after "appoint", substituted "and define the duties of" for "whatever" and inserted second sentence requiring the Auditor to pay employees according to the Legislative Council pay plan; inserted (2) regarding adoption of policies or rules that may impair the independence of the Audit Division; and made minor changes in style. Amendment effective July 1, 1995.

5-13-309. Information from state agencies.

Compiler's Comments

1981 Amendment: Inserted "both the attorney general and" after "shall immediately notify" in (3).

Case Notes

Malicious Prosecution of State Employee — Elements Not Shown: Employer brought suit for malicious prosecution against university employee who initiated an investigation against him, the university counsel who conducted the investigation, and the president of the university. Summary judgment for defendants and dismissal of the suit were proper because two of the prima facie elements of malicious prosecution were not established. The County Attorney, not defendants, initiated and continued the prosecution, and plaintiff's bald assertion that defendants caused the prosecution did not raise a genuine issue as to who initiated it. In addition, the defendants were fulfilling a statutory duty. A second unestablished prima facie element was that the prosecution must have terminated favorably for plaintiff. Here, three charges were brought; plaintiff was acquitted of one, and two were dismissed pursuant to a bargained plea of guilty to a substituted charge arising from the investigation. Vehrs v. Piquette, 210 M 386, 684 P2d 476, 41 St. Rep. 1110 (1984).

5-13-310. Prosecution — discipline of professionals.

Compiler's Comments

1993 Amendment: Chapter 14 in (1) substituted "offenses involving a state agency that are reported to the attorney general by the legislative auditor" for "offenses disclosed by an audit of a state agency performed by the legislative auditor"; and made minor changes in style.

Case Notes

Payment of Defense Counsel: The Department of Justice rather than counties is responsible for the payment of counsel for indigent defendants in prosecutions under this section. In re Barron, 170 M 218, 552 P2d 70 (1976).

Scope of Power of Prosecution — Retroactive Effect: The grant of authority in this section covers "public offenses disclosed by an audit of a state agency by the legislative auditor" and does not require individual identification of a particular offense or a particular offender by the Legislative Auditor as a precondition to the Attorney General's authority in such a manner as to defeat the obvious purpose of the legislation. The section may be given retroactive effect. St. v. Cline, 170 M 520, 555 P2d 724 (1976).

Limitation on Scope of Grand Jury Inquiry: When a grand jury was empaneled pursuant to this section, the court had authority to limit the area of the grand jury investigation by its charge given at empanelment and could inquire into the proceedings to ascertain if any instructions were not being followed. In re Grand Jury, 170 M 354, 553 P2d 987 (1976).

Investigative Subpoenas: In conducting investigations under this section, the Attorney General does not have general subpoena power and cannot, without an order of a court in a filed case or order of a grand jury, issue investigative subpoenas. State ex rel. Woodahl v. District Court, 166 M 31, 530 P2d 780 (1975).

Collateral References

Mandamus *key* 147.

5-13-311. Legislative auditor to establish and maintain toll-free number for reporting fraud, waste, and abuse — procedures.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 97, L. 1995, repealed sec. 6, Ch. 20, Sp. L. November 1993, which terminated this section July 1, 1995.

Severability: Section 3, Ch. 20, Sp. L. November 1993, was a severability clause.

Effective Date: Section 5, Ch. 20, Sp. L. November 1993, provided: "[This act] is effective July 1, 1994."

Termination: Section 6, Ch. 20, Sp. L. November 1993, provided: "[This act] terminates July 1, 1995."

5-13-312. Deposit of money recovered.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 97, L. 1995, repealed sec. 6, Ch. 20, Sp. L. November 1993, which terminated this section July 1, 1995.

Severability: Section 3, Ch. 20, Sp. L. November 1993, was a severability clause.

Effective Date: Section 5, Ch. 20, Sp. L. November 1993, provided: "[This act] is effective July 1, 1994."

Termination: Section 6, Ch. 20, Sp. L. November 1993, provided: "[This act] terminates July 1, 1995."

5-13-321. Joint audits of medicaid program.

Compiler's Comments

Code Commissioner Change: Pursuant to sec. 1, Ch. 546, L. 1995, the Code Commissioner substituted Department of Public Health and Human Services for Department of Social and Rehabilitation Services.

Part 4
Audit Costs and Contracts

5-13-403. Audit account — appropriation and expenditures.

Compiler's Comments

1993 Amendment: Chapter 234 in second sentence substituted "that is in excess of general and pay plan appropriations is statutorily appropriated, as provided in 17-7-502" for "is hereby appropriated"; and made minor changes in style. Amendment effective March 31, 1993.

1983 Amendment: Substituted reference to state special revenue fund for reference to revolving fund.

CHAPTER 15
LEGISLATIVE CONSUMER COMMITTEE
CONSUMER COUNSEL

Chapter Collateral References

Rules of the Montana Legislature, published biennially by the Mont. Leg. Serv. Div.

Part 1
Legislative Consumer Committee

5-15-101. Legislative consumer committee — appointment and composition.

Compiler's Comments

Section Not Codified: Section 70-701, R.C.M. 1947, a short title, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 65, L. 1973.

Section Not Codified: Section 70-702(2), R.C.M. 1947, was not codified in the MCA because it was redundant with 69-1-101. This clause has not been repealed and is still valid law. Citation may be made to sec. 2, Ch. 65, L. 1973.

Section Not Codified: Section 70-703 (part (2)), R.C.M. 1947, was a temporary section and was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 3, Ch. 65, L. 1973.

5-15-104. Vacancies.

Compiler's Comments

1995 Amendment: Chapter 545 inserted second sentence regarding appointment if there is a vacancy at the beginning of a legislative session. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

CHAPTER 16
ENVIRONMENTAL QUALITY COUNCIL

Chapter Collateral References

Rules of the Montana Legislature, published biennially by the Mont. Leg. Serv. Div.

A Council Member's Guide to the Environmental Quality Council, Mont. Environmental Quality Council (2001).

Eminent Domain in Montana, Mont. Environmental Quality Council (2001).

A Guide to the Montana Environmental Policy Act, Mont. Environmental Quality Council (Second Printing) (2000).

Funding for Growth Policies, Fact Sheet and Briefing Paper for the 57th Legislature of the State of Montana, Mont. Environmental Quality Council (2000).

Improving the Montana Environmental Policy Act (MEPA) Process, Senate Joint Resolution No. 18, Final Report to the 57th Legislature of the State of Montana, Mont. Environmental Quality Council (2000).

Montana Index of Environmental Permits, Mont. Environmental Quality Council, Twelfth Ed. (2000).

Wading into Montana Water Rights, A Joint Publication of the Mont. Environmental Quality Council and the Mont. University System Water Center, (Second Printing) (2000).

Water Policy 2000, Report to the 57th Legislature of the State of Montana, Mont. Environmental Quality Council (2000).

Part 1
Composition, Terms, and Officers

5-16-101. Appointment and composition.

Compiler's Comments

1995 Amendment: Chapter 545 in (1) increased from 13 to 17 the number of members on the Council; in (2), near beginning of first sentence, increased from four to six the number of members from each legislative chamber and in second sentence increased from two to three the number of appointees that may be from each political party; and made minor changes in style. Amendment effective April 27, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

Section Not Codified: Section 69-6505, R.C.M. 1947, was a temporary section and was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 5, Ch. 238, L. 1971.

5-16-102. Qualifications.

Compiler's Comments

1999 Amendment: Chapter 19 inserted (2) requiring that at least 50% of the members be selected from standing committees that consider issues within the jurisdiction of the environmental quality council; and made minor changes in style. Amendment effective February 17, 1999.

5-16-104. Vacancies.

Compiler's Comments

1995 Amendment: Chapter 545 in (1) inserted second sentence regarding appointment if there is a vacancy at the beginning of a legislative session. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all

necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1987 Amendment: Inserted (2) relating to posting of notice of actual or anticipated vacancy on Environmental Quality Council.

CHAPTER 17
CAPITOL BUILDING AND PLANNING — RESTORATION

Part 2
Capitol Restoration Commission

Part Compiler's Comments

Severability: Section 8, Ch. 689, L. 1991, was a severability clause.

5-17-202. Capitol restoration commission — composition — allocation.

Compiler's Comments

1993 Amendment: Chapter 10 in (1)(b), in two places, substituted "commission" for "committee"; in (2), in two places, and in (3) substituted "presiding officer" for "president"; and made minor changes in style.

5-17-205. Commission activities — authority.

Compiler's Comments

1997 Amendment: Chapter 42 deleted (3), which referred to planning for the Capitol centennial event; and made minor changes in style. Amendment effective March 12, 1997.

5-17-207. Account established — use of funds.

Compiler's Comments

1995 Amendment: Chapter 191 in (2), after "account", inserted "and the interest earned on the deposits". Amendment effective March 22, 1995.

Part 3
Pearl Harbor Memorial Committee

5-17-302. Pearl Harbor memorial committee — purpose — membership — duties.

Compiler's Comments

Coordination: Section 5, Ch. 75, L. 1993, provided: "If House Bill No. 20 is passed and approved and if it abolishes the capitol building and planning committee, then the reference to "the capitol building and planning committee" in [section 2(4) of this act] [5-17-302(4)] is changed to "the department of administration, in consultation with the Montana historical society". House Bill No. 20 was approved January 29, 1993, as Ch. 7, L. 1993, and the reference in 5-17-302(4) was changed as directed.

TITLE 6
RESERVED

TITLE 7
LOCAL GOVERNMENT

CHAPTER 1
GENERAL PROVISIONS

Part 1
Nature of Self-Government Local Governments

Part Compiler's Comments

Severability: Section 2, Ch. 345, L. 1975, was a severability section.

Part Case Notes

Regulation of Nude Dancing by Municipality: Under the broad regulatory powers of the twenty-first amendment, a municipality with self-government powers may enact an ordinance that regulates nude and seminude dancing. Billings v. Laedeke, 247 M 151, 805 P2d 1348, 48 St. Rep. 133 (1991).

Part Attorney General's Opinions

Authority of City-County Government to Acquire and Operate Electric and Natural Gas Utilities: A consolidated government with self-government powers, such as the city and county of Butte-Silver Bow, has the authority to acquire and operate electric and natural gas utilities both within and outside the boundaries of the local government unit. The Attorney General determined that Butte-Silver Bow was specifically authorized to do so after considering the local government's charter, constitutional ramifications, and whether the exercise of that authority was prohibited by local government law or other statutes applicable to self-government units and was consistent with state provisions in areas affirmatively subjected to state control, as described in 7-1-113. 48 A.G. Op. 14 (2000). See also State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100 (1981), D&F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977 (1986), and Lechner v. Billings, 244 M 195, 797 P2d 191 (1990).

Local Government Authority to Provide Alcohol and Drug Abuse Treatment Services: The city of Billings and Yellowstone County proposed to purchase and renovate a building for use by a nonprofit corporation providing treatment for alcohol and drug-related problems. The city proposed to issue industrial revenue bonds (IRBs) to fund a portion of the project, and the county sought a grant from the Montana Coal Board. Under the proposal, title to the building would vest in the nonprofit corporation once the IRBs have been retired. The questions presented were whether: (1) the building in question is a "governmental facility"; (2) a city or county has the power to expend funds for a building the title to which will eventually vest in a private corporation; and (3) contracting with a private corporation is a legitimate means of providing a governmental service. In the opinion of the Attorney General, a local government unit with self-government powers and counties with general government powers are authorized to provide alcohol and drug abuse treatment services under Title 53, ch. 24. Local governments may contract with nonprofit corporations for the provision of such services. A program of alcohol and drug abuse treatment services provided by contract with a private nonprofit corporation is a "governmental service or facility" under 90-6-205 for the purpose of determining eligibility for coal impact assistance. 39 A.G. Op. 31 (1981).

Part Law Review Articles

Local Government Under the 1972 Montana Constitution, Lopach, 51 Mont. L. Rev. 458 (1990).

Local Government: Old Problems and a New Constitution, Moore, 33 Mont. L. Rev. 96 (1980).

The Evolving Role of the Comprehensive Plan, Sullivan, 32 Urb. Law. 813 (2000).

Divergent but Co-Existent: Local Governments and Tribal Governments Under the Same Constitution, Sutton, 31 Urb. Law. 47 (1999).

Local Government: Developments in State Constitutional Law, Ford, 27 Rutgers L.J. 1243 (1996).

The County Supremacy Movement, Osenbaugh & Stoner, 28 Urb. Law. 497 (1996).

Symposium on Law and Economics of Local Government, Baker, 67 Chi.-Kent L.

Home Rule: An Essay on Pluralism, Libonati, 64 Wash. L. Rev. 51 (1989). Rev. 707 (1991).

The Rise of State Constitutional Limits on Planning and Zoning Powers, Sullivan, 1988 Inst. on Plan. Zoning & Eminent Domain 8.1-.46 (1988).

Part Collateral References

Municipal liability for negligent performance of building inspector's duties. 24 ALR 5th 200.

County Governance in the 1990s, Cigler, St. & Loc. Gov't Rev. (1995).

7-1-101. Self-government powers.

Case Notes

Power of Local Governments to Require All Residents to Connect to City Water Supply: The defendants argued that a city ordinance requiring them to hook up to the city water system violated their right to privacy by denying them the freedom to choose the type of water they wanted to use. The Supreme Court held that the interest asserted did not involve matters so fundamentally affecting the defendants' rights as to invoke constitutional protection. The court also held that a local government's concern with preventing health problems is a legitimate reason for controlling the water supply and a proper exercise of governmental power. Ennis v. Stewart, 247 M 355, 807 P2d 179, 48 St. Rep. 228 (1991).

System Development Fees Allowable Form of Financing Future Expansion of City Water and Sewer System: When liberally construed, it is within the power of a self-governing municipality, as well as a reasonable extension of a city's express statutory authority, to implement the collection and accumulation of system development fees to fund a portion of the cost of future expansion of municipal water and sewer systems. The fees are proper as long as they are based on reasonably anticipated future costs of the city and the revenue generated from the fees is used solely to fund facility expansion or to pay for bonds sold for that purpose. Lechner v. Billings, 244 M 195, 797 P2d 191, 47 St. Rep. 1512 (1990).

Tax on Sale of Attorney's Services — Invalid: A city ordinance imposing an annual tax on every lawyer or law firm carrying on the practice of law, calculated on the basis of gross revenue generated from attorney-client relationships, was held to be an unconstitutional sales tax. The tax was beyond the scope of self-government powers and in violation of 7-1-112, since it was not related to any regulatory control measure for the health or welfare of the city but was a tax on the sale of attorneys' services. Brueggemann v. Billings, 221 M 375, 719 P2d 768, 43 St. Rep. 905 (1986).

Establishment of Refuse Disposal District by County With Self-Governing Power: Title 7, ch. 13, part 2, is not mandatory upon a county charter form of government when it establishes a refuse disposal district and system. That part applies to the establishment of a refuse disposal district by governments that are of general power status, not those with self-government status. Title 7, ch. 13, part 2, does not direct or require a local government to provide a service within the meaning of 7-1-114. Clopton v. Madison County Comm'n, 216 M 335, 701 P2d 347, 42 St. Rep. 851 (1985).

Regulatory Municipal Business License Applicable to Attorneys — Unconstitutional: A business license ordinance enacted by a self-governing municipality requiring municipal licensure of attorneys and that provided for regulation was an unconstitutional encroachment on the Supreme Court's authority to regulate the bar as provided in Art. III, sec. 2, Mont. Const., because the ordinance conditions attorneys' access to the practice of law. The ordinance included police provisions that could conceivably cover standards of practice, prohibited attorneys from carrying on their occupation without procuring a municipal license, required municipal licensure of nonresident attorneys practicing in the municipality, and provided for fines and incarceration for failing to comply with the ordinance. Harlen v. Helena, 208 M 45, 676 P2d 191, 41 St. Rep. 162 (1984).

Unconstitutional Regulation of Attorneys — Regulatory Business License Required — Self-Government Powers Municipality: A business license ordinance enacted by a self-governing municipality requiring licensure of attorneys was declared invalid in respect to the attorneys because provisions of the ordinance provided for regulation of the practice of law contrary to the Supreme Court's authority to regulate the bar as provided in Art. III, sec. 2, Mont. Const. The Supreme Court recognized the universe of powers available to self-governing local governments that are not available to general power local governments, but said that such powers are restricted by the Montana Constitution. Harlen v. Helena, 208 M 45, 676 P2d 191, 41 St. Rep. 162 (1984).

Power to Prohibit Door-to-Door Solicitation: The city of Billings enacted an ordinance declaring uninvited door-to-door solicitation a nuisance punishable as a misdemeanor. It was argued that a state statute regulating itinerant vendors did not empower a city to prohibit their

activities, therefore precluding the ordinance. The Supreme Court disagreed. Under the expanded powers of local self-government provided by Montana's 1972 Constitution, a city possessing those powers may exercise any power not prohibited by the Constitution or state statute. A city possessing self-government powers may prohibit uninvited door-to-door solicitation by itinerant vendors, and a licensing statute does not legalize an activity otherwise prohibited. Any statements to the contrary contained in DeLong v. Downes, 175 M 152, 573 P2d 160 (1977), are expressly overruled. Tipco Corp. v. Billings, 197 M 339, 642 P2d 1074, 39 St. Rep. 600 (1982). See also Stevens v. Missoula, 205 M 274, 667 P2d 440, 40 St. Rep. 1267 (1983).

Attorney General's Opinions

Mandatory Seatbelt Ordinance: Under Montana law and the Montana Constitution, a municipality with self-governing powers may enact a mandatory seatbelt ordinance that provides for a fine or jail sentence for violation of the ordinance as long as the fine or penalty does not exceed $500 and the imprisonment does not exceed 6 months for any one offense, and as long as such an ordinance is not prohibited by the city charter. 41 A.G. Op. 47 (1986).

Self-Government Powers — Professional Licensing — Conflict With State Statutes: The city of Helena, operating under a home rule charter, passed an ordinance requiring a license fee of all city businesses. State statutes that prohibit municipalities from imposing license fees on certain professions did not apply because the statutes were not made specifically applicable to self-government units. Home rule governments have all powers not specifically denied by the Montana Constitution, law, or charter. 39 A.G. Op. 60 (1982), overruled in Harlen v. Helena, 208 M 45, 676 P2d 191, 41 St. Rep. 162 (1984).

Competitive Bidding Requirements Mandatory: A local government unit with self-government powers cannot supersede by the passage of a resolution or ordinance the competitive bidding requirements set forth in 7-5-4302. 37 A.G. Op. 175 (1978).

Collateral References

Municipal Corporations *key* 56, et seq.

62 C.J.S. Municipal Corporations §§107, 108.

56 Am. Jur. 2d Municipal Corporations §126, et seq.

Supreme Court's application of vagueness doctrine to noncriminal statutes or ordinances. 40 L. Ed. 2d 823.

7-1-102. Authorization for self-government services and functions.

Case Notes

County Employment of Independent Contractor to Provide Legal Services: There is no express prohibition under Montana law precluding or preventing a county from entering into an independent contractor relationship for the provision of legal services. Hamner v. Butte-Silver Bow County, 233 M 271, 760 P2d 76, 45 St. Rep. 1481 (1988).

Services Under Self-Government Powers — No Doctrine of Implied Preemption: Appellant garbage haulers contended that the Legislature preempted the field of garbage regulation by enacting 7-2-4736. Prior to the 1972 Constitution, cities had only those powers expressly given to them by the Legislature, and if the Legislature considered a subject to be a matter of statewide concern, it could enact laws on the subject and preempt local governments from the field. However, Art. XI, sec. 6, Mont. Const., states that a local government which adopts a self-government charter may exercise any power not prohibited by the Constitution, law, or the charter. The city of Billings adopted a self-government charter in 1976, and this section allows the city to provide services or perform any functions not expressly prohibited. The Supreme Court held in Tipco Corp., Inc. v. Billings, 197 M 339, 642 P2d 1074 (1982), that "the only way the doctrine of pre-emption by the state can co-exist with self-government powers of a municipality is if there is an express prohibition by statute which forbids local governments . . . from acting in a certain area. The doctrine of implied pre-emption, by definition, cannot apply to local governments with self-government powers". Powers specifically denied to local governments are enumerated in 7-1-111 and include the exercise of any power that prohibits the grant or denial of a certificate of public convenience and necessity. Under 69-12-314, garbage haulers are required to get a certificate of public convenience and necessity prior to doing business. The decision by Billings voters that the city should provide garbage services in no way prohibits the grant or denial of a certificate of public necessity. The Supreme Court held that the city was simply exercising its self-government powers to provide a service for its residents and was taxing them for that service. D & F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977, 43 St. Rep. 74 (1986), overruling Billings v. Weatherwax, 193 M 163, 630 P2d 1216, 38 St. Rep. 1034 (1981).

Attorney General's Opinions

Provision of Museum, Historical Society, or Community Theater Services: A local government with self-government powers may provide the services or functions of a museum, historical society, or community theater. These services or functions may be provided by a contract with a private organization if such a contract is a reasonable and appropriate method for doing so. 38 A.G. Op. 7 (1979).

Law Review Articles

Home Rule: An Essay on Pluralism, Libonati, 64 Wash. L. Rev. 51 (1989).

Collateral References

56 Am. Jur. 2d Municipal Corporations §156, et seq.

7-1-103. General power government limitations not applicable.

Case Notes

No Presumption That Hookup Fees Reasonable: Seypar, Inc., argued that the sewer district's $500 hookup fee assessed against each of Seypar, Inc.'s, 70 lots was unreasonable. The Supreme Court held that the District Court was wrong in finding that the district was a local self-governing unit and that therefore there was no presumption that the district's fees were reasonable. However, the Supreme Court found that the district had introduced evidence that the fees were reasonable and Seypar, Inc., had presented no contrary evidence. Therefore, Seypar, Inc., it had not met its burden of proof to show that the fees were unreasonable. Seypar, Inc. v. Water & Sewer District No. 363, 1998 MT 149, 289 M 263, 960 P2d 311, 55 St. Rep. 578 (1998).

Sewer District Not Local Self-Governing Unit: The lower court granted a multicounty sewer district's motion for summary judgment, ruling that the district had the right to impose hookup inspection fees on the appellant, Seypar, Inc. Seypar, Inc., argued that the district did not have the authority to impose the fee against individual property owners and that the cost should have been assessed against the whole district. The Supreme Court ruled that although state law gave the district the same administrative powers as County Commissioners have over a single county sewer district, those powers are not the same as a local self-governing unit and therefore the district did not have the authority to exercise any power not prohibited by Montana law. The Supreme Court stated that since the district was not self-governing, it could not argue that the statutes relating to municipal districts applied to it by analogy. The Supreme Court held that the district did have the power to impose hookup fees under 7-12-2151. Seypar, Inc. v. Water & Sewer District No. 363, 1998 MT 149, 289 M 263, 960 P2d 311, 55 St. Rep. 578 (1998).

City Ordinance Requiring Developer Surcharge — Valid Exercise of Self-Governing Power: A city ordinance imposing a 5% surcharge on developers of raw land prior to creation of a special improvement district was a valid exercise of the city's self-governing powers. Diefenderfer v. Billings, 223 M 487, 726 P2d 1362, 43 St. Rep. 1934 (1986), distinguished in Seypar, Inc. v. Water & Sewer District No. 363, 1998 MT 149, 289 M 263, 960 P2d 311, 55 St. Rep. 578 (1998).

Limitation on Self-Governing Powers: The city of Billings, a self-governing city, adopted an ordinance purporting to supersede all but two sections in Title 7, ch. 33, part 41, relating to municipal fire departments. The firefighters challenged the ordinance. The District Court held that the ordinance was a permissible exercise of a self-government power. On appeal, the Supreme Court held that under the shared sovereignty concept contained in the Montana Constitution, local governments with self-governing powers are limited only by express prohibitions in the constitution, state statute, or the local government charter itself. By statute, a local government may not establish standards or requirements lower or less stringent than those imposed by state law. The court held that because the ordinance did not contain standards governing several areas it purported to supersede, the ordinance provisions were lower or less stringent than the statutory provisions and therefore invalid. A local government must provide any service required by state law. State law requires every city to have a fire department. Pursuant to Art. XI, sec. 5(3), Mont. Const., the only statutory provisions a self-governing charter may control over are those establishing executive, legislative, and administrative structure and organization. The ordinance was invalid. Billings Firefighters Local 521 v. Billings, 214 M 481, 694 P2d 1335, 42 St. Rep. 112 (1985), followed in Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Exercise of Power Under Self-Government Charter Not Limited: A county government operating under a self-government charter which elects to provide a service or perform a function that may also be provided or performed by a general power government unit is not subject to any limitation in the provision of such service or performance of that function except to the extent of

such limitations as are found in its charter or in state law specifically applicable to self-government units. Thus, where a county government is not limited by its charter concerning whether it can charge a fee for review by the county-appointed land surveyor and where there is no state statute specifically forbidding self-government units from assessing a fee for the review of certificates of survey, the county's prescribed fee is valid. The county in prescribing such a fee is merely exercising a legislative power that as a self-governing unit it shares with the state. State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100, 38 St. Rep. 71 (1981), distinguished in Seypar, Inc. v. Water & Sewer District No. 363, 1998 MT 149, 289 M 263, 960 P2d 311, 55 St. Rep. 578 (1998).

Attorney General's Opinions

Self-Government Powers — Professional Licensing — Conflict With State Statutes: The city of Helena, operating under a home rule charter, passed an ordinance requiring a license fee of all city businesses. State statutes that prohibit municipalities from imposing license fees on certain professions did not apply because the statutes were not made specifically applicable to self-government units. Home rule governments have all powers not specifically denied by the Montana Constitution, law, or charter. 39 A.G. Op. 60 (1982), overruled in Harlen v. Helena, 208 M 45, 676 P2d 191, 41 St. Rep. 162 (1984).

Collateral References

56 Am. Jur. 2d Municipal Corporations §126, et seq.

7-1-104. Legislative power vested in legislative bodies.

Case Notes

Wrongful Discharge Suit — County Commissioners Not Entitled to Legislative Immunity: County Commissioners' conduct in terminating an administrative assistant was an administrative decision rather than a policy decision. County defendants The District Court erred in granting summary judgment in favor of defendants. The case was reversed and remanded. Bechard v. Rappold, 287 F3d 827 (9th Cir. 2002).

Collateral References

62 C.J.S. Municipal Corporations §183, et seq.

56 Am. Jur. 2d Municipal Corporations §126, et seq.

7-1-105. State law applicable until superseded.

Attorney General's Opinions

Competitive Bidding Requirements Mandatory: A local government unit with self-government powers cannot supersede by the passage of a resolution or ordinance the competitive bidding requirements set forth in 7-5-4302. 37 A.G. Op. 175 (1978).

Self-Government Powers: Section 7-4-2503 does not apply to self-government units since it may be superseded by ordinance or resolution of the Commission and is not prohibited by 7-1-114(1)(g). 37 A.G. Op. 68 (1977).

Collateral References

Municipal Corporations *key* 592(1), et seq.

62 C.J.S. Municipal Corporations §144.

56 Am. Jur. 2d Municipal Corporations §128.

7-1-106. Construction of self-government powers.

Case Notes

Local Development Code Regulating Sale of Alcoholic Beverages Not Preempted by State: Montana's statutory framework for the regulation of alcohol clearly contemplates that cities will impose local zoning that regulates the sale of alcohol. The development code of the city of Red Lodge, a self-governing city, being consistent with and stricter than the state's regulations, was not preempted by state law. Town Pump, Inc. v. Bd. of Adjustment of Red Lodge, 1998 MT 294, 292 M 6, 971 P2d 349, 55 St. Rep. 1205 (1998), overruling State ex rel. Libby v. Haswell, 147 M 492, 414 P2d 652 (1966).

System Development Fees Allowable Form of Financing Future Expansion of City Water and Sewer System: When liberally construed, it is within the power of a self-governing municipality, as well as a reasonable extension of a city's express statutory authority, to implement the collection and accumulation of system development fees to fund a portion of the cost of future expansion of municipal water and sewer systems. The fees are proper as long as they are based on reasonably anticipated future costs of the city and the revenue generated from the fees is used

solely to fund facility expansion or to pay for bonds sold for that purpose. Lechner v. Billings, 244 M 195, 797 P2d 191, 47 St. Rep. 1512 (1990).

Independent Exercise of Eminent Domain Power by Joint Airport Board Member: Plaintiffs argued that 67-10-205(2)(c) mandates that a proceeding for eminent domain may not be brought by a single municipal member of a joint airport board but rather only as a joint action with the other signatories. The Supreme Court found this to be an overly narrow interpretation in light of other statutory authority in Title 67, ch. 10, parts 1 and 2, which empowers municipalities to act either jointly or independently, and under the broad grant of power to cities under Art. XI, sec. 4, Mont. Const. By its terms, 67-10-205(2)(c) requires joint action when an eminent domain proceeding is brought pursuant to the authority of the joint airport board; however, it does not preclude action separate and apart from the board. Lake v. Lake County, 233 M 126, 759 P2d 161, 45 St. Rep. 1354 (1988).

City Ordinance Requiring Developer Surcharge — Valid Exercise of Self-Governing Power: A city ordinance imposing a 5% surcharge on developers of raw land prior to creation of a special improvement district was a valid exercise of the city's self-governing powers. Diefenderfer v. Billings, 223 M 487, 726 P2d 1362, 43 St. Rep. 1934 (1986).

Limitation on Self-Governing Powers: The city of Billings, a self-governing city, adopted an ordinance purporting to supersede all but two sections in Title 7, ch. 33, part 41, relating to municipal fire departments. The firefighters challenged the ordinance. The District Court held that the ordinance was a permissible exercise of a self-government power. On appeal, the Supreme Court held that under the shared sovereignty concept contained in the Montana Constitution, local governments with self-governing powers are limited only by express prohibitions in the constitution, state statute, or the local government charter itself. By statute, a local government may not establish standards or requirements lower or less stringent than those imposed by state law. The court held that because the ordinance did not contain standards governing several areas it purported to supersede, the ordinance provisions were lower or less stringent than the statutory provisions and therefore invalid. A local government must provide any service required by state law. State law requires every city to have a fire department. Pursuant to Art. XI, sec. 5(3), Mont. Const., the only statutory provisions a self-governing charter may control over are those establishing executive, legislative, and administrative structure and organization. The ordinance was invalid. Billings Firefighters Local 521 v. Billings, 214 M 481, 694 P2d 1335, 42 St. Rep. 112 (1985), followed in Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Exercise of Power Under Self-Government Charter Not Limited: A county government operating under a self-government charter which elects to provide a service or perform a function that may also be provided or performed by a general power government unit is not subject to any limitation in the provision of such service or performance of that function except to the extent of such limitations as are found in its charter or in state law specifically applicable to self-government units. Thus, where a county government is not limited by its charter concerning whether it can charge a fee for review by the county-appointed land surveyor and where there is no state statute specifically forbidding self-government units from assessing a fee for the review of certificates of survey, the county's prescribed fee is valid. The county in prescribing such a fee is merely exercising a legislative power that as a self-governing unit it shares with the state. State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100, 38 St. Rep. 71 (1981).

Attorney General's Opinions

Municipal Tiered Resort Tax Allowed: Resort tax statutes neither prohibit nor explicitly permit a differential tax schedule. However, a differential tax structure is not inconsistent with concerns revealed in the legislative history and may arguably further the express statutory purposes by taxing at a higher rate those businesses drawing more of their customers from tourists than those businesses serving a greater proportion of local residents. Therefore, a municipality with self-governing powers may establish a tiered resort tax schedule providing different tax rates for similar goods or services according to the character of the business in which the goods or services are offered, as long as none of the tax rates exceed 3%. 48 A.G. Op. 25 (2000).

Enactment of Local Government Ordinance Providing That Delinquent Solid Waste Service Charges Become Lien on Property Served: A city-county charter that provided that levies for special services were the obligation of the property owners was not in conflict with state constitutional powers delegated to local governments or with state law governing local governments, nor was it inconsistent with state provisions in an area affirmatively subjected to state control. Therefore, a local government with self-governing powers may enact an ordinance

that provides that delinquent solid waste management service charges become a lien on the property served, consistent with the remedy available to a solid waste management district for collecting its delinquent service charges under 7-13-233. 44 A.G. Op. 34 (1992).

Mandatory Seatbelt Ordinance: Under Montana law and the Montana Constitution, a municipality with self-governing powers may enact a mandatory seatbelt ordinance that provides for a fine or jail sentence for violation of the ordinance as long as the fine or penalty does not exceed $500 and the imprisonment does not exceed 6 months for any one offense, and as long as such an ordinance is not prohibited by the city charter. 41 A.G. Op. 47 (1986).

Self-Government Powers — Professional Licensing — Conflict With State Statutes: The city of Helena, operating under a home rule charter, passed an ordinance requiring a license fee of all city businesses. State statutes that prohibit municipalities from imposing license fees on certain professions did not apply because the statutes were not made specifically applicable to self-government units. Home rule governments have all powers not specifically denied by the Montana Constitution, law, or charter. 39 A.G. Op. 60 (1982), overruled in Harlen v. Helena, 208 M 45, 676 P2d 191, 41 St. Rep. 162 (1984).

Competitive Bidding Requirements Mandatory: A local government unit with self-government powers cannot supersede by the passage of a resolution or ordinance the competitive bidding requirements set forth in 7-5-4302. 37 A.G. Op. 175 (1978).

Collateral References

Municipal Corporations *key* 57, 58.

62 C.J.S. Municipal Corporations §§119, 124.

56 Am. Jur. 2d Municipal Corporations §195.

Supreme Court's application of vagueness doctrine to noncriminal statutes or ordinances. 40 L. Ed. 2d 823.

7-1-111. Powers denied.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 217 in (7) at end after "certificate of" substituted "compliance" for "environmental compatibility and public need". Amendment effective April 3, 2003.

Chapter 466 in (12) inserted exception clause. Amendment effective April 23, 2003.

Chapter 561 inserted (14) prohibiting a local government unit with self-government powers from enacting an ordinance prohibiting or penalizing vagrancy unless a local ordinance defines and includes aggressive solicitation in the offense of disorderly conduct. Amendment effective May 5, 2003.

Saving Clause: Section 19, Ch. 217, L. 2003, was a saving clause.

Section 7, Ch. 466, L. 2003, was a saving clause.

Severability: Section 20, Ch. 217, L. 2003, was a severability clause.

Retroactive Applicability: Section 6, Ch. 561, L. 2003, provided: "[Sections 1 and 3] [7-1-111 and 7-32-4304] apply retroactively, within the meaning of 1-2-109, to ordinances enacted prior to [the effective date of this act]." Effective May 5, 2003.

2001 Amendment: Chapter 446 inserted (13) prohibiting a self-governing local government unit from licensing or regulating certain activities of landlords; and made minor changes in style. Amendment effective October 1, 2001.

1995 Amendment: Chapter 418 in (6) substituted "department of environmental quality" for "department of state lands"; in (7) substituted "department of environmental quality" for "department of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1983 Amendment: In middle of (2), deleted reference to 7-33-4129 after 7-33-4128.

Case Notes

No Prohibition Against Utility Regulation by Municipality: Appellants argued that the restriction in subsection (5) of this section, which prohibits a local government unit from establishing a rate or price otherwise determined by a state agency, preempted the city of Billings from assessing new utility fees in the form of system development fees for funding the expansion of water and sewer facilities. However, under Title 69, ch. 7, municipal utility rates are not determined by a state agency; rather, unless the rates result in an increase in total revenue of 12% in any 1 year, the exclusive authority to regulate, establish, and change

municipal utility rates rests with the city. Lechner v. Billings, 244 M 195, 797 P2d 191, 47 St. Rep. 1512 (1990).

City Ordinance Requiring Developer Surcharge — Valid Exercise of Self-Governing Power: A city ordinance imposing a 5% surcharge on developers of raw land prior to creation of a special improvement district was a valid exercise of the city's self-governing powers. Diefenderfer v. Billings, 223 M 487, 726 P2d 1362, 43 St. Rep. 1934 (1986).

Garbage Service Under Self-Government — No Doctrine of Implied Preemption: Appellant garbage haulers contended that the Legislature preempted the field of garbage regulation by enacting 7-2-4736. Prior to the 1972 Constitution, cities had only those powers expressly given to them by the Legislature, and if the Legislature considered a subject to be a matter of statewide concern, it could enact laws on the subject and preempt local governments from the field. However, Art. XI, sec. 6, Mont. Const., states that a local government which adopts a self-government charter may exercise any power not prohibited by the Constitution, law, or the charter. The city of Billings adopted a self-government charter in 1976, and 7-1-102 allows the city to provide services or perform any functions not expressly prohibited. Powers specifically denied to local governments are enumerated in this section and include the exercise of any power that prohibits the grant or denial of a certificate of public convenience and necessity. Under 69-12-314, garbage haulers are required to get a certificate of public convenience and necessity prior to doing business. The decision by Billings voters that the city should provide garbage services in no way prohibits the grant or denial of a certificate of public necessity. The Supreme Court held that the city was simply exercising its self-government powers to provide a service for its residents and was taxing them for that service. D & F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977, 43 St. Rep. 74 (1986), overruling Billings v. Weatherwax, 193 M 163, 630 P2d 1216, 38 St. Rep. 1034 (1981).

Limitation on Self-Governing Powers: The city of Billings, a self-governing city, adopted an ordinance purporting to supersede all but two sections in Title 7, ch. 33, part 41, relating to municipal fire departments. The firefighters challenged the ordinance. The District Court held that the ordinance was a permissible exercise of a self-government power. On appeal, the Supreme Court held that under the shared sovereignty concept contained in the Montana Constitution, local governments with self-governing powers are limited only by express prohibitions in the constitution, state statute, or the local government charter itself. By statute, a local government may not establish standards or requirements lower or less stringent than those imposed by state law. The court held that because the ordinance did not contain standards governing several areas it purported to supersede, the ordinance provisions were lower or less stringent than the statutory provisions and therefore invalid. A local government must provide any service required by state law. State law requires every city to have a fire department. Pursuant to Art. XI, sec. 5(3), Mont. Const., the only statutory provisions a self-governing charter may control over are those establishing executive, legislative, and administrative structure and organization. The ordinance was invalid. Billings Firefighters Local 521 v. Billings, 214 M 481, 694 P2d 1335, 42 St. Rep. 112 (1985), followed in Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Self-Governing Unit Ordinance — State Statute Silent on Subject of Ordinance: A county's ordinance enacted pursuant to a self-government charter that requires payment of a fee for review by the appointed land surveyor of certificates of survey does not prescribe a lower standard than 76-3-611 (requiring review but no fee), is "not less stringent", and therefore, under 7-1-113, is not the exercise of a power inconsistent with state law. State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100, 38 St. Rep. 71 (1981).

Attorney General's Opinions

Authority of City-County Government to Acquire and Operate Electric and Natural Gas Utilities: A consolidated government with self-government powers, such as the city and county of Butte-Silver Bow, has the authority to acquire and operate electric and natural gas utilities both within and outside the boundaries of the local government unit. The Attorney General determined that Butte-Silver Bow was specifically authorized to do so after considering the local government's charter, constitutional ramifications, and whether the exercise of that authority was prohibited by local government law or other statutes applicable to self-government units and was consistent with state provisions in areas affirmatively subjected to state control, as described in 7-1-113. 48 A.G. Op. 14 (2000). See also State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100 (1981), D&F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977 (1986), and Lechner v. Billings, 244 M 195, 797 P2d 191 (1990).

City Authority to Enact Photo-Radar Ordinance: No state agency is given exclusive power to establish administrative rules governing speed of traffic in cities and towns, nor is the enforcement of speed regulations exclusively vested in a state agency. Therefore, the city of Billings, under its self-government charter, is not precluded by statute from enacting a photo-radar ordinance providing either for accountability on the part of the registered owner for illegal speeding by any person operating the vehicle with the owner's permission or for a permissive inference that the registered owner was the speeding violator. 45 A.G. Op. 7 (1993).

Enactment of Local Government Ordinance Providing That Delinquent Solid Waste Service Charges Become Lien on Property Served: A city-county charter that provided that levies for special services were the obligation of the property owners was not in conflict with state constitutional powers delegated to local governments or with state law governing local governments, nor was it inconsistent with state provisions in an area affirmatively subjected to state control. Therefore, a local government with self-governing powers may enact an ordinance that provides that delinquent solid waste management service charges become a lien on the property served, consistent with the remedy available to a solid waste management district for collecting its delinquent service charges under 7-13-233. 44 A.G. Op. 34 (1992).

Public Utility Contractor Not to Install Certain Service Lines in Billings Unless Licensed by State as Plumber — City Required to Check License Qualifications: The city of Billings may not allow public utility contractors to install water and wastewater service lines that extend from the public water or sewer main to a point within the walls of the private property or within 20 feet from any foundation wall of the private residence unless the contractor also has a plumber's license issued by the state. The city is required to determine whether a person applying for a plumbing permit pursuant to the Uniform Plumbing Code is licensed by the state as a plumber if the type of work described in the permit requires licensure as a requisite to performance. 44 A.G. Op. 12 (1991). In clarifying this opinion, the Attorney General noted that work done on a public water supply or public sewer system that does not include work falling within the statutory distances for plumbing or drainage systems does not require a state-issued plumber's license. Therefore, the city of Billings may not allow public utility contractors to install water service lines that extend from the public water main to a point within the walls of the private property or within 20 feet from any foundation wall of the premises, whichever distance is shorter as measured from the foundation wall, or wastewater service lines that extend from the public sewer main to a point within 2 feet from any foundation wall of the premises, unless the contractor also has a plumber's license issued by the state. 44 A.G. Op. 39 (1992).

Extraterritorial Extension of City Zoning Regulations: In the absence of applicable county zoning regulations, 76-2-310 authorizes a city of the first class that has adopted a master plan (now growth policy) to extend its zoning regulations extraterritorially within a 3-mile radius of its corporate limits without reference to county boundary lines. 43 A.G. Op. 22 (1989).

Law Review Articles

Updating a Municipal Utility's Right to Refuse Service, 17 Stetson L. Rev. 807 (1988).

Collateral References

56 Am. Jur. 2d Municipal Corporations §128.

Waiver of, or estoppel to assert, failure to give or defects in notice of claim against state or local political subdivision—modern status. 64 ALR 5th 519.

Sufficiency of notice of claim against local political entity as regards time when accident occurred. 57 ALR 5th 689.

Sufficiency of notice of claim against local governmental unit as regards identity, name, address, and residence of claimant. 53 ALR 5th 617.

7-1-112. Powers requiring delegation.

Compiler's Comments

1999 Amendment: Chapter 584 in (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Case Notes

System Development Fee as Service Charge, Not Tax: System development fees that are placed in a special fund earmarked for expanding a city's water and sewer facilities or for retiring bonds issued for that purpose, rather than being held in a general revenue fund to be used on projects unrelated to water and sewer systems, are not taxes but service charges, which the city

is not prohibited from adopting by this section. Lechner v. Billings, 244 M 195, 797 P2d 191, 47 St. Rep. 1512 (1990).

Tax on Sale of Attorney's Services — Invalid: A city ordinance imposing an annual tax on every lawyer or law firm carrying on the practice of law, calculated on the basis of gross revenue generated from attorney-client relationships, was held to be an unconstitutional sales tax. The tax was beyond the scope of self-government powers and in violation of 7-1-112, since it was not related to any regulatory control measure for the health or welfare of the city but was a tax on the sale of attorneys' services. Brueggemann v. Billings, 221 M 375, 719 P2d 768, 43 St. Rep. 905 (1986).

Fee for Occupancy of Motel Room Held a Sales Tax: Where the city of Billings imposed a fee of $1 on each adult transient for each day he occupied a hotel or motel room, the District Court erred in holding that the fee was not a sales tax, prohibited by law, on a service. The fact that the tax is imposed on the occupant rather than upon the passage of possession of the room is not persuasive on the issue of whether the fee is a tax upon a service. The fee is directly connected to the renting of the room, as such a fee is not imposed upon any other type of business. The ordinance imposing the fee is illegal and void. Mont. Innkeepers Ass'n v. Billings, 206 M 425, 671 P2d 21, 40 St. Rep. 1753 (1983).

Attorney General's Opinions

Municipal Tiered Resort Tax Allowed: Resort tax statutes neither prohibit nor explicitly permit a differential tax schedule. However, a differential tax structure is not inconsistent with concerns revealed in the legislative history and may arguably further the express statutory purposes by taxing at a higher rate those businesses drawing more of their customers from tourists than those businesses serving a greater proportion of local residents. Therefore, a municipality with self-governing powers may establish a tiered resort tax schedule providing different tax rates for similar goods or services according to the character of the business in which the goods or services are offered, as long as none of the tax rates exceed 3%. 48 A.G. Op. 25 (2000).

City Authority to Enact Photo-Radar Ordinance: No state agency is given exclusive power to establish administrative rules governing speed of traffic in cities and towns, nor is the enforcement of speed regulations exclusively vested in a state agency. Therefore, the city of Billings, under its self-government charter, is not precluded by statute from enacting a photo-radar ordinance providing either for accountability on the part of the registered owner for illegal speeding by any person operating the vehicle with the owner's permission or for a permissive inference that the registered owner was the speeding violator. 45 A.G. Op. 7 (1993).

Collateral References

56 Am. Jur. 2d Municipal Corporations §128.

Facilities: power of municipality to charge nonresidents higher fees than residents for use of municipal facilities. 57 ALR 3d 998.

7-1-113. Consistency with state regulation required.

Case Notes

Local Development Code Regulating Sale of Alcoholic Beverages Not Preempted by State: Montana's statutory framework for the regulation of alcohol clearly contemplates that cities will impose local zoning that regulates the sale of alcohol. The development code of the city of Red Lodge, a self-governing city, being consistent with and stricter than the state's regulations, was not preempted by state law. Town Pump, Inc. v. Bd. of Adjustment of Red Lodge, 1998 MT 294, 292 M 6, 971 P2d 349, 55 St. Rep. 1205 (1998), overruling State ex rel. Libby v. Haswell, 147 M 492, 414 P2d 652 (1966).

No Mandatory Application of Wastewater Treatment Regulation by Local Board of Health: Under 76-3-501, review and approval or disapproval of a subdivision under the Montana Subdivision and Platting Act may occur only under regulations in effect at the time that an application is submitted to the governing body. The Lewis and Clark County Commission approved the Green Acres subdivision in July 1990, at which time the Lewis and Clark County Board of Health's onsite wastewater treatment regulations mandated shallow standard treatment systems, rather than the present regulation requiring intermittent sand filters. Skinner Enterprises, Inc., argued that the 1990 regulation should be applied pursuant to 76-3-501. However, local boards of health derive authority to regulate subdivisions from 50-2-116, not from the Montana Subdivision and Platting Act. Therefore, the local board's own onsite wastewater treatment regulations did not obligate the local board to apply the 1990 regulation. Further, 50-2-130 allows local boards of health to promulgate regulations that are

more stringent than comparable state regulations, notwithstanding the provisions of this section prohibiting a local government from exercising any power inconsistent with state law or administrative regulations. The facts regarding whether shallow-capped drainfields or intermittent sand filters are considered more stringent were not the subject of the present appeal. The discretionary authority of the local board of health to regulate subdivision sanitation by requiring intermittent sand filters was affirmed. Skinner Enterprises, Inc. v. Lewis & Clark County Bd. of Health, 286 M 256, 950 P2d 733, 54 St. Rep. 1398 (1997). In early 1998, prior to trial, the Board again amended the onsite wastewater treatment regulations, superseding the 1995 regulations to which Skinner objected. As a result, the legality of the 1995 amendments were no longer of any practical consequence to the parties and Skinner's objections to the process by which the 1995 amendments were adopted were moot and properly dismissed. Skinner Enterprises, Inc. v. Lewis & Clark City-County Health Dept., 1999 MT 106, 294 M 310, 980 P2d 1049, 56 St. Rep. 438 (1999).

Setting of Municipal Utility Rates Not Subjected to State Control: The setting of rates and charges for municipal utilities has not been affirmatively subjected to state control within the meaning of this section. The enforcement of standards or requirements and the power to establish administrative rules in the area of municipal ratemaking are not vested in any state agency or officer. Rather, 69-7-201 requires the municipal utility, with the concurrence of the municipal governing body, to adopt rules for operating the utility. Lechner v. Billings, 244 M 195, 797 P2d 191, 47 St. Rep. 1512 (1990).

City Ordinance Requiring Developer Surcharge — Valid Exercise of Self-Governing Power: A city ordinance imposing a 5% surcharge on developers of raw land prior to creation of a special improvement district was a valid exercise of the city's self-governing powers. Diefenderfer v. Billings, 223 M 487, 726 P2d 1362, 43 St. Rep. 1934 (1986).

Limitation on Self-Governing Powers: The city of Billings, a self-governing city, adopted an ordinance purporting to supersede all but two sections in Title 7, ch. 33, part 41, relating to municipal fire departments. The firefighters challenged the ordinance. The District Court held that the ordinance was a permissible exercise of a self-government power. On appeal, the Supreme Court held that under the shared sovereignty concept contained in the Montana Constitution, local governments with self-governing powers are limited only by express prohibitions in the constitution, state statute, or the local government charter itself. By statute, a local government may not establish standards or requirements lower or less stringent than those imposed by state law. The court held that because the ordinance did not contain standards governing several areas it purported to supersede, the ordinance provisions were lower or less stringent than the statutory provisions and therefore invalid. A local government must provide any service required by state law. State law requires every city to have a fire department. Pursuant to Art. XI, sec. 5(3), Mont. Const., the only statutory provisions a self-governing charter may control over are those establishing executive, legislative, and administrative structure and organization. The ordinance was invalid. Billings Firefighters Local 521 v. Billings, 214 M 481, 694 P2d 1335, 42 St. Rep. 112 (1985), followed in Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Self-Governing Unit Ordinance — State Statute Silent on Subject of Ordinance: A county's ordinance enacted pursuant to a self-government charter that requires payment of a fee for review by the appointed land surveyor of certificates of survey does not prescribe a lower standard than 76-3-611 (requiring review but no fee), is "not less stringent", and therefore, under 7-1-113, is not the exercise of a power inconsistent with state law. State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100, 38 St. Rep. 71 (1981).

Attorney General's Opinions

Authority of City-County Government to Acquire and Operate Electric and Natural Gas Utilities: A consolidated government with self-government powers, such as the city and county of Butte-Silver Bow, has the authority to acquire and operate electric and natural gas utilities both within and outside the boundaries of the local government unit. The Attorney General determined that Butte-Silver Bow was specifically authorized to do so after considering the local government's charter, constitutional ramifications, and whether the exercise of that authority was prohibited by local government law or other statutes applicable to self-government units and was consistent with state provisions in areas affirmatively subjected to state control, as described in this section. 48 A.G. Op. 14 (2000). See also State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100 (1981), D&F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977 (1986), and Lechner v. Billings, 244 M 195, 797 P2d 191 (1990).

No Authority for Self-Governing City to Assess Fire Service Fees to State Property Within Fire Service Area: The city of Helena, a self-governing city, is precluded from assessing fire service fees to state property located in the city fire service area because the fees are a tax for services provided for the general public good, and thus prohibited by 15-6-201(1)(a)(ii), rather than an assessment commensurate with a specific benefit conferred on the assessed property. 46 A.G. Op. 7 (1995).

City Authority to Enact Photo-Radar Ordinance: No state agency is given exclusive power to establish administrative rules governing speed of traffic in cities and towns, nor is the enforcement of speed regulations exclusively vested in a state agency. Therefore, the city of Billings, under its self-government charter, is not precluded by statute from enacting a photo-radar ordinance providing either for accountability on the part of the registered owner for illegal speeding by any person operating the vehicle with the owner's permission or for a permissive inference that the registered owner was the speeding violator. 45 A.G. Op. 7 (1993).

Enactment of Local Government Ordinance Providing That Delinquent Solid Waste Service Charges Become Lien on Property Served: A city-county charter that provided that levies for special services were the obligation of the property owners was not in conflict with state constitutional powers delegated to local governments or with state law governing local governments, nor was it inconsistent with state provisions in an area affirmatively subjected to state control. Therefore, a local government with self-governing powers may enact an ordinance that provides that delinquent solid waste management service charges become a lien on the property served, consistent with the remedy available to a solid waste management district for collecting its delinquent service charges under 7-13-233. 44 A.G. Op. 34 (1992).

Funeral Procession Vehicles Not to Be Exempted From Traffic Laws by City Ordinance: A city with self-government powers may not enact an ordinance exempting vehicles in a funeral procession from obeying traffic control devices by designating the vehicles as authorized emergency vehicles. 43 A.G. Op. 53 (1990).

Sale of City Land by City With Self-Government Powers — Vote Required: Although subsection (2)(a) of 7-8-4201 requires a two-thirds vote of the city commission to sell city land, a city with self-governing powers may enact a superseding ordinance allowing the sale of city land by a simple majority vote. 43 A.G. Op. 41 (1989). After analyzing 7-8-4201(2)(b), the Attorney General applied the same analysis and conclusion to allow the governing body of a local government unit with self-governing powers to enact an ordinance providing for the disposition by majority vote of the council of property held in trust for a specific purpose. 43 A.G. Op. 55 (1990).

Local Governments Preempted by State Law From Controlling Beer Sales: By enacting 16-1-102, the Legislature reserved to the state the entire control of the manufacture, sale, and distribution of beer. Thus, neither cities nor counties have authority to enact ordinances requiring distributors of keg beer to keep and maintain records of the sales or distribution of all beer kegs within the city or county. 40 A.G. Op. 48 (1984).

Self-Government Powers — Professional Licensing — Conflict With State Statutes: The city of Helena, operating under a home rule charter, passed an ordinance requiring a license fee of all city businesses. State statutes that prohibit municipalities from imposing license fees on certain professions did not apply because the statutes were not made specifically applicable to self-government units. Home rule governments have all powers not specifically denied by the Montana Constitution, law, or charter. 39 A.G. Op. 60 (1982), overruled in Harlen v. Helena, 208 M 45, 676 P2d 191, 41 St. Rep. 162 (1984).

County Powers — Revenue Funds: Unless a specific mode or manner of action is mandated by statute, counties may contract with individuals or private organizations, including nonprofit service organizations, for the purchase of services or materials the counties are authorized by statute to provide their constituents if the contracts are reasonable and appropriate methods of furnishing services or materials. Counties may use federal revenue sharing funds to purchase any services or materials they could use county tax revenues to purchase. 37 A.G. Op. 105 (1978).

Increase in County Attorney's Salary: A county having self-government powers may grant an increase in salary to its County Attorney in excess of the amount provided in 7-4-2503, but the increase must be borne by the general fund of the county. 37 A.G. Op. 70 (1977).

Collateral References

56 Am. Jur. 2d Municipal Corporations §226.

7-1-114. Mandatory provisions.

Compiler's Comments

2001 Amendment: Chapter 278 in (1)(g) at beginning inserted exception clause and at end after "local governments" deleted "except that the mill levy limits established by 15-10-420 apply"; inserted (3) regarding mill levy limits and application of 15-10-420; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1999 Amendment: Chapter 584 at end of (1)(g) substituted "established by 15-10-420 apply" for "established by state law do not apply". Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1997 Amendment: Chapter 42 in (1)(b) substituted "Title 7, chapter 3, part 1" for references to 7-3-104 through 7-3-106, 7-3-111 through 7-3-114, and 7-3-1101 through 7-3-1105; and made minor changes in style. Amendment effective March 12, 1997.

Case Notes

Suspension of Firefighters — All Cities Required to Present Charges to City Council for Hearing — Suspension Procedure Not Part of "Structure" of City Government Under Applicable Definitions — Statute Not Superseded by Charter: Elsenpeter, a Billings firefighter, was suspended from duty by the Billings fire chief. The firefighters' union filed a lawsuit in which the union contended that the suspension procedure used by the city was unlawful because the charges against Elsenpeter were not presented to the Billings City Council for hearing pursuant to 7-33-4124. The city contended that the suspension procedure that it used is part of the structure and organization of the city under its charter and that, pursuant to Art. XI, sec. 5, Mont. Const., and 7-3-701(2), which allow the structure of a chartered city government to supersede statutory requirements, the city may override the statutory requirements for hearing contained in 7-33-4124 because the definition of "structure" contained in 7-1-4121(24) is the definition that should apply. The Supreme Court held that in as much as the definitions in 7-1-4121 are, by the terms of that section, limited in their application to 7-1-4121 through 7-1-4149, the dictionary definition of "structure" is the definition that applies. Because the dictionary definition of structure was narrower, the Supreme Court held that the disciplinary suspension procedure used by the city was not part of the "structure" of city government. Therefore, the Supreme Court held that the statutory procedure contained in 7-33-4124, requiring presentment of the charges to the City Council, was not superseded by the city charter and had to be followed for the purposes of the suspension of Elsenpeter. Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Statutory Duty of City Council to Hold Termination Hearing Not Superseded by City Policy or Collective Bargaining Agreement: Phillips was terminated from his employment as a full-time firefighter for the city of Livingston. Before his termination, the city manager held a termination hearing. Phillips argued that the hearing was held in violation of 7-33-4124, requiring the hearing to be held before the City Council. The city responded that the termination procedures followed were provided in the city policy and procedures manual that was included in the firefighters' collective bargaining agreement and that the provisions of that agreement controlled pursuant to 39-31-306(3). The Supreme Court noted that the agreement adopted the city's procedures manual that allowed the manager to hold the hearing but that the agreement also referenced termination action "by the appropriate authority". Because the appropriate authority under 7-33-4124 was the City Council, the Supreme Court held that the agreement and the city's policies did not supersede state statute. Phillips v. Livingston, 268 M 156, 885 P2d 528, 51 St. Rep. 1227 (1994), followed, as to the inability of a city charter to supersede the statutory duty of a City Council to hold a disciplinary hearing, in Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

City Ordinance Requiring Developer Surcharge — Valid Exercise of Self-Governing Power: A city ordinance imposing a 5% surcharge on developers of raw land prior to creation of a special improvement district was a valid exercise of the city's self-governing powers. (See 1999 amendment.) Diefenderfer v. Billings, 223 M 487, 726 P2d 1362, 43 St. Rep. 1934 (1986).

Establishment of Refuse Disposal District by County With Self-Governing Power: Title 7, ch. 13, part 2, is not mandatory upon a county charter form of government when it establishes a refuse disposal district and system. That part applies to the establishment of a refuse disposal district by governments that are of general power status, not those with self-government status.

Title 7, ch. 13, part 2, does not direct or require a local government to provide a service within the meaning of this section. Clopton v. Madison County Comm'n, 216 M 335, 701 P2d 347, 42 St. Rep. 851 (1985).

Limitation on Self-Governing Powers: The city of Billings, a self-governing city, adopted an ordinance purporting to supersede all but two sections in Title 7, ch. 33, part 41, relating to municipal fire departments. The firefighters challenged the ordinance. The District Court held that the ordinance was a permissible exercise of a self-government power. On appeal, the Supreme Court held that under the shared sovereignty concept contained in the Montana Constitution, local governments with self-governing powers are limited only by express prohibitions in the constitution, state statute, or the local government charter itself. By statute, a local government may not establish standards or requirements lower or less stringent than those imposed by state law. The court held that because the ordinance did not contain standards governing several areas it purported to supersede, the ordinance provisions were lower or less stringent than the statutory provisions and therefore invalid. A local government must provide any service required by state law. State law requires every city to have a fire department. Pursuant to Art. XI, sec. 5(3), Mont. Const., the only statutory provisions a self-governing charter may control over are those establishing executive, legislative, and administrative structure and organization. The ordinance was invalid. Billings Firefighters Local 521 v. Billings, 214 M 481, 694 P2d 1335, 42 St. Rep. 112 (1985), followed in Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Attorney General's Opinions

Municipal Planning Board Not to Be Vested With Municipal Zoning Commission Powers: Authorization does not exist for designation of a city planning board as a zoning commission, and this section prohibits establishment of an alternative zoning system by local ordinance. Therefore, a city exercising self-government powers may not vest its municipal planning board with powers vested in municipal zoning commissions by 76-2-307. 47 A.G. Op. 4 (1997).

No Authority for Self-Governing City to Assess Fire Service Fees to State Property Within Fire Service Area: The city of Helena, a self-governing city, is precluded from assessing fire service fees to state property located in the city fire service area because the fees are a tax for services provided for the general public good, and thus prohibited by 15-6-201(1)(a)(ii), rather than an assessment commensurate with a specific benefit conferred on the assessed property. 46 A.G. Op. 7 (1995).

City Authority to Enact Photo-Radar Ordinance: No state agency is given exclusive power to establish administrative rules governing speed of traffic in cities and towns, nor is the enforcement of speed regulations exclusively vested in a state agency. Therefore, the city of Billings, under its self-government charter, is not precluded by statute from enacting a photo-radar ordinance providing either for accountability on the part of the registered owner for illegal speeding by any person operating the vehicle with the owner's permission or for a permissive inference that the registered owner was the speeding violator. 45 A.G. Op. 7 (1993).

Enactment of Local Government Ordinance Providing That Delinquent Solid Waste Service Charges Become Lien on Property Served: A city-county charter that provided that levies for special services were the obligation of the property owners was not in conflict with state constitutional powers delegated to local governments or with state law governing local governments, nor was it inconsistent with state provisions in an area affirmatively subjected to state control. Therefore, a local government with self-governing powers may enact an ordinance that provides that delinquent solid waste management service charges become a lien on the property served, consistent with the remedy available to a solid waste management district for collecting its delinquent service charges under 7-13-233. 44 A.G. Op. 34 (1992).

City Not Authorized to Reduce Office Hours: The phrase "unless otherwise provided by law", as used in 7-4-102, does not authorize a city to enact a municipal ordinance reducing the number of hours during which city offices must be open. Subsection (1)(f) of this section prohibits a city from reducing its office hours beyond those required by 7-4-102. 43 A.G. Op. 16 (1989).

Local Government Subject to State Zoning Laws — Ordinance Creating Appeal Prohibited: Section 7-1-114 prohibits a local legislative body from providing for an optional appeal of decisions from the local zoning Board of Adjustment to the legislative body since 76-2-327 provides that appeal may only be to a court of record. Section 76-2-321 authorizes the local legislative body to act instead of the Board of Adjustment in certain cases, not in addition to the Board. 38 A.G. Op. 98 (1980).

Mandatory Provisions — Procedural Laws: Section 7-1-114 applies to procedural as well as substantive laws. 38 A.G. Op. 98 (1980).

Local Governments — Authority to Borrow From Financial Institutions: A county, city, or town with general government or self-government powers can incur indebtedness by borrowing money directly from a financial institution. This authority to borrow does not change the debt limitations on the local government. 38 A.G. Op. 14 (1979).

Competitive Bidding Requirements Mandatory: A local government unit with self-government powers cannot supersede by the passage of a resolution or ordinance the competitive bidding requirements set forth in 7-5-4302. 37 A.G. Op. 175 (1978).

Self-Government Powers: Section 7-4-2503 does not apply to self-government units since it may be superseded by ordinance or resolution of the Commission and is not prohibited by 7-1-114(1)(g). 37 A.G. Op. 68 (1977).

Collateral References

56 Am. Jur. 2d Municipal Corporations §226.

7-1-115. Governmental right to sue firearms or ammunition manufacturer, trade association, or dealer in tort or for abatement or injunctive relief.

Compiler's Comments

Preamble: The preamble attached to Ch. 581, L. 1999, provided: "WHEREAS, the Second Amendment to the Constitution of the United States provides that "the right of the people to keep and bear arms shall not be infringed"; and

WHEREAS, documents written by the founding fathers clearly indicate that the right to keep and bear arms includes the keeping and bearing of firearms for personal use and protection unrelated to the necessity of a well-regulated militia to the security of a free state; and

WHEREAS, Article II, section 12, of the Montana Constitution provides that the "right of any person to keep or bear arms in defense of his own home, person, and property . . . shall not be called in question"; and

WHEREAS, Article II, section 3, of the Montana Constitution grants all persons the inalienable right of defending their lives and liberties and protecting property; and

WHEREAS, the Legislature seeks to facilitate the exercise of the above rights, expedite the purchase of firearms, and further the protection of the lives and property of the people."

Effective Date: This section is effective October 1, 1999.

7-1-120. Premises with video gambling machines — local smoking ordinance no more restrictive than state law.

Compiler's Comments

Effective Date: Section 4, Ch. 471, L. 2003, provided that this section is effective on passage and approval. Approved April 23, 2003.

Applicability: Section 5(1), Ch. 471, L. 2003, provided that this section applies retroactively, within the meaning of 1-2-109, to local government ordinances on smoking adopted prior to April 23, 2003.

Part 2
Boards

7-1-201. Boards.

Compiler's Comments

1999 Amendment: Chapter 254 inserted language in (3)(b) authorizing cancellation of administrative board election when number of candidates is equal to or less than number of positions, appointment of persons when no nominees for position, and election of person by acclamation when only one nominee; and made minor changes in style. Amendment effective October 1, 1999.

Attorney General's Opinions

Setting of Compensation for Mosquito Control Board Employees — Approval Required: A mosquito control board may not set the level of compensation of board employees without the approval of the Board of County Commissioners. 47 A.G. Op. 11 (1998). See also 38 A.G. Op. 35 (1979).

Setting of Compensation for Weed Control Board Employees — Approval Required: A weed control board may not set the level of compensation of board employees without the approval of the Board of County Commissioners. 47 A.G. Op. 11 (1998). See also 38 A.G. Op. 35 (1979).

7-1-202. Creation of new boards.

Compiler's Comments

2003 Amendment: Chapter 114 deleted former (1), that read: "(1) Unless otherwise specified by law, the state laws providing for the organization and operation of the following administrative boards, districts, and commissions must be given the status of local ordinances for 1 year following October 1, 1995, and the following boards, districts, and commissions shall continue to function during this period under the respective laws until the boards, districts, or commissions are reorganized by the county commissioners pursuant to the provisions of 7-1-201"; in (10) substituted "weed management district" for "weed control district"; and made minor changes in style. Amendment effective October 1, 2003.

Part 21
Counties

Part Attorney General's Opinions

Local Government Authority to Provide Alcohol and Drug Abuse Treatment Services: The city of Billings and Yellowstone County proposed to purchase and renovate a building for use by a nonprofit corporation providing treatment for alcohol and drug-related problems. The city proposed to issue industrial revenue bonds (IRBs) to fund a portion of the project, and the county sought a grant from the Montana Coal Board. Under the proposal, title to the building would vest in the nonprofit corporation once the IRBs have been retired. The questions presented were whether: (1) the building in question is a "governmental facility"; (2) a city or county has the power to expend funds for a building the title to which will eventually vest in a private corporation; and (3) contracting with a private corporation is a legitimate means of providing a governmental service. In the opinion of the Attorney General, a local government unit with self-government powers and counties with general government powers are authorized to provide alcohol and drug abuse treatment services under Title 53, ch. 24. Local governments may contract with nonprofit corporations for the provision of such services. A program of alcohol and drug abuse treatment services provided by contract with a private nonprofit corporation is a "governmental service or facility" under 90-6-205 for the purpose of determining eligibility for coal impact assistance. 39 A.G. Op. 31 (1981).

7-1-2101. Nature of county.

Case Notes

Decisions Under 1972 Constitution 616
Decisions Under 1889 Constitution 616

DECISIONS UNDER 1972 CONSTITUTION

Powers of Self-Government Charter Counties: Under the 1889 Montana Constitution, legislative control over counties was supreme; counties could exercise only such powers as were expressly granted to them by the state, together with such implied powers as were necessary for the execution of the powers expressly granted. The 1972 Montana Constitution opened to local government units new vistas of shared sovereignty with the state through the adoption of self-government charters. Article XI, sec. 4, Mont. Const., continues to provide that general local government forms have such powers as are expressly provided or implied by law (to be liberally construed), but Art. XI, sec. 6, Mont. Const., provides that a local government unit may act under a self-government charter with its powers uninhibited except by express prohibitions of the constitution, law, or charter. The broad expanse of shared sovereignty given to self-governing local units is illustrated by 7-1-103 and 7-1-106. Madison County, having a self-governing charter form of local government, may exercise legislative powers it shares with the state. State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100, 38 St. Rep. 71 (1981).

DECISIONS UNDER 1889 CONSTITUTION

Political Subdivision of State: A county is one of the civil divisions of the state for political and judicial purposes, created by the sovereign power of the state of its own will, without the consent of the people who inhabit it. It is quasi-corporate in character but has only such powers as are expressly provided by law or are necessarily implied by those expressed. Lewis v. Petroleum County, 92 M 563, 17 P2d 60, 86 ALR 575 (1932); Franzke v. Fergus County, 76 M 150, 245 P 962 (1926); Edwards v. Lewis & Clark County, 53 M 359, 165 P 297 (1917); Hersey v. Neilson, 47 M 132, 131 P 30 (1913); Yellowstone County v. First Trust & Savings Bank, 46 M 439, 128 P 596 (1912); Independent Publishing Co. v. Lewis & Clark County, 30 M 83, 75 P 860 (1904); State ex rel. Lambert v. Coad, 23 M 131, 57 P 1092 (1899).

Ultra Vires Contracts:

Where a party assumes to deal with a county on the supposition that it possesses powers which it does not in fact possess, he may not recover even though he has performed his part of the contract. Lewis v. Petroleum County, 92 M 563, 17 P2d 60, 86 ALR 575 (1932).

A party assuming to deal with a county on the supposition that it possesses powers which it does not cannot maintain an action against it upon its unauthorized action. Sullivan v. Big Horn County, 66 M 45, 212 P 1105 (1923).

Limit of Powers:

Counties are subdivisions of the state of purely statutory creation, and when they assume to exercise a power, authority therefor must be found in the statute conferring it upon them or necessarily implied from the power expressly conferred. Wherever a power is conferred upon the Board of County Commissioners but the mode in which the authority is to be exercised is not indicated, it may in its discretion select any appropriate mode or course of procedure. State ex rel. Blair v. Kuhr, 86 M 377, 283 P 758 (1930).

Counties and school districts are subdivisions of the state government with fixed powers and duties, and any act taken by the Commissioners of the former or the trustees of the latter must be justified by the provisions of the statutes defining and limiting their powers. State ex rel. School District v. McGraw, 74 M 152, 240 P 812 (1925).

"Prerogative" or its synonym "sovereignty" means the inherent power of the people; it must involve the general interest of the state at large, and though the prerogative of the state may be invoked for the protection of the rights of a county, the county, in the absence of express authority granting it, does not itself possess the power of the sovereign. Bignell v. Cummins, 69 M 294, 222 P 797, 36 ALR 634 (1923).

Construction of Existence of Powers — Prior to 1972 Montana Constitution: Aside from the powers granted to counties by statute and those necessarily implied from the powers expressed, they have none, and where there is a fair and reasonable doubt as to the existence of a particular power, it must be resolved against them and the power denied. Sullivan v. Big Horn County, 66 M 45, 212 P 1105 (1923).

Unlawful Detainer — Penal Liability — Ejectment: A municipal corporation, such as a county, being no more than a political subdivision of the state for governmental purposes, cannot be subject to a penal liability, and therefore an action for treble (or penal) damages for unlawful detainer does not lie. While an action for unlawful detainer in which treble damages are sought does not lie against a county, one in ejectment may be maintained against it. Sullivan v. Big Horn County, 66 M 45, 212 P 1105 (1923).

Distinguished From Municipal Corporation:

A county is a body corporate but does not possess the powers of local legislation and control that are the distinguishing characteristics of a municipal corporation. Hersey v. Neilson, 47 M 132, 131 P 30 (1913).

While in a strict sense a county is not a municipal corporation, yet in the sense that it is a body corporate with such powers only as are expressly conferred by the code and special statutes and such as are necessarily implied from those expressed, it comes within the rules and principles applicable to such corporations. Morse v. Granite County, 44 M 78, 119 P 286 (1911); State ex rel. Lambert v. Coad, 23 M 131, 57 P 1092 (1899).

Collateral References

Counties *key* 1.

20 C.J.S. Counties §1.

56 Am. Jur. 2d Municipal Corporations §§2, 5, 17.

7-1-2102. Name of county.

Compiler's Comments

Name Change: The spelling of Lewis and Clark County was changed from "Lewis and Clarke" by Ch. 13, L. 1905. The spelling of Chouteau County was changed from "Choteau" by Ch. 74, L. 1903.

Case Notes

Action in Name of County: A county by its corporate name is the proper party to bring "all actions and proceedings touching its corporate rights, property and duties"; hence, a mandamus proceeding to compel a Board of County Commissioners to reapportion an indebtedness between an old county and a new one should be brought in the name of the county; the Board itself is not authorized to bring such a proceeding in its own name. State ex rel. Furnish v. Mullendore, 53 M 109, 161 P 949 (1916).

Collateral References

Counties *key* 217.

20 C.J.S. Counties §328.

56 Am. Jur. 2d Municipal Corporations §29.

7-1-2103. County powers.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of (5) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Case Notes

One Governmental Subdivision Not Subject to Suit by Another: School districts sued the county for recovery of lost revenue and investment income on decreased reserve funds. The Supreme Court found that dismissal of the suit was proper because absent specific statutory or constitutional authority, one governmental subdivision may not sue another for damages. School District No. 55 v. Musselshell County, 245 M 525, 802 P2d 1252, 47 St. Rep. 2249 (1990).

County May Bring Action for Acquisition by Prescription: The defendant argued that the county did not have legal standing to bring an action on behalf of the public to acquire a road by prescription. The Supreme Court held that the general powers granted to counties must be liberally construed, and in so doing, it was clear that the county could maintain the action. Granite County v. Komberec, 245 M 252, 800 P2d 166, 47 St. Rep. 2061 (1990).

Tax Sales:

In the sale of land acquired by tax deed, county had the power to reserve the right to take road building material from the land for authorized public purpose. Helena Gun Club v. Lewis & Clark County, 141 M 490, 379 P2d 436 (1963).

Board of County Commissioners has the power and the authority to dispose of and convey real estate acquired through tax deeds. Flom v. Unknown Heirs of Conrad, 132 M 574, 319 P2d 499 (1957).

Tort Liability of County — Prior to 1972 Montana Constitution: The court is not precluded from holding a county liable for the torts of its employees on the theory that a "sovereign" cannot be sued without its consent, since this section provides that counties may "sue and be sued". Johnson v. Billings, 101 M 462, 54 P2d 579 (1936), distinguished in Goldwater v. St. Highway Comm'n, 118 M 65, 162 P2d 772 (1945), explained in Rhoades v. School District, 115 M 352, 142 P2d 890 (1943).

Sale of County Property: A county is merely a subdivision of the state for governmental purposes and as such is subject to legislative regulation and control. The Legislature may, within the limitations prescribed by the constitution, circumscribe or extend the powers to be exercised by a county, legislative authority to regulate or control the disposition of county property not having been limited by the 1889 Montana Constitution. The Legislature could properly declare, as it did by this section and section 4465, Revised Codes of 1921, that such property may be sold only under the restrictions and in the manner therein indicated. Franzke v. Fergus County, 76 M 150, 245 P 962 (1926).

Action Against County for Penal Liability Prohibited: A municipal corporation, such as a county, being no more than a political subdivision of the state for governmental purposes, cannot be subjected to a penal liability, and therefore an action for treble (or penal) damages for unlawful detainer does not lie. Sullivan v. Big Horn County, 66 M 45, 212 P 1105 (1923).

Ejectment Against County: While an action for unlawful detainer in which treble damages are sought does not lie against a county, one in ejectment may be maintained against it. Sullivan v. Big Horn County, 66 M 45, 212 P 1105 (1923).

Unauthorized Action: A party assuming to deal with a county on the supposition that it possesses powers which it does not cannot maintain an action against it upon its unauthorized action. Sullivan v. Big Horn County, 66 M 45, 212 P 1105 (1923).

Attorney General's Opinions

Authority of County to Issue General Obligation Bonds for Demolition of Abandoned County Building: Under its general duty to care for and maintain its property, a county, through its Board of County Commissioners, may issue general obligation bonds to fund demolition of a county-owned building that has been abandoned and poses a threat to the public safety and welfare. 44 A.G. Op. 31 (1992).

Exception to County Travel Policy — Certain County Officers Entitled to Actual Travel Expenses: In attending the annual state convention for the office held, a County Attorney, Sheriff, Assessor, or Justice of the Peace is entitled to reimbursement for actual travel expenses. These expenses may exceed the levels established in a county travel policy. 42 A.G. Op. 124 (1988).

County Power to Grant Franchises — Interlocal Agreements Not Precluded: Article XI, sec. 4, Mont. Const.; 7-3-144; 7-4-2611; and 7-5-2129, as well as applicable case law, imply that a county vested with general government powers may exercise the power to grant franchises. Under 7-11-104, a city-county interlocal franchise agreement is possible. 42 A.G. Op. 87 (1988).

Parameters of County Commission Authority to Permit County Road Use for Pipelines: A Board of County Commissioners is charged with a significant amount of discretion under this section, 7-14-2102, and 7-14-2107 in determining whether to permit the use of a county road right-of-way for the laying of permanent or temporary pipelines. This discretion is potentially limited by state regulations under Title 69, ch. 13, concerning pipeline carriers, depending on specific factual situations. To be consistent with the holding in Bolinger v. Bozeman, 158 M 507, 493 P2d 1062 (1972), the Board must find that the action: (1) is necessary for the best interest of the county roads and the road districts; (2) does not unreasonably impair the special easements of abutting owners in the street for purposes of access, light, and air; and (3) is conducive to the public welfare and serves one of the purposes for which highways and streets are dedicated. 42 A.G. Op. 40 (1987).

Authority of County Commissioners to Adopt Meal and Lodging Expense Regulations: Section 2-18-501 does not, by its own terms, govern meal and lodging expense payments to county officers or employees. Except as may otherwise be specified statutorily, a Board of County Commissioners with general governmental powers may adopt rules and regulations providing for payment or reimbursement of reasonable meal and lodging expenses incurred by county officers or employees in the performance of official duties. 40 A.G. Op. 77 (1984).

County Buildings — Use of Rent for Costs: If no sale of the building is being attempted, a Board of County Commissioners may use money obtained from tenants of a county building to defray the operational and maintenance costs of the building. 40 A.G. Op. 33 (1984).

Collateral References

Counties *key* 103, 111(1), 190(1), 208.

20 C.J.S. Counties §§165, 173, 279, 319.

56 Am. Jur. 2d Municipal Corporations §98, et seq.

Validity of governmental domestic partnership enactment. 74 ALR 5th 439.

Privatization of governmental services by state or local governmental agency. 65 ALR 5th 1.

Propriety of using census data as basis for govermental regulations or activities—state cases. 56 ALR 5th 171.

Snow removal operations as within doctrine of governmental immunity from tort liability. 92 ALR 2d 796.

Liability of county for torts in connection with activities which pertain, or claimed to pertain, to private or proprietary function. 16 ALR 2d 1079.

Flood protection measures. 5 ALR 2d 84.

7-1-2104. Exercise of county power.

Case Notes

Actions by County: The powers of a county are exercised by the Commissioners, but they are not therefore authorized to bring actions in their official capacity on behalf of the county in the absence of a provision conferring upon them the right to do so. State ex rel. Furnish v. Mullendore, 53 M 109, 161 P 949 (1916).

Collateral References

Counties *key* 21 ½, 47, 81.

20 C.J.S. Counties §§49, 81, 131.

56 Am. Jur. 2d Municipal Corporations §139, et seq.

7-1-2111. Classification of counties.

Compiler's Comments

2003 Amendment: Chapter 522 in (2)(e) substituted "15-36-332(7)" for "15-36-324(14)"; inserted (2)(h) relating to value provided under 15-24-3001; and made minor changes in style. Amendment effective April 26, 2003.

Saving Clause: Section 19, Ch. 522, L. 2003, was a saving clause.

Retroactive Applicability: Section 21, Ch. 522, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to tax revenue derived from oil and natural gas production occurring after December 31, 2002."

2001 Amendment: Chapter 7 in (2)(e) at end substituted "15-36-324(14)" for "15-36-324(13)". Amendment effective October 1, 2001.

2000 Amendment by Referendum: Chapter 515, L. 1999, near end of (1) after "made" deleted "except for vehicles subject to taxation under 61-3-504". Amendment effective November 7, 2000.

Saving Clause: Section 50, Ch. 515, L. 1999, was a saving clause.

Severability: Section 51, Ch. 515, L. 1999, was a severability clause.

Effective Date — Applicability: Section 52(1), Ch. 515, L. 1999, provided: "If approved by the electorate, this act is effective on approval by the electorate, except as provided in subsection (2), and applies to motor vehicle registration periods beginning after December 31, 2000."

1999 Amendments — Composite Section: Chapter 426 inserted (2)(f) relating to taxable value of telecommunications property; and made minor changes in style. Amendment effective January 1, 2000.

Chapter 556 inserted (2)(g) relating to taxable value of electrical generation property; and made minor changes in style. Amendment effective January 1, 2000.

Applicability: Section 43, Ch. 426, L. 1999, provided: "[This act] applies to tax years beginning after December 31, 1999."

Section 39(2), Ch. 556, L. 1999, provided that this section applies to fiscal years beginning after June 30, 2000.

Saving Clause: Section 36, Ch. 556, L. 1999, was a saving clause.

Severability: Section 37, Ch. 556, L. 1999, was a severability clause.

1997 Amendments: Chapter 121 inserted (2)(d) concerning taxable value attributable to trailers, pole trailers, and certain semitrailers; and made minor changes in style. Amendment effective January 1, 1998.

Chapter 466 in (2)(e) substituted "15-36-324(13)" for "15-36-324(10)"; and made minor changes in style. Amendment effective April 30, 1997.

Chapter 496 in (1), in introductory clause near end, substituted "61-3-504" for "61-3-504(2)"; in (1)(b) through (1)(f), before dollar amount of valuation, deleted "more than" and after dollar amount of valuation inserted "or more"; in (2)(b) inserted "manufacturer's"; inserted (2)(c) concerning portion of taxable valuation attributable to buses, certain trucks, and truck tractors; and made minor changes in style. Amendment effective January 1, 1998.

Effective Date — Applicability: Section 42(1), Ch. 496, L. 1997, provided: "Except for the purposes of subsection (2), [this act] is effective January 1, 1998, and applies to tax years beginning after December 31, 1997."

1995 Amendment: Chapter 451 in (1), in introductory clause after "according to", substituted "the taxable" for "that percentage of the true and full"; substituted (2)(c) concerning value provided by Department for "the amount of taxes levied on new production, production from horizontally completed wells, and incremental production, as provided in 15-23-607, divided by the appropriate tax rates described in 15-23-607(2)(a), (2)(b), or (2)(c) and multiplied by 60%"; deleted former (2)(d) that read: "(d) the amount of value represented by new production or production from horizontally completed wells exempted from tax as provided in 15-23-612 multiplied by 60%, plus the value of any other production occurring after December 31, 1988, multiplied by 60%"; and made minor changes in style. Amendment effective January 1, 1996.

Applicability: Section 55, Ch. 451, L. 1995, provided: "(1) [This act] applies to oil and natural gas produced and sold on or after January 1, 1996.

(2) (a) [Sections 21 through 26] [7-1-2111, 7-7-2101, 7-7-2203, 7-14-2524, 7-14-2525, and 7-16-2327] apply to county fiscal years beginning after June 30, 1996.

(b) [Sections 38 through 46] [20-9-104, 20-9-141, 20-9-161, 20-9-331, 20-9-333, 20-9-501, 20-9-507, 20-10-144, and 20-10-146] apply to school fiscal years beginning after June 30, 1996.

(3) (a) An operator is subject to provisions of Title 15, chapter 23, parts 1 and 6 [part 6 now repealed]; Title 15, chapter 36; Title 15, chapter 38; and Title 82, chapter 11, part 1, as those laws read on December 31, 1995, for all oil and natural gas produced and sold by the operator before January 1, 1996. [On December 31, 1995, Title 15, ch. 36, contained only part 1, now repealed. Part 3 of that chapter became effective January 1, 1996.]

(b) Except as provided in subsection (3)(c), the payment, collection, and distribution of taxes on oil and natural gas production occurring before January 1, 1996, must be made according to the provisions of the laws referred to in subsection (3)(a) governing the tax in effect on the last day of the tax period in which the activity, enterprise, or product being taxed was engaged in, took place, or was produced and sold.

(c) [Section 19] [15-36-325, now repealed] applies to the payment, collection, and distribution of the local government severance tax for oil and natural gas produced and sold after December 31, 1994, and before January 1, 1996.

(d) All taxes collected pursuant to audit or collected after the date the tax is payable under the laws referred to in subsection (3)(a) must be distributed according to the statute governing allocation of the tax in effect on the date when the tax liability was incurred."

1993 Special Session Amendment: Chapter 9 in (2)(c), after "amount of", substituted "taxes levied on new production, production from horizontally completed wells, and incremental production" for "interim production and new production taxes levied" and near end inserted reference to subsection (2)(c); near beginning of (2)(d), after "new production", inserted "or production from horizontally completed wells"; and made minor changes in style. Amendment effective December 17, 1993.

Report Required: Section 21, Ch. 9, Sp. L. November 1993, provided: "The board of oil and gas conservation shall report at least once a year to the revenue oversight committee [now revenue and transportation interim committee] regarding the implementation of [this act]. The reports must include but are not limited to information regarding:

(1) the methods used to determine production decline rates;

(2) rules adopted to implement [this act];

(3) the number of enhanced recovery projects completed or anticipated to be completed in a year; and

(4) the number of horizontal wells completed or anticipated to be completed in a year and the method of recovery from the horizontal wells."

Severability: Section 23, Ch. 9, Sp. L. November 1993, was a severability clause.

Effective Date — Applicability: Section 24, Ch. 9, Sp. L. November 1993, provided: "[This act] is effective on passage and approval [approved December 17, 1993] and applies to oil production from new or expanded enhanced recovery projects and to tax years that begin after December 31, 1993."

1991 Amendment: Inserted (2)(e) revising definition of taxable valuation to include 6% of the taxable value of the county on January 1 of each tax year. Amendment effective March 25, 1991.

Retroactive Applicability: Section 2, Ch. 161, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1989."

1989 Special Session Amendment: At end of (2)(d) inserted "multiplied by 60%, plus the value of any other production occurring after December 31, 1988, multiplied by 60%"; and made minor changes in phraseology. Amendment effective August 11, 1989, and applies retroactively to net proceeds taxes, severance taxes, and local government taxes on oil and gas, other than interim production and new production, produced after December 31, 1988.

1989 Amendment: Inserted (2)(b) including a portion attributable to vehicles with capacity of more than three-quarters of a ton but less than or equal to 1 ton.

Applicability: Section 5, Ch. 612, L. 1989, provided: "[This act] applies to taxable years beginning after December 31, 1989."

1987 Amendments: Chapter 611 near end of (1), before "as follows", inserted exception clause.

Chapter 655 in (2)(b), before "new production taxes", inserted "interim production and"; and inserted (2)(c) defining taxable valuation as to the amount of value represented by new production exempted from tax.

Effective Date — Applicability — 1987 Enactment: Section 28, Ch. 655, L. 1987, provided: "This act is effective on passage and approval [approved April 13, 1987] and applies retroactively, within the meaning of 1-2-109, to taxable quarters beginning on or after April 1, 1987. The tax rate and filing method applicable to a well that qualifies as interim production under section 10 but which did not qualify as new production under 15-23-601 [now repealed] prior to the applicability date of this act does not change for tax periods prior to the applicability date."

1985 Amendment: Inserted (2)(b) relating to oil and gas production net proceeds.

1981 Amendment: Inserted (2) relating to meaning of taxable valuation.

Effective Date — 1981 Enactment: Section 66, Ch. 614, L. 1981, provided: "(1) Except as provided in subsection (2), this act is effective January 1, 1982.

(2) Section 5 [61-3-535] is effective on passage and approval."

Clause Not Codified: A proviso at the end of section 16-2419, R.C.M. 1947, providing that no reclassifications of counties, except for new counties, shall take place until after March 10, 1921, was not codified in the MCA because it was temporary. This clause is still valid law. Citation may be made to sec. 1, Ch. 24, Ex. L. 1919.

Case Notes

Operates Automatically: This statute operates automatically to place a county in a certain class on the ascertainment of such valuation as shown from the records of the assessor's office in even-numbered years. State ex rel. Jaumotte v. Zimmerman, 105 M 464, 73 P2d 548 (1937).

Salary Reduction From Reclassification — Constitutionality: Since county officers elected in 1936 were charged with the knowledge that their salaries might be changed by a reclassification of their county as provided by this section, an act in force since 1905, they took office with the knowledge that their salaries might be reduced depending upon assessed valuation of property in the county. Thus the provision of Art. V, sec. 31, 1889 Mont. Const. [no similar provision in 1972 Mont. Const.], prohibiting the passing of a law increasing or diminishing an official's salary after his election was not violated. (See 2001 amendments to county salary laws, particularly 7-4-2503.) State ex rel. Jaumotte v. Zimmerman, 105 M 464, 73 P2d 548 (1937).

Change in Boundaries of County: When a portion of one county is attached to another county, the last assessment on the territory so attached may be ascertained by reference to the assessment books of the former county in determining the classification of the latter county as established by the assessed valuation of property within its boundaries. State ex rel. Herford v. Cook, 14 M 201, 36 P 44 (1894).

Attorney General's Opinions

Change in County Classification — Adjustment of Salaries of County Officials: When the classification of a county under this section changes, salaries of County Commissioners, the County Attorney, and county officials listed in 7-4-2503(1) must be adjusted as of July 1 of the following year. Adjustments are computed as follows: (1) for County Commissioners, according to 7-4-2107; (2) for a part-time County Attorney, according to 7-4-2503(3); and (3) for county officials listed in 7-4-2503(1), according to 7-4-2503. (See 2001 amendments to county salary laws, particularly 7-4-2503.) 42 A.G. Op. 85 (1988).

Timing of Salary Increases Caused by County Classification Change: Under the reasoning of 40 A.G. Op. 81 (1984), when a county's classification changes according to this section, the salaries of the County Commissioners, as provided for in 7-4-2107, must change as of July 1 of the following year, the onset of a new fiscal year for the county. (See 2001 amendments to county salary laws, particularly 7-4-2503). 41 A.G. Op. 6 (1985)

Change in County Classification — Time for Setting County Officials' Salaries: When a county's classification changes pursuant to this section, the salaries of the county officials listed in 7-4-2503(1) must also change. The salaries must change as of July 1 of the following year, with the onset of a new fiscal year for the county. (See 2001 amendments to county salary laws, particularly 7-4-2503.) 40 A.G. Op. 81 (1984), followed in 41 A.G. Op. 6 (1985).

Collateral References

Counties *key* 70.

20 C.J.S. Counties §110.

56 Am. Jur. 2d Municipal Corporations §105, et seq.

7-1-2112. Designation of county classification by county commissioners.

Case Notes

Directory Only: This statute is directory only, and such an order made in February 1937 instead of September 1936 substantially complied with the statute, no substantial rights having been impaired by the Board's delay. State ex rel. Jaumotte v. Zimmerman, 105 M 464, 73 P2d 548 (1937).

Attorney General's Opinions

Change in County Classification — Time for Setting County Officials' Salaries: When a county's classification changes pursuant to 7-1-2111, the salaries of the county officials listed in 7-4-2503(1) must also change. The salaries must change as of July 1 of the following year, with the onset of a new fiscal year for the county. (See 2001 amendments to county salary laws, particularly 7-4-2503.) 40 A.G. Op. 81 (1984).

Collateral References

Counties *key* 47.

20 C.J.S. Counties §81.

56 Am. Jur. 2d Municipal Corporations §105, et seq.

7-1-2121. Publication and content of notice — proof of publication.

Compiler's Comments

2001 Amendment: Chapter 354 in (2)(a) substituted "periodicals" for "second-class"; in (5) near end inserted "each" and deleted last sentence requiring the first publication to be no more than 21 days prior to the action and the last no less than 3 days prior to the action; in (7) at end inserted "through 2-3-107"; and inserted (8) allowing proof of publication or posting of a notice to be by affidavit of the owner, publisher, printer, or clerk of the newspaper or of the person posting the notice. Amendment effective October 1, 2001.

Collateral References

Notice *key* 10, 11.
66 C.J.S. Notice §18g.

7-1-2122. Mail notice.

Collateral References

Notice *key* 10, 11.
66 C.J.S. Notice §18g.

Part 40
Payment of Construction Contractors and Subcontractors

7-1-4001. Payment of contractors and subcontractors.

Compiler's Comments

Unfunded Mandate Law Superseded: Section 10, Ch. 470, L. 1999, provided: "The provisions of [this act] [enacting this section, 18-2-123, and Title 28, ch. 2, part 21] expressly supersede and modify the requirements of 1-2-112 through 1-2-116."

Effective Date: This section is effective October 1, 1999.

Applicability: Section 12, Ch. 470, L. 1999, provided: "[This act] applies to contracts agreed to on or after July 1, 1999."

Part 41
Municipalities

Part Case Notes

Equitable Estoppel as Applied to Municipal Corporations: Bullock received a building permit issued by the town of Boulder. A year later the building inspector discovered that the building being constructed encroached upon a city street. At a City Council meeting Bullock was told that he would never be required to tear down his house but that he should cease construction until he submitted a survey to the Council. Construction ceased and a survey was completed. When Bullock submitted the survey to the Council, they indicated that arrangements would be made to allow Bullock to occupy that portion of the street on which the encroachment existed. Relying on this representation, Bullock resumed construction. At a later Council meeting, the Council decided to require Bullock to remove his building from the street. Bullock received no notice of this meeting. A suit was brought, and the court found that the town of Boulder is equitably estopped from requiring the removal of the encroachment. Equitable estoppel is applied to municipal corporations with great caution and only in exceptional cases. The court set out six elements that are necessary to make out a case for the application of the doctrine of equitable estoppel. All six elements were present in this case. Boulder v. Bullock, 193 M 463, 632 P2d 716, 38 St. Rep. 1344 (1981), distinguished in Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106, 49 St. Rep. 1162 (1992).

Part Collateral References

Estoppel of municipality as to encroachments upon public streets. 44 ALR 3d 257.

Prohibiting or regulating removal or exploitation of oil and gas, minerals, soil, or other natural products within municipal limits. 10 ALR 3d 1226.

Institutional Powers and Mayoral Leadership, Svara , St. & Loc. Gov't Rev. (1995).

Current Condemnation Law; Takings, Compensation & Benefits, Ackerman, A.B.A. (1994).

7-1-4101. Nature of municipalities.

Case Notes

Power Conferred by Grant or Implication: A city has no powers except such as are conferred upon it by legislative grant either directly or by necessary implication. Stephens v. Great Falls,

119 M 368, 175 P2d 408 (1946); Sharkey v. Butte, 52 M 16, 155 P 266 (1916); Palmer v. Helena, 40 M 498, 107 P 512 (1910); Helena v. Kent, 32 M 279, 80 P 259 (1905); Davenport v. Kleinschmidt, 6 M 502, 13 P 249 (1887).

Doubt as to Power — Prior to 1972 Montana Constitution: A city has only such authority as is conferred upon it by express legislative declaration or necessary implication, and where there is a fair and reasonable doubt as to the existence of a particular power, it must be resolved against the municipality and the power denied. State ex rel. Billings v. Billings Gas Co., 55 M 102, 173 P 799 (1918); Sharkey v. Butte, 52 M 16, 155 P 266 (1916); Shapard v. Missoula, 49 M 269, 141 P 544 (1914); Helena Light & Ry. v. Helena, 47 M 18, 130 P 446 (1913); State ex rel. Quintin v. Edwards, 40 M 287, 106 P 695 (1910); Helena v. Kent, 32 M 279, 80 P 258 (1905); Davenport v. Kleinschmidt, 6 M 502, 13 P 249 (1887).

Mode of Exercising Power: When the mode of exercising any power is pointed out in the statute granting it to a municipal corporation, the mode thus prescribed must be pursued in all substantial particulars. Shapard v. Missoula, 49 M 269, 141 P 544 (1914); Carlson v. Helena, 39 M 82, 102 P 39 (1909); McGillie v. Corby, 37 M 249, 95 P 1063 (1908).

Street Improvements — Negligence: It is the duty of a city organized under the laws of this state to establish and improve streets, and damages can be recovered by one who is injured by its negligence in permitting its streets to become and remain in a dangerous condition. Ford v. Great Falls, 46 M 292, 127 P 1004 (1912); May v. Anaconda, 26 M 140, 66 P 759 (1901); Snook v. Anaconda, 26 M 128, 66 P 756 (1901); Sullivan v. Helena, 10 M 134, 25 P 94 (1890).

Construction of Section:

The entire municipal code is to be treated as one statute whose provisions are interdependent. Brown v. Foster, 48 M 114, 135 P 993 (1913).

No consistency whatever has been observed in the legislative use of the term "town". State ex rel. Powers v. Dale, 47 M 227, 131 P 670 (1913).

This section, taken in connection with 7-1-4103 (since repealed) and 7-5-4101, constitutes a general grant of power, as well as a limitation of power, for authority is given to the city to pass all ordinances necessary for its government and management, and such ordinances shall not contravene constitutional or statutory provisions. Helena v. Kent, 32 M 279, 80 P 259 (1905).

Judicial Notice: In an action against a city to recover damage for injuries to real property, an averment in the complaint that the city "is a municipal corporation, organized and existing under the laws of the state" was sufficient as against the objection that the pleading did not state a cause of action. Judicial notice will be taken of the fact that during a certain year a city was a municipal corporation existing under the laws of this state. Drew v. Butte, 44 M 124, 119 P 279 (1911).

Collateral References

Municipal Corporations *key* 57; Towns *key* 1.

62 C.J.S. Municipal Corporations §106; 87 C.J.S. Towns §1.

56 Am. Jur. 2d Municipal Corporations §16.

Municipal liability for negligent performance of building inspector's duties. 24 ALR 5th 200.

Doctrine of apparent authority as applied to agent of municipality. 77 ALR 3d 925.

Power of municipal corporation or authorities to employ detectives. 45 ALR 737.

Liability of municipal corporation upon implied contract for use of property which it received under an invalid contract. 42 ALR 632.

Power of municipal corporation to accept and administer trust. 10 ALR 1368.

7-1-4102. Name of municipality.

Collateral References

56 Am. Jur. 2d Municipal Corporations §29.

7-1-4111. Classification of municipalities.

Collateral References

Municipal Corporations *key* 22; Towns *key* 2, 13.

62 C.J.S. Municipal Corporations §36; 87 C.J.S. Towns §5.

56 Am. Jur. 2d Municipal Corporations §105, et seq.

7-1-4112. Exceptions from classification system.

Compiler's Comments

2003 Amendment: Chapter 15 inserted (1) allowing municipal corporations with a population of more than 9,000 and less than 10,000 to be either a first-class or second-class city; and made minor changes in style. Amendment effective February 11, 2003.

7-1-4114. Advance in classification of municipalities.

Collateral References

Census *key* 2, 8, 9; Municipal Corporations *key* 22.

14 C.J.S. Census §§2, 5; 62 C.J.S. Municipal Corporations §36.

7-1-4121. General definitions.

Compiler's Comments

2001 Amendment: Chapter 354 in introductory clause inserted "7-1-4127 and 7-1-4129 through"; and made minor changes in style. Amendment effective October 1, 2001.

1983 Amendment: In definition of population substituted "department of commerce" for "department of administration".

1981 Amendment: In definition of population substituted "department of administration" for "department of community affairs".

Transfer of Function: Section 7, Ch. 274, L. 1981, provided in part: "(1) The functions of the department of community affairs of auditing the accounts and financial transactions of political subdivisions and generally assisting political subdivisions in . . . 7-1-4121 . . . are transferred to the department of administration." Since transferred to the Department of Commerce by sec. 1, Ch. 114, L. 1983.

Case Notes

Suspension of Firefighters — All Cities Required to Present Charges to City Council for Hearing — Suspension Procedure Not Part of "Structure" of City Government Under Applicable Definitions — Statute Not Superseded by Charter: Elsenpeter, a Billings firefighter, was suspended from duty by the Billings fire chief. The firefighters' union filed a lawsuit in which the union contended that the suspension procedure used by the city was unlawful because the charges against Elsenpeter were not presented to the Billings City Council for hearing pursuant to 7-33-4124. The city contended that the suspension procedure that it used is part of the structure and organization of the city under its charter and that, pursuant to Art. XI, sec. 5, Mont. Const., and 7-3-701(2), which allow the structure of a chartered city government to supersede statutory requirements, the city may override the statutory requirements for hearing contained in 7-33-4124 because the definition of "structure" contained in subsection (24) of this section is the definition that should apply. The Supreme Court held that in as much as the definitions in this section are, by the terms of this section, limited in their application to 7-1-4122 through 7-1-4149 and this section, the dictionary definition of "structure" is the definition that applies. Because the dictionary definition of structure was narrower, the Supreme Court held that the disciplinary suspension procedure used by the city was not part of the "structure" of city government. Therefore, the Supreme Court held that the statutory procedure contained in 7-33-4124, requiring presentment of the charges to the City Council, was not superseded by the city charter and had to be followed for the purposes of the suspension of Elsenpeter. Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

7-1-4123. Legislative powers.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of (5) inserted reference to 15-10-420. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Case Notes

Applicability to Attorney of Ordinance Requiring Safety Inspection Certificate: A city ordinance requiring a business to obtain an annual safety inspection certificate to ensure that the place of business is safe for the public did not carry a penalty that would prohibit an attorney from practicing law. The penalty for a violation is a fine or jail time. In addition, the Supreme Court's exclusive authority to regulate the practice of law does not prohibit certain limited legislative actions in the area. The amount of the certificate fee, which is determined by the square footage of the business, is reasonable in relation to the safety inspection services. The certificate requirement is a minimal and inoffensive intrusion on the Supreme Court's constitutional authority to regulate attorneys, and the defendant attorney could be convicted for nonpayment. St. v. Radford, 2001 MT 36, 304 M 198, 19 P3d 809 (2001).

Arbitrary Denial of Building Permit by City Council — City, City Council, and Individual Council Members Liable: In an action under 43 U.S.C. 1983, the court of appeals upheld the

District Court's holding that the Billings City Council's refusal to issue a building permit after the applicant had satisfied all the requirements for issuing the permit was an arbitrary and capricious action that deprived the applicant of his substantive due process rights. The city, City Council, and individual members of the City Council have no immunity from such action and are all liable for damages. Bateson v. Geisse, 857 F2d 1300 (9th Cir. 1988).

Licensing Fee for Adult Movie Video Booths as Regulatory Measure — Free Speech Not Violated: The Supreme Court affirmed a city ordinance imposing a $300 annual fee for adult movie video booths, finding the city met its burden of proving the fee was both reasonable and designed as a regulatory measure to provide funds for administrative costs, policing of the booths, and health enforcement costs and expenses. The court held that estimates of future expenses may be included for purposes of setting a fee and that, being regulatory in nature, the fee did not violate the right to free speech guaranteed by the first amendment to the U.S. Constitution and Art. II, sec. 7, Mont. Const. Great Falls v. M.K. Enterprises, Inc., 225 M 292, 732 P2d 413, 44 St. Rep. 242 (1987).

Attorney General's Opinions

Regulation of Live Dance Performance in Licensed Liquor Establishment — Abridgment of Free Expression: The validity of a city ordinance regulating live dance performances in establishments licensed to serve liquor must be measured against free expression standards imposed by Art. II, sec. 7, Mont. Const., and the first amendment to the U.S. Constitution. Therefore, a proposed city ordinance prohibiting any live performance involving dance or the removal of clothing in licensed liquor establishments is an unconstitutional abridgment of the constitutional standards because: (1) it fails to distinguish carefully between protected and unprotected conduct; and (2) the requisite governmental interest in regulating such conduct has not been sufficiently established. 41 A.G. Op. 75 (1986).

State Authority to Regulate Liquor — No Delegation to Municipalities: The authority granted to the state by the 21st amendment to the U.S. Constitution to regulate the sale of liquor has not been delegated to municipalities with general powers. Therefore, a municipality with general powers may not punish a violation of its obscenity ordinance by suspending or revoking the liquor license of the offender. 41 A.G. Op. 75 (1986).

Collateral References

56 Am. Jur. 2d Municipal Corporations §139, et seq.

Right of municipality to refuse services provided by it to resident for failure of resident to pay for other unrelated services. 60 ALR 3d 714.

Power of municipality to charge nonresidents higher fees than residents for use of municipal facilities. 57 ALR 3d 998.

7-1-4124. Powers.

Compiler's Comments

2001 Amendment: Chapter 125 in (14) substituted "for a public use" for "to provide any service or facility"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1999 Amendment: Chapter 249 inserted (23) authorizing municipalities to classify violations of city ordinances as civil infractions with civil penalties; and made minor changes in style. Amendment effective October 1, 1999.

Case Notes

Power of General Powers Town to Arbitrate Contract Held Included in Power to Contract: Holm-Sutherland contracted with the town of Shelby to construct sewer and water improvements within the town. The contract included a provision requiring that all disputes involving the interpretation of the contract documents or breach of the contract were to be settled by arbitration. When a dispute arose, Holm-Sutherland sought arbitration. Litigation ensued, and the town argued that as a noncharter government, it had only those powers granted by the Legislature and that a municipality's council had a duty pursuant to 7-6-4301 and 7-6-4302 to determine the validity of claims and that duty could not be delegated to an arbitrator. The Supreme Court agreed with the District Court that a general powers municipality has broad powers to enter into contracts pursuant to subsections (4) and (23) of this section, that Title 27, ch. 5, evidences a general state policy favoring arbitration, and that the powers granted a municipality establish its ability to be bound to the terms of a contract that contains a binding

arbitration clause. Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053, 56 St. Rep. 595 (1999).

Tax Sales: County acquiring tax deeds to lots advertised them for sale but received no offer. Purchase of lots by city being authorized by City Council because of housing and sanitary conditions, it had the right to sell them at varying prices, much higher than purchase price paid to county. Flom v. Unknown Heirs of Conrad, 132 M 574, 319 P2d 499 (1957).

Creditor's Residence as Place of Trial — Not Applicable to Municipal Corporations: The rule that where a contract for payment of money is entered into between persons residing at different places and place of payment is not agreed upon, creditor's residence becomes place of performance and therefore place of trial does not apply to municipal corporations. Lillis v. Big Timber, 103 M 206, 62 P2d 219 (1936).

Mandamus to Compel Payment of Bill: Mandamus will lie to compel a city to audit and pay a bill which it owes to a water company for the rent of hydrants, although 7-1-4103 (the predecessor to this section, since repealed) provides that cities may sue or be sued. State ex rel. Kaiser Water Co. v. Philipsburg, 23 M 16, 57 P 405 (1899); State ex rel. Great Falls Water Works v. Great Falls, 19 M 518, 49 P 15 (1897).

Attorney General's Opinions

Long-Term Lease With Contractual Nonappropriation Clause Not Considered Accumulation of Municipal Debt — Vote Not Required: A question arose regarding the applicability of laws regulating municipal government debt based on a proposal by the city of Great Falls to enter a contract for the development and operation of a water park. Under the arrangement, the city would enter a long-term lease to a private party of real property adjacent to the municipal swimming pool and concurrently lease from that party certain personal property to be used for the water park. The personalty lease would include an option for the city to purchase the personal property at the close of the lease terms and a nonappropriation clause under which the personalty lease would terminate without penalty to the city if the city chose not to appropriate funds for the lease payment in any fiscal year, in which case possession of the personal property would revert to the lessor, who would retain possession under a separate realty lease until that lease expired. The Attorney General concluded that such an arrangement did not create a debt and thus would not violate provisions of state law limiting the accumulation of debt by municipal governments. Further, the city's proposal would not pledge the taxing power of the city to make the full term of lease payments and therefore would not qualify as an obligation for which the general credit of the city is pledged that would require a vote of the people under 7-7-4221. 49 A.G. Op. 3 (2001), distinguishing 38 A.G. Op. 56 (1979).

County Authorized to Appropriate Money for Museum — City Authorized to Appropriate Money for Public Purpose — Constitutionality Analyzed: Pursuant to 7-16-2202, a county, but not a city, is authorized to create a program to provide grants to private, nonprofit museums. However, pursuant to this section, a city is allowed to grant money to public or private entities as long as the grant is for a public purpose, such as a museum that would enhance the education and enjoyment of the general public, but that would not be merely for the gain of a private entity. The Attorney General declined to opine regarding the constitutionality of 7-16-2202 or this section, in light of the prohibition in Art. V, sec. 11(5), Mont. Const., against the appropriation of public funds for any private individual, private association, or private corporation not under control of the state, but did analyze that constitutional provision as it related to the question of county or city expenditures for grants to private museum programs, concluding that the constitutional prohibition applies only to the appropriation of public funds by the Legislature, not by local governmental entities. 48 A.G. Op. 12 (2000), overruling prior opinions to the contrary in 37 A.G. Op. 25 (1977), 37 A.G. Op. 105 (1978), and 39 A.G. Op. 25 (1981).

Motor Vehicle Parking Offenses — Civil Penalty: A city with general government powers may not establish a civil penalty and collection system for motor vehicle parking offenses. (See 1999 amendment.) 40 A.G. Op. 31 (1984).

Law Review Articles

Municipal Recovery of Natural Resource Damages Under CERCLA, Wittke, 23 B.C. Envtl. Aff. L. Rev. 921 (1996).

Voting Requirements in Municipal Governing Bodies: Minority Rule or Legislative Stalemate?, Reynolds, 27 Urb. Law. 87 (1995).

Act Locally: Municipal Enforcement of Environmental Law, Lehner, 12 Stan. Envtl. L.J. 50 (1993).

Control of Air Pollution From Mobile Sources Through Inspection and Maintenance Programs, Reitze & Needleman, 30 Harv. J. on Legis. 409 (1993).

Public Use and Necessity—The Right to Take Revisited, Dushoff & Henslee, 1988 Inst. on Plan. Zoning & Eminent Domain. 14.1-.22 (1988).

The Impacts and Issues Surrounding the Regulatory Confiscation of Real Property, 2 B.Y.U. J. Pub. L. 99 (1988).

Collateral References

Municipal Corporations *key* 21, 57; Towns *key* 3.

62 C.J.S. Municipal Corporations §§35, 106; 87 C.J.S. Towns §8.

56 Am. Jur. 2d Municipal Corporations §201, et seq.

Validity of governmental domestic partnership enactment. 74 ALR 5th 439.

Privatization of governmental services by state or local governmental agency. 65 ALR 5th 1.

Propriety of using census data as basis for governmental regulations or activities—state cases. 56 ALR 5th 171.

Eminent domain: industrial park or similar development as public use justifying condemnation of private property. 62 ALR 4th 1183.

Validity and construction of statute or ordinance making it offense to have possession of open or unsealed alcoholic beverage in public place. 39 ALR 4th 668.

Validity and construction of statute or ordinances forbidding treatment in health clubs or massage salons by persons of the opposite sex. 51 ALR 3d 936.

Power of municipal corporation to lease or sublet property owned or leased by it. 47 ALR 3d 19.

Public utility—municipality's power to sell, lease, or mortgage public utility plant or interest therein. 60 ALR 2d 595.

Water system—right to compel municipality to extend its water system. 48 ALR 2d 1222.

Lease—granting or taking of lease by municipality as within authorization of purchase or acquisition thereof. 11 ALR 2d 168.

Validity, under federal constitution, of so-called "head shop" ordinances or statutes, prohibiting manufacture and sale of drug use related paraphernalia. 69 ALR Fed. 15.

7-1-4125. Limit on liability.

Law Review Articles

Noll v. Bozeman: Notice of Claim Provisions in Montana, Murphy, 37 Mont. L. Rev. 206 (1976).

Recent Developments in Government Operations and Liability, Brown, 32 Urb. Law. 931 (2000).

Qualified Immunity: A User's Manual, Blum, 26 Ind. L. Rev. 187 (1993).

The Extent of Governmental Immunity When Reporting or Investigating Suspected Child Abuse, Wimer, 13 J. Juv. L. 173 (1992).

The Meaning of "Under Color of" Law, Winter, 91 Mich. L. Rev. 323 (1992).

"Or Causes to Be Subjected": The Role of Causation in Section 1983 Municipal Liability Analysis, Kritchevsky, 35 UCLA L. Rev. 1187 (1989).

Qualified Immunity and State Courts, Welch, 8 Rev. Litigation 53 (1988).

Search for Valid Governmental Regulations: A Review of the Judicial Response to Municipal Policies Regarding First Amendment Activities, 63 Notre Dame L. Rev. 561 (1988).

Policy, Custom, or Practice: The Contours of Proof of Section 1983 Municipal Liability, Peppler, 10 Am. J. Trial Advoc. 477 (1987).

Collateral References

56 Am. Jur. 2d Municipal Corporations §206.

Liability of municipality or other governmental unit for failure to provide police protection from crime. 90 ALR 5th 273.

State or local government's liability to subcontractors, laborers, or materialmen for failure to require general contractor to post bond. 54 ALR 5th 649.

Liability of municipal corporation or other governmental entity for injury or death caused by action or inaction of off-duty police officer. 36 ALR 5th 1.

Municipal liability for negligent performance of building inspector's duties. 24 ALR 5th 200.

Governmental liability for negligence in licensing, regulating, or supervising private day-care home in which child is injured. 68 ALR 4th 266.

State and local government liability for injury or death of bicyclist due to defect or obstruction in public bicycle path. 68 ALR 4th 204.

Tort liability of public authority for failure to remove parentally abused or neglected children from parents' custody. 60 ALR 4th 942.

Governmental tort liability as to highway median barriers. 58 ALR 4th 559.

Local governmental tort liability: minority as affecting notice of claim requirement. 58 ALR 4th 402.

Liability, in motor-vehicle related cases, of governmental entity for injury, death, or property damage resulting from defect or obstruction in shoulder of street or highway. 19 ALR 4th 532.

Police: Liability of governmental unit for injuries caused by driver of third vehicle to person whose vehicle had been stopped by police car. 17 ALR 4th 897.

Liability of governmental unit for intentional assault by employee other than police officer. 17 ALR 4th 881.

Actual notice or knowledge by governmental body or officer of injury or incident resulting in injury as constituting required claim or notice of claim for injury—modern status. 7 ALR 4th 1063.

Release of person: governmental tort liability for injuries caused by negligently released individual. 6 ALR 4th 1155.

Liability of governmental unit or its officers for injury to innocent occupant of moving vehicle, or for damages to such vehicle, as result of police chase. 4 ALR 4th 865.

Punitive damages: recovery of exemplary or punitive damages from municipal corporation. 1 ALR 4th 448.

Automobiles: liability of governmental unit or its officers for injury to innocent pedestrian or occupant of parked vehicle, or for damage to such vehicle, as result of police chase. 100 ALR 3d 815.

Privacy: state or municipal liability for invasion of privacy. 87 ALR 3d 145.

Safety rules: municipal corporation's safety rules and regulations as admissible in evidence in action by private party against municipal corporation or its officers or employees for negligent operation of vehicle. 82 ALR 3d 1285.

Waiting period: plaintiff's right to bring tort action against municipality prior to expiration of statutory waiting period. 73 ALR 3d 1019.

Insurance: validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR 3d 6.

Flooding: liability of governmental entity for issuance of permit for construction which caused or accelerated flooding. 62 ALR 3d 514.

Modern status of the law as to validity of statutes or ordinances requiring notice of tort claim against local governmental entity. 59 ALR 3d 93.

Abutting landowner: liability of abutting landowner for injury to municipal employee engaged in constructing or repairing sewers or drains. 58 ALR 3d 1085.

Attorney's mistake or neglect as excuse for failing to file timely notice of tort claim against state or local governmental unit. 55 ALR 3d 930.

Amount of damages stated in notice of claim against municipality or county as limiting amount of recovery. 24 ALR 3d 965.

7-1-4126. Administrative rules.

Collateral References

56 Am. Jur. 2d Municipal Corporations §196.

7-1-4127. Publication of notice — content — proof.

Compiler's Comments

2001 Amendment: Chapter 354 in (2)(a) substituted "periodicals" for "second-class"; in (3) inserted "In the case of a contract award, the newspaper must have been"; inserted (6) through (9) concerning number and timing of publication, content of notice, supplemental publication, and proof of publication; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

Notice *key* 10, 11.

66 C.J.S. Notice §18g.

7-1-4129. Mail notice.

Compiler's Comments

1989 Amendment: In (1)(b), before "certified mail", deleted "registered or"; and in (1)(c) substituted "200 or more electors" for "all electors". Amendment effective July 1, 1989.

Collateral References
Notice *key* 10, 11.
66 C.J.S. Notice §18e.

7-1-4130. Petition.

Compiler's Comments
1991 Amendment: Near end, after "criteria", substituted "the petition is subject to 7-5-131 through 7-5-137" for former language establishing requirements for petition validity, filing, adequacy, submission, signing, statements of implication, and availability (see 1989 MCA for text).
1985 Amendment: In (9) before "secretary of state", deleted "department of commerce, in cooperation with the".
1983 Amendment: In (9) substituted "department of commerce" for "department of administration".
1981 Amendment: In (9) substituted "department of administration" for "department of community affairs".
Transfer of Function: The function of the Department of Commerce in this section was transferred from the Department of Administration by sec. 1, Ch. 287, L. 1983. Those functions were transferred to the Department of Administration from the Department of Community Affairs by sec. 7, Ch. 274, L. 1981.

7-1-4137. Oath of office.

Compiler's Comments
1993 Amendment: Chapter 486 near beginning of first sentence of (1), after "elected", inserted "and appointed", at beginning of second sentence inserted "Before the officer performs any official duties", at beginning of third sentence inserted "An elected officer shall file the oath" and after "administrator" deleted "before the officer exercises any official duties", and inserted last sentence requiring, except as provided in subsection (2), a person appointed to fill a vacancy to file oath with the city clerk; inserted (2) requiring a person appointed to fill a vacancy in an elected municipal office to file oath with the county election administrator; and made minor changes in style. Amendment effective April 22, 1993.
1981 Amendment: Substituted "section 3" for "section 4".

Collateral References
Public officer's bond as subject to forfeiture for malfeasance in office. 4 ALR 2d 1348.

7-1-4138. Public servants.

Collateral References
56 Am. Jur. 2d Municipal Corporations §233.

7-1-4141. Public meeting required.

Collateral References
56 Am. Jur. 2d Municipal Corporations §§161, 162.
Attorney-client exception under state law making proceedings by public bodies open to the public. 34 ALR 5th 591.
Defamation: nature and extent of privilege accorded public statements, relating to subject of legislative business or concern, made by member of state or local legislature or council outside of formal proceedings. 41 ALR 4th 1116.
Inclusion or exclusion of first and last days in computing the time for performance of an act or event which must take place a certain number of days before a known future date. 98 ALR 2d 1331.

7-1-4142. Public participation.

Collateral References
56 Am. Jur. 2d Municipal Corporations §161.

7-1-4143. Participation.

Collateral References
56 Am. Jur. 2d Municipal Corporations §156.

7-1-4144. Public records.

Attorney General's Opinions

Mayor, Not Chief of Police, as Chief Law Enforcement Administrator in Commission-Executive Form of Government: In a commission-executive form of local government, the Mayor, not the Chief of Police, is the chief law enforcement administrator. To bestow the title of chief law enforcement administrator upon the Chief of Police would require the Chief of Police to perform administrative functions that the officer is not otherwise authorized to do. 48 A.G. Op. 4 (1999).

7-1-4145. State reports.

Compiler's Comments

2001 Amendment: Chapter 483 in (2) and (3) after "department of" substituted "administration" for "commerce". Amendment effective July 1, 2001.

1983 Amendment: Substituted references to department of commerce for references to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs" in (2) and (3).

Transfer of Function: The function of the Department of Commerce in this section was transferred from the Department of Administration by sec. 1, Ch. 287, L. 1983. Those functions were transferred to the Department of Administration from the Department of Community Affairs by sec. 7, Ch. 274, L. 1981.

7-1-4147. State technical advice and assistance.

Compiler's Comments

2001 Amendment: Chapter 483 in (4) after "department of" substituted "administration" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

1983 Amendment: Substituted reference to department of commerce for reference to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs" in (4).

Transfer of Function: The function of the Department of Commerce in this section was transferred from the Department of Administration by sec. 1, Ch. 287, L. 1983. Those functions were transferred to the Department of Administration from the Department of Community Affairs by sec. 7, Ch. 274, L. 1981.

7-1-4148. Penalty.

Compiler's Comments

2001 Amendment: Chapter 483 in first sentence near middle after "department of" substituted "administration" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

1983 Amendment: Substituted reference to department of commerce for reference to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs".

Transfer of Function: The function of the Department of Commerce in this section was transferred from the Department of Administration by sec. 1, Ch. 287, L. 1983. Those functions were transferred to the Department of Administration from the Department of Community Affairs by sec. 7, Ch. 274, L. 1981.

7-1-4149. Applicability.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) and (2) inserted "7-1-4127 and 7-1-4129 through". Amendment effective October 1, 2001.

7-1-4150. Municipal infractions — civil offense.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

7-1-4151. Municipal infractions — proceedings.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

7-1-4152. Municipal infractions — jurisdiction — appeal.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

CHAPTER 2
CREATION, ALTERATION, AND ABANDONMENT OF LOCAL GOVERNMENTS

Part 1
General Provisions Applicable to Local Government

7-2-102. Apportionment of indebtedness and credits upon alteration of boundary of local government.

Collateral References

Counties *key* 16(2); Municipal Corporations *key* 36(4).
20 C.J.S. Counties §36; 62 C.J.S. Municipal Corporations §§78, 79.
56 Am. Jur. 2d Municipal Corporations §94, et seq.

7-2-103. Collection of taxes upon alteration of boundary of local government.

Collateral References

Counties *key* 16(4); Municipal Corporations *key* 36(4).
20 C.J.S. Counties §38; 62 C.J.S. Municipal Corporations §79.
56 Am. Jur. 2d Municipal Corporations §94, et seq.

Validity of municipal bond issue as against owners of property annexation of which to municipality became effective after date of election at which issue was approved by voters. 10 ALR 2d 559.

Part 21
General Provisions Applicable to Counties

7-2-2102. Apportionment of liabilities and assets upon creation or enlargement of county.

Collateral References

56 Am. Jur. 2d Municipal Corporations §94, et seq.

7-2-2103. Qualifications for municipality or village to be county seat.

Collateral References

Counties *key* 28.
20 C.J.S. Counties §55.
56 Am. Jur. 2d Municipal Corporations §44.

7-2-2104. Transfer of certain records upon alteration of boundary of county.

Collateral References

56 Am. Jur. 2d Municipal Corporations §97.

7-2-2105. Establishment of townships.

Collateral References

Towns *key* 9.
87 C.J.S. Towns §23.

Part 22
Creation of New Counties by Petition

Part Compiler's Comments

Sections Not Codified: Section 16-519, R.C.M. 1947, providing that failure to properly follow Ch. 226, L. 1911, was a misdemeanor, was not codified in the MCA because it was redundant with 45-7-401. That section has not been repealed and is still valid law. Citation may be made to

sec. 15, Ch. 226, L. 1919. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Section 16-520, R.C.M. 1947, a repealing and saving clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 16, Ch. 226, L. 1919.

Part Case Notes

Political Subdivisions of State: Since enactment of statutes providing for the creation of new counties, the involuntary character of counties in this state is somewhat modified, but the change does not affect their status as political subdivisions of the state for governmental purposes; only incorporated cities and towns are municipal corporations in this state. Hersey v. Neilson, 47 M 132, 131 P 30 (1913).

7-2-2201. Authorization to create new counties.

Compiler's Comments

1985 Amendment: Inserted (2) relating to enlargement of a county.

Collateral References

Counties *key* 10, 12, 16(1).
20 C.J.S. Counties §§23, 27, 35.
56 Am. Jur. 2d Municipal Corporations §§30, et seq., 83, et seq.

7-2-2202. Limitations on creation of new counties.

Compiler's Comments

1985 Amendment: In (3) substituted "500 square miles" for "1,200 square miles"; inserted (4) requiring minimum size of property to be part of a different county; and in (5) substituted "250 square miles" for "1,000 square miles".

7-2-2204. Basis for determination of assessed valuation.

Collateral References

Taxation *key* 347.
84 C.J.S. Taxation §§410 through 412.

7-2-2205. Petition for creation of new county — number of signatures required.

Compiler's Comments

1985 Amendment — Redesignation by Code Commissioner — Subsection Enactment: In (2)(a) inserted "If the proposed new county is to be formed from a portion of only one existing county"; inserted (2)(c) concerning petition requirements if the proposed new county is to be an existing county enlarged by territory taken from one or more other counties; and made minor changes in phraseology.

The Code Commissioner redesignated (2)(d) (formerly (2)(c)) as 7-2-2206(4) for more logical placement.

Section 6(1), Ch. 742, L. 1985, concerning means of determining number of signatures needed on petition, was enacted as part of a separate section but is codified as (3) of this section for logic and convenience.

Case Notes

Withdrawal From Petition:

The right of one who had signed a petition for the creation of a new county and then signed a withdrawal of his name therefrom to thereafter and before the hearing, withdraw from the withdrawal is not absolute, and therefore, no clear legal duty being imposed upon the Board of County Commissioners to give effect to the withdrawal from the withdrawal, mandamus does not lie to compel it to do so. State ex rel. Faragher v. Moulton, 68 M 219, 216 P 804 (1923), explained in Ford v. Mitchell, 103 M 99, 61 P2d 815 (1936).

The matter of the creation of a new county must be determined on the case as made upon the date fixed for the hearing, save as it may be affected by subsequent withdrawals before final action taken; therefore, protests against its creation or petitions for the exclusion of territory from within its proposed boundaries filed after the date fixed for the hearings may not be entertained by the Board of County Commissioners. State ex rel. Lang v. Furnish, 48 M 28, 134 P 297 (1913).

In the absence of legislative expression to the contrary, signers of a petition may withdraw their names at any time before final action thereon. The Board of County Commissioners was in error in refusing to consider withdrawals from petitions theretofore filed asking the exclusion of

certain territory from a proposed new county upon the ground that the withdrawals of signatures, though filed before final action, had not been presented until after the date fixed for the hearing. State ex rel. Lang v. Furnish, 48 M 28, 134 P 297 (1913), explained in Ford v. Mitchell, 103 M 99, 61 P2d 815 (1936).

7-2-2206. Contents of petition — petition approval procedure — deadline for filing signatures.

Compiler's Comments

1985 Amendment — Redesignation by Code Commissioner — Subsection Enactment: In (1)(a) substituted requirement for legal description for "a particular description of the boundaries of the proposed new county"; inserted (1)(b) relating to map requirement; deleted former (2) that read: "a statement that no line thereof passes within 15 miles of the courthouse situated at the county seat of any county proposed to be divided, except as otherwise provided in this part"; in (1)(d) inserted "and a statement that the surveyed area of the territory proposed to be transferred is greater than 49 square miles"; inserted (1)(e) relating to criminal sanctions; in (1)(f) inserted "if the proposed new county is to be formed from one existing county, or from portions of two or more existing counties"; inserted (1)(g) relating to adding territory to an existing county; made minor changes in phraseology and punctuation in (1); inserted (2) relating to signature requirements; and inserted (3) relating to numbered lines for petitions.

The Code Commissioner redesignated 7-2-2205(2)(d) (formerly (2)(c)), concerning signatures on several petitions, as 7-2-2206(4) for more logical placement.

Section 5, Ch. 742, L. 1985, requiring submission of a sample petition to the county election administrator prior to circulation and providing for procedures if the petition form is rejected or approved, was enacted as a separate section but is codified as (5) of this section for logic and convenience.

Section 6(2), Ch. 742, L. 1985, providing time limit within which petition signatures must be collected and filed, was enacted as part of a separate section but is codified as (6) of this section for logic and convenience.

7-2-2207. Affidavits to be attached to petition — verification of signatures.

Compiler's Comments

1985 Amendment — Subsection Enactment: In introductory clause of (1) substituted affidavit requirements of petition circulator for "There shall be attached and filed with said petition or petitions an affidavit of five qualified electors residing within each county sought to be divided, to the effect that:

(a) they have read said petition and examined the signatures affixed thereto and they believe that the statements therein are true"; in (1)(c) substituted "the proposed new county or of the portion thereof taken from an existing county" for "such county therein sought to be divided"; and deleted former (2) that read: "Such petition or petitions, so verified, and the verification thereof shall be accepted in all proceedings permitted or provided for in this part as prima facie evidence of the truth of the matters and facts therein set forth."

Section 8, Ch. 742, L. 1985, requiring the Clerk of the County to verify that all petition signers are registered electors of the proposed territory to be taken from the county and to randomly compare signatures, was enacted as a separate section but is codified as (2) of this section for logic and convenience.

Case Notes

Verified Petition Prima Facie Evidence: Applying the provisions of this section by analogy to proceedings for the consolidation of school districts, the court held that a verified petition for such consolidation was prima facie evidence that it contained a majority of the resident freeholders of a district affected at the time it was filed. Swaim v. Redeen, 101 M 521, 55 P2d 1 (1936).

7-2-2209. Hearing and notice on petition.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) in first sentence after "a date to hear the" substituted "petition" for "proof of the petitions"; in (2) substituted "The county clerk shall also publish notice as provided in 7-1-2121 in the old counties and also within the boundaries of the proposed new county. The notice must be published in substantially the following form" for "The county clerk shall also, at the same time, designate a newspaper of general circulation published in the old counties but not within the proposed new county and also a newspaper of general circulation

published within the boundaries of the proposed new county, if there be such, in which the county clerk shall order and cause to be published, at least once a week for 2 weeks preceding the date fixed for such hearing, a notice in substantially the following form"; and made minor changes in style. Amendment effective October 1, 2001.

1985 Amendment: In "Dated" line of notice form, deleted "at" after "Dated".

Case Notes

Notice as Jurisdictional Requirement:

The Board of County Commissioners is without jurisdiction to proceed with a hearing of a petition for the creation of a new county unless publication of the notice as required by this section has been made; if not so made and the Board proceeds with the hearing, its action is void. Garry v. Martin, 70 M 587, 227 P 573 (1924), distinguished in Scilley v. Red Lodge-Rosebud Irrigation District, 83 M 282, 272 P 543 (1928).

Publication of notice of hearing on petitions for the creation of a new county required by this act, in certain newspapers for at least once a week for 2 weeks next preceding the date fixed for it, is jurisdictional, and failure of publication in one of the papers designated in the week immediately preceding the date of the hearing was fatal to jurisdiction and rendered all subsequent proceedings, including the election, invalid. (See 2001 amendment.) State ex rel. Stevens v. McLeish, 59 M 527, 198 P 357 (1921).

Period of Notice:

Under the rule that where a notice is required to be published at least once a week for a period next preceding a certain date, the word "for" means "throughout" or "during the continuance of" the period prescribed; the provision of this section, requiring publication of notice of hearing of a petition for the creation of a new county "at least once a week for two weeks next preceding the date fixed for such hearing", means that 2 full weeks' notice, 14 days, shall be given and that therefore publication made for a shorter period of time is insufficient. (See 2001 amendment.) Garry v. Martin, 70 M 587, 227 P 573 (1924), distinguished in Scilley v. Red Lodge-Rosebud Irrigation District, 83 M 282, 272 P 543 (1928).

The requirement of this act that notice of the hearing of new county petitions shall be published "at least once a week for two weeks next preceding the date fixed for such hearing" means 2 weeks immediately preceding the hearing. (See 2001 amendment.) State ex rel. Stevens v. McLeish, 59 M 527, 198 P 357 (1921).

7-2-2211. Hearing on petition — protest.

Case Notes

When Protest Must Be Filed: Petitions for the exclusion of territory and protests against the exclusion must, but protests against the creation of a new county need not, be filed at least 1 day before the date set for hearing to entitle them to consideration by the Board of County Commissioners. It is sufficient if such latter protests are filed on or before the time fixed for the hearing. State ex rel. Faragher v. Moulton, 68 M 219, 216 P 804 (1923).

7-2-2212. Exclusions and additions of territory upon petition.

Case Notes

One Block:

The requirement that territory sought to be excluded from a proposed new county must be in one block (the word "block" implying solidity or compactness) was not met by a petition describing an irregularly shaped tract distributed over 14 townships, the exterior boundaries of which ran back and forth in all directions of the compass, alternately including and excluding small tracts, so threaded together as to preserve its continuity, and including those against the creation of the new county and excluding those favoring it. State ex rel. Woodward v. Moulton, 57 M 414, 189 P 59 (1920), distinguished in State ex rel. Keane v. County Comm'rs, 83 M 540, 273 P 290 (1929).

The intent of the Legislature in enacting the provision that territory sought to be excluded from a proposed new county must be in one block was held to have been that a block should be mapped out irrespective of the personnel of those residing within it, the majority of the residents thereof to determine whether, as a whole and not as individuals, they go with the new or remain with the old county. State ex rel. Woodward v. Moulton, 57 M 414, 189 P 59 (1920), distinguished in State ex rel. Keane v. County Comm'rs, 83 M 540, 273 P 290 (1929).

Counterpetition for Exclusion — Verification:

A verification to a counterpetition asking for the exclusion of territory sought to be included in a proposed new county, which merely averred that each affiant believed that the

counterpetition was signed by at least 50% of the qualified electors of the territory sought to be excluded, was of no probative value as to the facts alleged. State ex rel. Wood v. Bd. of County Comm'rs, 49 M 165, 140 P 728 (1914).

Since the statute does not require the verification of counterpetitions and does not authorize the acceptance of them as probative, the counterpetitions, though verified, cannot be given any evidentiary value. State ex rel. Wood v. Bd. of County Comm'rs, 49 M 165, 140 P 728 (1914).

A recital in the affidavit verifying a petition for the elimination of certain territory from the area included within the boundaries of a proposed new county that 50% of the qualified electors of the territory sought to be withdrawn had signed such petition was sufficient prima facie showing of that fact. State ex rel. Arthurs v. Bd. of County Comm'rs, 44 M 51, 118 P 804 (1911). But this is not so where the petition is unaccompanied by such affidavit, in which case it may not be taken as prima facie evidence of such facts. State ex rel. Lang v. Furnish, 48 M 28, 134 P 297 (1913).

Number in Exclusion Area — Burden: The burden of establishing the number of electors residing in territory sought to be excluded from a proposed new county is upon the petitioners seeking exclusion and not upon the proponents of the new county. State ex rel. Lang v. Furnish, 48 M 28, 134 P 297 (1913).

Exclusion Without Counterpetition for Exclusion: A valid petition describing the territory to be included within the proposed new county was the very foundation of the proceedings for the creation of a new county. While under certain circumstances the Board of County Commissioners was authorized to exclude territory, there was no authority in the Board to incorporate within the boundaries of a proposed new county territory which was not included in the petition praying for its creation or to exclude territory unless a proper petition for withdrawal thereof was presented. State ex rel. Jacobson v. Bd. of County Comm'rs, 47 M 531, 134 P 291 (1913).

Counterpetition for Exclusion — Sufficiency:

The Board of County Commissioners, which is entrusted with the duty of passing upon the sufficiency of the petition required to be filed to effect the elimination of certain territory from a proposed new county, must read it in connection with the original petition for the creation of such county; and if thus, by any fair intendment, a description of the territory sought to be eliminated may be arrived at, it is the duty of the Board to give the intention of the petitioners full force and effect. State ex rel. Arthurs v. Bd. of County Comm'rs, 44 M 51, 118 P 804 (1911).

The petition for an elimination of certain territory from the area included within the boundaries of a proposed new county must contain a description of the territory sought to be eliminated and a prayer for the relief demanded. The other facts may be made to appear by evidence upon the hearing without being specially alleged. State ex rel. Arthurs v. Bd. of County Comm'rs, 44 M 51, 118 P 804 (1911).

Mandamus — Rejection of Petition: The fact that a Board of County Commissioners, in erroneously rejecting as insufficient a petition seeking the elimination of certain territory from the area of a proposed new county, acted in a quasi-judicial capacity is not any defense to the issuance of mandamus. State ex rel. Arthurs v. Bd. of County Comm'rs, 44 M 51, 118 P 804 (1911).

7-2-2213. Resolution of board of county commissioners.

Compiler's Comments

1991 Amendment: In (4), after "county", substituted "and affected existing counties meet the limitations contained in 7-2-2202" for "will contain property, according to the last preceding assessment, which will equal in amount at least $4 million, inclusive of all assessed valuation"; deleted former (5) and (6) that read: "(5) whether the area of any existing county from which territory is taken to form the new county will be reduced to less than 1,200 square miles of surveyed land by taking the territory proposed to be taken therefrom to form the new county;

(6) whether the area of the proposed new county will contain at least 1,000 square miles of surveyed land to form the new county"; and made minor changes in style.

7-2-2215. Election on question of creating new county — proclamation and notice.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), near beginning after "give", deleted "proclamation and" and after "held" deleted "on a specified day, not less than 60 days thereafter"; in (2) substituted "regular or primary election" for "countywide primary, general, or school election" and near end substituted "order" for "proclamation"; and made minor changes in style.

1985 Amendment: Near middle of (1) after "not less than", substituted "60 days thereafter" for "90 days or more than 120 days thereafter, in the territory which is proposed to be taken for

the new county", substituted "the territory proposed to be taken from the county" for "such territory", inserted "or enlarged", and at end of (1) inserted "formed from a portion of one existing county or from portions of two or more existing counties"; inserted (2) relating to when the question is to be voted on; in (3) near beginning after "All registered electors", deleted "residing within the proposed new county who are registered electors", and after "of the county", deleted "or counties from which territory is taken to form the proposed new county and who are to be registered under the provisions of the registration laws of the state"; deleted former (3) and (4) that read: "(3) The proclamation and notice of election shall be published as provided in 13-1-108, and a copy thereof shall be mailed immediately by the election administrator of the county in which the petition is filed to the election administrator of each county from which territory is to be taken for the proposed new county.

(4) The proclamation calling the election and the notice thereof provided for in this part shall be made and given exclusively by the board with which the petition for the formation and establishment of the new county is filed"; and inserted (4) relating to procedure when existing county is enlarged.

Case Notes

Rehearing on Question of Election: After an order calling an election to determine whether a new county should be created had been made and the Board of County Commissioners clothed with jurisdiction had adjourned sine die, it was without power to grant a rehearing. State ex rel. Wood v. Bd. of County Comm'rs, 49 M 165, 140 P 728 (1914).

Collateral References

56 Am. Jur. 2d Municipal Corporations §31.

Actionability, under 42 USCS §1983, of claim arising out of maladministration of election. 66 ALR Fed. 750.

7-2-2216. Establishment of election precincts.

Compiler's Comments

1985 Amendment: Near beginning inserted "of the county in which the petition was filed", substituted "7-2-2215(1)" for "7-2-2215", and made minor changes in phraseology.

7-2-2217. Appointment of election officials.

Compiler's Comments

1985 Amendment: Inserted "of the county concerned" and substituted "7-2-2215(1) or 7-2-2215(4)" for "7-2-2215".

7-2-2218. Form of ballot.

Compiler's Comments

1997 Amendment: Chapter 42 in (1)(a) and (2), before "notice", deleted reference to proclamation required by 7-2-2215; in (1)(b) substituted "notice" for "proclamation"; and made minor changes in style. Amendment effective March 12, 1997.

1985 Amendment: In (1) inserted introductory clause concerning ballot form if the proposed new county is to be formed from one county or from portions of existing counties; in (1)(a) after "proposed new county) — No"" deleted "and each elector desiring to vote for the establishment and organization of the new county shall mark a cross (X) opposite the words "For the new county of .... — Yes" in the manner now required by law in other elections, and each elector desiring to vote against the establishment and organization of the new county shall mark a cross (X) opposite the words "For the new county of .... — No" in the manner now required by law in other elections"; and inserted (2) relating to enlarging an existing county.

7-2-2219. Conduct of election.

Compiler's Comments

1997 Amendment: Chapter 42 in (1)(a), before "notice", deleted reference to proclamation required by 7-2-2215; and made minor changes in style. Amendment effective March 12, 1997.

1985 Amendment: In (2) near beginning, substituted "elections provided for in 7-2-2215" for "election provided for in 7-2-2215".

7-2-2221. Determination of county seat — temporary county seat.

Compiler's Comments

1985 Amendment: In (1) at beginning, substituted "If the proposed new county is to be formed from one county or from portions of two or more existing counties" for "At the special election to

be held as provided in 7-2-2215", and near end inserted "at the election provided for in 7-2-2215(1)"; and inserted (3) relating to enlarging an existing county.

7-2-2222. Effect of election — resolution by county commissioners.

Compiler's Comments

1985 Amendment: In (1) near beginning substituted "by those voting in an election under 7-2-2215(1) in the county, by those voting in the same election in the territory proposed to be taken from the county, and by those voting in an election held under 7-2-2215(4) are affirmative" for "on the issue are "For the new county of .... — Yes"", near middle after "declare" substituted "the new or enlarged county" for "such territory", and after "name of .... County, and" inserted "if appropriate"; in (2) near beginning substituted "by those voting in the county, or by those voting in the territory proposed to be taken from the county, or by those voting in an election held under 7-2-2215(4) are negative" for "at the election are "For the new county of .... — No""; and near end substituted "4 years" for "2 years".

7-2-2223. Procedure to complete creation of county.

Compiler's Comments

1985 Amendment: In introductory clause of (1) inserted "together with a legal description of the new boundaries of each affected county"; and in (1)(c) at beginning substituted "any new county" for "the county".

7-2-2224. Offices and supplies for new county.

Compiler's Comments

1985 Amendment: Inserted "If the new county has a new county seat under 7-2-2221".

7-2-2225. Officers of new county.

Compiler's Comments

1991 Amendment: In (1), after "other county", deleted "township"; near middle of (4) substituted "Title 20, chapter 6" for "7-2-2214"; and made minor changes in style.

Case Notes

Proclaiming Election: In view of the provision of this section that all officers of a county out of which a new county is to be created residing in the proposed new county shall be deemed officers of the new county if within 5 days after determination on the petition for the creation of a new one they shall indicate their intention to become officers of the new county, and the Board of Commissioners shall then omit providing for the election of such officers, it would seem that the proclamation for the election of officers of the new county should be made after 5 days from the determination on the petition. State ex rel. Foot v. Rogge, 80 M 1, 257 P 1029 (1927).

Collateral References

Counties *key* 41, 62; Courts *key* 45.

20 C.J.S. Counties §§75, 101; 21 C.J.S. Courts §136.

7-2-2226. Term of office for initial officers of new county.

Case Notes

Term of Office: To "hold their offices until the time provided by general law for the election and qualification of such officers" does not mean the officers' terms are up for election at the next general election but when the term of the officers' election expires. Thus three County Commissioners elected concurrently with the election for the formation of a new county on staggered 2-, 4-, and 6-year terms continue in office until the expiration of their elected terms irrespective of intervening general election dates. State ex rel. Foot v. Rogge, 80 M 1, 257 P 1029 (1927).

7-2-2241. Commission to determine and adjust indebtedness and assessments for old and new counties.

Case Notes

Mandamus — School District Boundaries — Discretion of County Commissioners: The matter of dividing a new county into school districts being lodged in the discretion of the Commissioners of the old county out of which the new one is created, a court cannot, upon finding that the discretion had been erroneously exercised, substitute its discretion and establish the boundaries so as to exclude territory which should not have been included or hold the order valid

as to the portion properly included and invalid as to the other. State ex rel. School District v. Urton, 76 M 458, 248 P 369 (1926).

Laches — Dismissal of Mandamus: Where two counties, out of which a third was created, made no objection to the report of the Commissioners appointed to adjust the indebtedness between the counties, and with knowledge of mandamus proceedings instituted by the new county to have the Board's findings reviewed, did not intervene, though they were represented by their respective County Attorneys who took part in the hearing, but waited until the final decision in such proceeding and until the new county had incurred expense in the issuance of bonds to pay the indebtedness due the parent counties and then commenced proceedings to compel the Board of Adjustment to reassemble and correct its findings, they were guilty of laches warranting dismissal of the proceedings. State ex rel. Cascade County v. Poland, 66 M 286, 213 P 800 (1923).

Breach of Promise to Transfer Assets of Old to New County — No Mandamus: Where the Board of Commissioners of a county, a portion of which was thereafter included in a new county, in order to obtain favorable action by the electors of that portion on a proposed issue of road bonds, passed a resolution, amounting to a promise merely, that in the event the bonds were authorized, a certain portion of the receipts would be devoted to road improvement in their district, their breach of trust in thereafter failing to carry out their promise could not be remedied by Writ of Mandate to compel the Board of Adjusters of the indebtedness between the old and the new county to charge the old county with the amount the district should have received under the resolution, the New Counties Act (Ch. 226, L. 1919) not authorizing the adjusters to take such action. State ex rel. Judith Basin County v. Poland, 61 M 600, 203 P 352 (1921).

When Mandamus Is Proper to Compel Adjustment of Indebtedness: Mandamus is the proper remedy to compel Commissioners appointed to adjust county indebtedness between an old and a new county to reassemble and correctly apportion such indebtedness; the fact of their adjournment is immaterial. Such proceedings should be brought in the name of the county and not by the Board of County Commissioners in their official capacity. State ex rel. Furnish v. Mullendore, 53 M 109, 161 P 949 (1916).

Constitutionality: In proceedings for the organization of a new county, the Board of County Commissioners is required to act as a quasi-judicial tribunal, and this constitutes no invasion of the constitutional provisions of the 1889 Montana Constitution that lodge the judicial power of the state in its courts. State ex rel. Lang v. Furnish, 48 M 28, 134 P 297 (1913); State ex rel. Jacobson v. Bd. of County Comm'rs, 47 M 531, 134 P 291 (1913); State ex rel. Arthurs v. Bd. of County Comm'rs, 44 M 51, 118 P 804 (1911).

Collateral References

Counties *key* 16(1), (2).

20 C.J.S. Counties §§35, 36.

56 Am. Jur. 2d Municipal Corporations §94, et seq.

7-2-2243. Compensation of commission members.

Compiler's Comments

1985 Amendment: Increased compensation of commission members from $8 to $25 per day.

7-2-2244. Role of commission.

Case Notes

Property of the County — Bridges:

Since a completed and used bridge belongs to the state and therefore is not "property of the county" within the meaning of Art. XVI, sec. 3, 1889 Mont. Const., prescribing the method by which, in the creation of a new county out of an old one, the proportion of the net indebtedness of the old county chargeable to the new one shall be ascertained, the Legislature was without power to authorize the Commissioners appointed to adjust the indebtedness between a new and an old county as it did by the enactment of sec. 7, Ch. 139, L. 1915, to take into consideration steel bridges constructed and in use for a period of less than 10 years, in determining the value of county property. (Section 7, Ch. 139, L. 1915, was repealed by Ch. 226, L. 1919, that enacted this section. This section, containing a subsection identical to the subsection declared unconstitutional, was in effect when this case was decided, and the court declared a repealed law unconstitutional.) State ex rel. Missoula County v. Brown, 73 M 371, 236 P 548 (1925).

A partly finished bridge constructed with funds obtained by a bond issue is not such county property as it may sell and therefore cannot be taken into consideration as county property in the

adjustment of indebtedness between an old and a new county. State ex rel. Judith Basin County v. Poland, 61 M 600, 203 P 352 (1921).

Generally speaking, bridges are not such county property as that their value shall enter into consideration in the adjustment of the indebtedness of the old county with the new one. A bridge is to be treated as but a portion of a public highway. State ex rel. Foster v. Ritch, 49 M 155, 140 P 731 (1914).

Property of the County: "Property of the county", within the meaning of Art. XVI, sec. 3, 1889 Mont. Const., under which, when a new county is created, the net indebtedness of the old county, its ratable proportion of which the new county must pay, is to be determined by deducting from its total indebtedness the value of all property of the old county, means such property as a county holds and can sell. State ex rel. Judith Basin County v. Poland, 61 M 600, 203 P 352 (1921).

7-2-2251. Collection of delinquent taxes.

Case Notes

Delinquent Taxes: Taxes that are delinquent upon creation of the new county or were delinquent and remain unpaid for previous years are collectible by and belong to the new county. Delinquent taxes paid on property incorporated in a new county, in the interim between the passing of the resolution by the Board of Commissioners of the parent county and the expiration of the 90-day period after its filing with the Secretary of State, belong to the parent and not to the new county. Hill County v. Liberty County, 62 M 15, 203 P 500 (1921).

Collateral References

56 Am. Jur. 2d Municipal Corporations §94, et seq.

7-2-2252. Assessment and collection of taxes for new county.

Collateral References

Taxation *key* 297.
84 C.J.S. Taxation §352.

7-2-2253. Procedure to transfer money to school and road funds.

Collateral References

Highways *key* 99 ¼; Schools and School Districts *key* 19(1).
40 C.J.S. Highways §§176 through 178; 78 C.J.S. Schools and School Districts §21.

7-2-2255. Transfer of court files and actions.

Collateral References

Courts *key* 485.
21 C.J.S. Courts §502.

Part 24
Transfer and Transcription of Records, Court Actions, and Jury Lists for New Counties

Part Compiler's Comments

Sections Not Codified: Sections 16-615 through 16-621, R.C.M. 1947, were not codified in the MCA because they were temporary. These sections related to tax delinquencies of "new" counties being transcribed over from the "old" county and allowing until July 1, 1947, for redemption under certain circumstances. These sections have not been repealed and are still valid law. Citation may be made to Ch. 122, L. 1945.

7-2-2407. Legal effect of transcribed records.

Collateral References

56 Am. Jur. 2d Municipal Corporations §97.

7-2-2411. Transfer of court actions affecting real property.

Collateral References

56 Am. Jur. 2d Municipal Corporations §97.

Part 25
Change of Name of County

7-2-2501. Authorization to change name of county.

Collateral References

56 Am. Jur. 2d Municipal Corporations §29.

7-2-2505. Publication of copies of petition.

Compiler's Comments

2001 Amendment: Chapter 354 in first sentence at end substituted "publish a copy of the petition as provided in 7-1-2121" for "cause a copy of the same to be published for 4 successive weeks in some newspaper published in the county, and a copy of such petition must be posted at three of the most public places in the county for a like period by the clerk of the district court" and in second sentence after "publication" deleted "and posting"; and made minor changes in style. Amendment effective October 1, 2001.

Part 26
Removal of County Seat

7-2-2601. Petition to remove county seat.

Case Notes

Selection of County Seat — Decision of Electorate: Conceding that the selection or removal of a county seat is a purely political function, that function has not been confided to judges of election or to the canvassers of the returns but to a certain proportion of the qualified electors of the county affected. It rests with the courts to ascertain and decide whether the choice actually made by the requisite proportion of the qualified electors has been duly declared and, if not, to declare it and make it effective. Poe v. Sheridan County, 52 M 279, 157 P 185 (1916).

Inapplicable to Temporary County Seat: The words "changing" and "removing" found in Art. XVI, sec. 2, 1889 Mont. Const. (no comparable provision in 1972 Mont. Const.), and the statute laws refer to the act of changing or removing a county seat that has been definitely located and have no reference to a so-called temporary or provisional county seat. State ex rel. Geiger v. Long, 43 M 401, 117 P 104 (1911).

Collateral References

56 Am. Jur. 2d Municipal Corporations §§46, 47.

7-2-2602. Filing of petition — notice and hearing.

Compiler's Comments

2001 Amendment: Chapter 354 in (2) substituted "shall publish a notice as provided in 7-1-2121. The notice must state that the petition is open to inspection in the office of the county clerk" for "must cause to be printed in every newspaper published within said county a notice to the effect that a petition praying for the removal of said county seat has been filed with the county clerk, that said petition is open to the inspection of any and all persons interested therein, and that said petition will be presented to the board of county commissioners at its next regular session for action thereon"; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

56 Am. Jur. 2d Municipal Corporations §47.

7-2-2603. Withdrawal of name from petition.

Collateral References

56 Am. Jur. 2d Municipal Corporations §47.

7-2-2604. Consideration of petition — submission to voters.

Case Notes

Sufficiency of Petition — Statutory Requirements:

Under this section, prior to amendment in 1973, the Board of County Commissioners is limited in its investigation of the sufficiency of a petition for the removal of the county seat to a comparison of the names appearing thereon with the pollbooks to ascertain whether the signers are voters and with the assessment roll to ascertain whether they are taxpayers. The Board may

not, therefore, eliminate from the petition names of persons who have ceased to be legal voters or taxpayers. Ainsworth v. McKay, 55 M 270, 175 P 887 (1918).

Prior to amendment of this section in 1973, a petition for the removal of a county seat is sufficient if it is signed by the required number of ad valorem taxpayers of the county, provided all the persons necessary to make up such number are qualified voters. State ex rel. Stringfellow v. Bd. of Comm'rs, 42 M 62, 111 P 144 (1910).

Official Duty Presumed Performed: The official duty devolving upon the Commissioners is presumed to have been regularly performed; thus, it is presumed that the Board compared the names signed to the petition with the pollbooks of the "last election". State ex rel. Stringfellow v. Bd. of Comm'rs, 42 M 62, 111 P 144 (1910).

Sufficiency of Petition — Judicial Function of County Commissioners: A Board of County Commissioners exercises judicial functions when it decides whether a petition for the submission of the removal of the county seat to the electors of the county is signed by sufficient number to require such submission. State ex rel. Buck v. Bd. of County Comm'rs, 21 M 469, 54 P 939 (1898).

Collateral References

56 Am. Jur. 2d Municipal Corporations §47.

7-2-2605. Notice and conduct of election.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), after "election", inserted "for removal of a county seat" and at end inserted "at a regular or primary election"; and made minor changes in style.

Collateral References

56 Am. Jur. 2d Municipal Corporations §48.

7-2-2606. Determination and publication of election results.

Collateral References

56 Am. Jur. 2d Municipal Corporations §48.

7-2-2607. Transmittal of election results.

Collateral References

56 Am. Jur. 2d Municipal Corporations §48.

Part 27
Abandonment and Consolidation of Counties

7-2-2702. Petition for abandonment of county.

Collateral References

56 Am. Jur. 2d Municipal Corporations §§81, 82, 89 through 92.

7-2-2704. Hearing on petition by county commissioners — notice.

Compiler's Comments

1985 Amendment: In (2) substituted "as provided in 7-1-2121" for "in the official newspaper of the county", after "and that" deleted "the board will meet at the time specified in the order for considering and taking final action on the petition, at which time", and deleted former last sentence that read: "The notice shall be published once a week for 2 successive weeks immediately following the making of the order".

7-2-2709. Election on question of abandonment and consolidation.

Compiler's Comments

1995 Amendment: Chapter 387 in (1)(a), at end, inserted "to be held in connection with the next regular or primary election"; in (1)(b), near beginning after "counties", deleted "which shall be not less than 90 days or more than 120 days after the date of the joint resolution calling the same"; and made minor changes in style.

1983 Amendment: In (1)(a), substituted language relating to joint meeting of county commissions to call election for "Upon receipt of a certified copy of the resolution provided for in 7-2-2707, the governor shall, within 10 days thereafter, issue his proclamation calling a special election in the county in which the petition referred to in the resolution was filed and in each county designated in the resolution as a county to which any of the territory of the county, if

abandoned and abolished, shall be attached and made a part."; in (1)(b), changed references to governor's proclamation to "joint resolution" in three places; in middle of (1)(b), after "date of" substituted "the resolution provided for in 7-2-2707, the joint resolution" for "such proclamation, the governor, in the proclamation,"; near end of (1)(b), after "transmitted" deleted "by the governor"; and made minor changes in phraseology.

7-2-2730. Establishment of special warrant district or special funding bond district in continuing county.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) in first sentence near beginning after "adjoining county" inserted "referred to in 7-2-2729" and in third sentence after "commissioners shall" inserted "subject to 15-10-420"; inserted (3) concerning consideration as separate taxing jurisdictions for purposes of 15-10-420; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Near end of (2)(b) deleted reference to 7-7-2105.

7-2-2746. Details relating to special warrant district.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) in first sentence after "county purposes" inserted "subject to 15-10-420"; and made minor changes in style. Amendment effective July 1, 2001.

7-2-2748. Special funding bond district bonds.

Compiler's Comments

1987 Amendment: Near end of (1) deleted reference to 7-7-2105.

7-2-2749. Payment of outstanding bonds of abandoned county.

Compiler's Comments

1987 Amendment: Near end of (1) deleted reference to 7-7-2105.

7-2-2756. Sale of acquired real property.

Compiler's Comments

1985 Amendment: In (1) near end, substituted "as provided in 7-1-2121" for "in the official newspaper of the county once a week for at least 2 weeks immediately prior to the date for holding the same".

Part 41
Organization and Incorporation of New Municipalities

Part Case Notes

Presumption of Regularity of Incorporation Proceedings: In a proceeding to enjoin a town from collecting municipal taxes on a 40-acre tract of land originally owned by an Indian ward on the ground that when the town was incorporated the consent of the federal government had not been given to include it in the city limits, the court held, under the rule that every presumption will be indulged in favor of the regularity of the proceedings if the corporate charter shows compliance with the applicable statutes, particularly in view of 26-1-602(15), that official duty is presumed regularly performed, judgment of dismissal affirmed. Ogle v. Ronan, 112 M 394, 117 P2d 257 (1941).

7-2-4101. Petition to organize municipalities.

Compiler's Comments

1981 Amendment: Decreased number of registered electors' signatures in (2)(a) from 150 to 50.

Effective Date: Chapter 255, L. 1981, became effective April 3, 1981.

Collateral References

Municipal Corporations *key* 3, et seq.
62 C.J.S. Municipal Corporations §7, et seq.
56 Am. Jur. 2d Municipal Corporations §30, et seq.

7-2-4102. Census of proposed municipality.

Collateral References

56 Am. Jur. 2d Municipal Corporations §30, et seq.

7-2-4103. Prerequisites to organization of municipality.

Compiler's Comments

1981 Amendment: Inserted (1)(b) relating to U.S. government ownership.

Effective Date: Chapter 255, L. 1981, became effective April 3, 1981.

Collateral References

Municipal Corporations *key* 3, et seq.

62 C.J.S. Municipal Corporations §7, et seq.

56 Am. Jur. 2d Municipal Corporations §30, et seq.

7-2-4104. Election on question of organization.

Compiler's Comments

1995 Amendment: Chapter 387 in (2), at end, inserted "If possible, the election must be held in conjunction with a regular or primary election"; and made minor changes in style.

Collateral References

Municipal Corporations *key* 12(8).

62 C.J.S. Municipal Corporations §21.

56 Am. Jur. 2d Municipal Corporations §31.

7-2-4105. Notice of election on question of organization.

Collateral References

56 Am. Jur. 2d Municipal Corporations §31.

7-2-4106. First election for officers.

Compiler's Comments

1999 Amendment: Chapter 162 in (1) in last sentence substituted "may be held in conjunction" for "must be held in conjunction"; and inserted (4) providing for term of office if first election of officers is not held in conjunction with a regular or primary election. Amendment effective March 24, 1999.

1995 Amendment: Chapter 387 in (1), in two places, substituted "city or town" for "corporation" and at end inserted "The election must be held in conjunction with a regular or primary election"; and made minor changes in style.

Collateral References

Municipal Corporations *key* 13.

62 C.J.S. Municipal Corporations §28.

7-2-4111. Tax base — maintenance agreements.

Compiler's Comments

2001 Amendment: Chapter 574 in first sentence near beginning after "may" inserted "subject to 15-10-420". Amendment effective July 1, 2001.

Effective Date: Section 3, Ch. 353, L. 1999, provided: "[This act is effective on passage and approval." Approved April 19, 1999.

Retroactive Applicability: Section 4, Ch. 353, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to a city or town established on or after July 1, 1998."

Part 42
Addition to Municipalities

Part Case Notes

Remedy for Illegal Inclusion: The remedy of injunction is available to one whose taxes would be increased by an illegal inclusion of his property within the limits of a city. Sharkey v. Butte, 52 M 16, 155 P 266 (1916).

Part Law Review Articles

Recent Developments in Montana Land Use Law, Goetz, 38 Mont. L. Rev. 97 (1977).

Annexation in Montana—A Time for Change, Burke, 35 Mont. L. Rev. 71 (1974).

Annexation and Municipal Voting Rights, Berri, 35 Wash. U.J. Urb. & Contemp. L. 237 (1989).

Part Collateral References

Application of zoning regulations to golf courses, swimming pools, tennis courts, or the like. 63 ALR 5th 607.

Right of one governmental subdivision to challenge annexation proceedings by another such subdivision. 17 ALR 5th 195.

What zoning regulations are applicable to territory annexed to a municipality. 41 ALR 2d 1463.

Proper remedy or procedure for attacking legality of proceedings annexing territory to municipal corporation. 18 ALR 2d 1255.

Boundaries: capacity to attack the fixing or extension of municipal limits or boundary. 13 ALR 2d 1279, §§10, 13 superseded by 17 ALR 5th 195.

Validity of municipal bond issue as against owners of property annexation of which to municipality became effective after date of election at which issue was approved by voters. 10 ALR 2d 559.

Refusal of municipality to annex impoverished area as violative of federal law. 22 ALR Fed. 272.

7-2-4201. Additions to municipalities.

Case Notes

Approval by Mayor and Council: The approval of the Mayor and a majority of the Council endorsed on the map or plat of an addition to a city or town is essential to bring the territory included therein within the jurisdiction of the Council. Pool v. Townsend, 58 M 297, 191 P 385 (1920).

Attorney General's Opinions

Growth Policy Required Prior to Annexation of New Territory but Not for Continued Subdivision Review: Under 7-2-4734, a growth policy covering an area proposed for municipal annexation is required before a municipality may extend corporate limits under Title 7, ch. 2, part 47, but the requirement does not apply to annexations conducted under 7-2-4301, 7-2-4401, 7-2-4501, 7-2-4601, or this section. A growth policy is also required before certain subdivision review procedures and city powers of annexation are authorized. However, a growth policy is not required to continue subdivision review unless the city or county wishes to qualify for streamlined review processes. 49 A.G. Op. 23 (2002).

Collateral References

Municipal Corporations *key* 29(4).

62 C.J.S. Municipal Corporations §46.

56 Am. Jur. 2d Municipal Corporations §57, et seq.

7-2-4202. Control of additions.

Collateral References

56 Am. Jur. 2d Municipal Corporations §63.

Estoppel of municipality as to encroachments upon public streets. 44 ALR 3d 257.

7-2-4203. Imposition of conditions for approval of addition.

Collateral References

Municipal Corporations *key* 33(2).

62 C.J.S. Municipal Corporations §53.

56 Am. Jur. 2d Municipal Corporations §57, et seq.

7-2-4204. Applicability of part.

Compiler's Comments

1981 Amendment: Inserted (2) relating to choice of procedure.

Interim Study Committee Bill: House Bill 54 (Ch. 130, L. 1981) was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Case Notes

Annexation Without Detraction — Methods of Annexation Separate and Distinct: The 1979 amendments to Montana municipal annexation law created methods of annexation that are separate and independent of each other and allow a city to annex real property by statute without detraction prior to annexation. Therefore, a 1974 permanent injunction barring a city

from annexing any lands outside city limits that were situated within a rural fire district was properly dissolved, and the decision set out in Missoula Rural Fire District v. Missoula, 168 M 70, 540 P2d 958 (1975), which affirmed the 1974 injunction, was statutorily overruled. Missoula Rural Fire District v. Missoula, 237 M 444, 775 P2d 209, 46 St. Rep. 936 (1989).

Each Method of Annexation as Separate Procedure: Each of the eight methods of municipal annexation is a separate and distinct procedure. Therefore, the statutory exemption for golf courses found in 7-2-4503 does not apply to annexations commenced under Title 7, ch. 2, part 47 (Planned Community Development Act). State ex rel. Hilands Golf Club v. Billings, 198 M 475, 647 P2d 345, 39 St. Rep. 1132 (1982).

7-2-4205. Provision of services.

Compiler's Comments

1995 Amendment: Chapter 66 in (2) substituted "real property owners" for "freeholders"; and made minor changes in style. Amendment effective February 16, 1995.

1981 Amendment: Inserted "according to a plan provided by the municipality" after "services will be provided"; substituted "as specified in 7-2-4732" for "as specified in Title 7, chapter 2, part 47"; inserted (1) that reads: "as provided in 7-2-4736"; and inserted "in first-class cities" and "otherwise" at the beginning of (2).

Interim Study Committee Bill: Chapter 447, L. 1981 (HB 58), was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

7-2-4210. When land conclusively presumed to be annexed.

Compiler's Comments

Interim Study Committee Bill: Chapter 109, L. 1981 (HB 55), was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Case Notes

Former Law: Prior to the enactment of this section, the exclusive manner of annexation was through statutory provisions and failure to substantially comply with such provisions defeated annexation. Gregory v. Forsyth, 187 M 132, 609 P2d 248, 37 St. Rep. 277 (1980); Balock v. Melstone, 186 M 303, 607 P2d 545, 37 St. Rep. 288 (1980).

Attorney General's Opinions

Statutory Applicability: This section applies to tracts or parcels of land on which municipal taxes have been paid without protest for 7 years, even when a portion of the 7-year period passed prior to the 1981 enactment of this section. 42 A.G. Op. 93 (1988).

Collateral References

Proper remedy or procedure for attacking legality of proceedings annexing territory to municipal corporation. 18 ALR 2d 1255.

7-2-4211. Inclusion of roads and rights-of-way in annexation.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

Part 43
Annexation of Contiguous Land

Part Case Notes

Contiguous to Newly Annexed Land — Standing Based Upon Additional Taxation — Annexation Void Ab Initio: A taxpayer appealed a District Court decision upholding the annexation of land by the city of Great Falls. The appellant contended that a taxpayer who has been assessed special improvement taxes under a statute authorizing taxation of land that is "contiguous" to a city has the capacity to challenge the annexation proceeding that made its own land contiguous to the city. The Supreme Court noted that the trial court had cited its language in the Sharkey case that when such proceedings are void ab initio for want of jurisdiction of the subject matter, as here, equity will afford relief to the property owner whose taxes would be increased if his property were included within the city's limits. Having determined that the proceedings by Great Falls were indeed void at inception for want of proper jurisdiction, the court held that the taxpayer here had standing and was entitled to relief. Other affected taxpayers who, like appellant, paid the assessments under protest would also have an equitable right to relief for lack of consent. Nilson Enterprises, Inc. v. Great Falls, 190 M 341, 621 P2d 466, 37 St. Rep. 1977 (1980), following Sharkey v. Butte, 52 M 16, 155 P 266 (1916).

"Freeholder" Defined: The term "freeholder", as used in 7-2-4323 (now repealed) and 7-2-4324 (now repealed), means the purchaser and not the seller under a contract for deed. State ex rel. Stephens v. Hamilton, 161 M 1, 504 P2d 283 (1972).

Contiguous Land — Constitutionality: Annexation of contiguous land and annexation of wholly surrounded land do not violate Art. III, sec. 14, 1889 Mont. Const. (comparable to Art. V, sec. 29, 1972 Mont. Const.), or amendment five of the United States Constitution, which provides that private property may not be taken for public use without payment of just compensation, and do not violate Art. III, sec. 27, 1889 Mont. Const. (Art. II, sec. 17, 1972 Mont. Const.), or amendments 5 and 14 of the United States Constitution, which provide that private property cannot be taken without due process of law. Brodie v. Missoula, 155 M 185, 468 P2d 778 (1970), following Harrison v. Missoula, 146 M 420, 407 P2d 703 (1965).

Constitutionality — Annexation Generally: Annexation, in the absence of a constitutional prohibition, is a political matter exclusively for the Legislature to control, and unless specifically restrained by the Montana Constitution, the Legislature can authorize annexation without the consent or even against the wishes of the people living in the annexed corporation or territory. Harrison v. Missoula, 146 M 420, 407 P2d 703 (1965).

Evidence of Annexation Benefits to Landowner: In action for injunctive relief against resolution of intention of City Council to annex land, court properly excluded all evidence relating to benefits. Penland v. Missoula, 132 M 591, 318 P2d 1089 (1957).

Remedy for Illegal Inclusion: The remedy of injunction is available to one whose taxes would be increased by an illegal inclusion of his property within the limits of a city. Sharkey v. Butte, 52 M 16, 155 P 266 (1916).

Part Law Review Articles

Freeholder Requirements in the Montana Code Annotated: Unconstitutional Restrictions on the Right of Political Participation, Hammond, 41 Mont. L. Rev. 96 (1980).

Recent Developments in Montana Land Use Law, Goetz, 38 Mont. L. Rev. 97 (1977).

Annexation in Montana—A Time for Change, Burke, 35 Mont. L. Rev. 71 (1974).

Part Collateral References

Right of one governmental subdivision to challenge annexation proceedings by another such subdivision. 17 ALR 5th 195.

What land is contiguous or adjacent to municipality so as to be subject to annexation. 49 ALR 3d 589.

What zoning regulations are applicable to territory annexed to a municipality. 41 ALR 2d 1463.

Proper remedy or procedure for attacking legality of proceedings annexing territory to municipal corporation. 18 ALR 2d 1255.

Boundaries: capacity to attack the fixing or extension of municipal limits or boundary. 13 ALR 2d 1279, §§10, 13 superseded by 17 ALR 5th 195.

Validity of municipal bond issue as against owners of property annexation of which to municipality became effective after date of election at which issue was approved by voters. 10 ALR 2d 559.

Refusal of municipality to annex impoverished area as violative of federal law. 22 ALR Fed. 272.

7-2-4301. What constitutes contiguous lands.

Case Notes

Annexation of City Street Upheld as Basis for Subsequent Annexation of Other Land: The Missoula Rural Fire District and private property owners sued the city of Missoula to enjoin the annexation of their property by the city. The District Court held that the city could use previously annexed land consisting of all or parts of three city streets as a basis for subsequent annexation of parcels of land enclosed by those city streets because those parcels were "wholly surrounded" by city land. The Supreme Court affirmed the judgment of the District Court, holding that a street is an annexable "tract or parcel" of land, pursuant to this section, and that when the contiguity of those streets with other city land at city intersections was considered with the public purpose of the annexations, the streets were valid annexations of contiguous land, pursuant to this section. The Supreme Court then held that since the parcels of land owned by the fire district and the private property owners were then "wholly surrounded" by properly annexed city land, the contested parcels of land were themselves properly annexed, pursuant to 7-2-4501. Missoula Rural Fire District v. Missoula, 286 M 387, 950 P2d 758, 54 St. Rep. 1459 (1997).

Strip of Land Too Small for Platting: Triangular piece of unplatted land separated area sought to be annexed into two tracts of land. Although the triangular strip was a part of a much larger tract, that fact was immaterial. The only part of the land which was significant was the strip separating the area sought to be annexed, not the larger area of which the separating strip was a part. If the triangular separating strip is too small or too narrow to be platted, then the tracts separated by it will be considered contiguous. Penland v. Missoula, 132 M 591, 318 P2d 1089 (1957).

Attorney General's Opinions

Growth Policy Required Prior to Annexation of New Territory but Not for Continued Subdivision Review: Under 7-2-4734, a growth policy covering an area proposed for municipal annexation is required before a municipality may extend corporate limits under Title 7, ch. 2, part 47, but the requirement does not apply to annexations conducted under 7-2-4201, 7-2-4401, 7-2-4501, 7-2-4601, or this section. A growth policy is also required before certain subdivision review procedures and city powers of annexation are authorized. However, a growth policy is not required to continue subdivision review unless the city or county wishes to qualify for streamlined review processes. 49 A.G. Op. 23 (2002).

Collateral References

Municipal Corporations *key* 29(4).

62 C.J.S. Municipal Corporations §46.

56 Am. Jur. 2d Municipal Corporations §§67 through 69.

What land is contiguous or adjacent to municipality so as to be subject to annexation. 49 ALR 3d 589.

7-2-4302. Annexation of contiguous municipalities.

Collateral References

Municipal Corporations *key* 34.

62 C.J.S. Municipal Corporations §58.

56 Am. Jur. 2d Municipal Corporations §66.

7-2-4303. Restrictions on annexation power.

Compiler's Comments

1997 Amendment: Chapter 485 at beginning inserted exception clause, after "industrial" inserted "railroad", after "city" inserted "or town", and after "7-2-4314 and" deleted "7-2-4321 through"; and made minor changes in style.

Case Notes

"Industrial Purpose" Defined: "Industrial purpose" is limited to any factory, business, or concern that is engaged primarily in the manufacture or assembly of goods or processing of raw materials unserviceable in their natural state which are extracted, processed, or made fit for use or are substantially altered or treated so as to create commercial products or materials. Burritt v. Butte, 161 M 530, 508 P2d 563 (1973).

Law Review Articles

Land-Use Litigation: Takings and Due Process Claims, Roberts & Shearer, 24 Urb. Law. 833 (1992).

Regulatory Takings After the Supreme Court's 1991-92 Term: An Evolving Return to Property Rights, Eagle & Mellor, 29 Cal. W.L. Rev. 209 (1992).

Collateral References

Municipal Corporations *key* 29(4).

62 C.J.S. Municipal Corporations §46.

Eminent domain: industrial park or similar development as public use justifying condemnation of private property. 62 ALR 4th 1183.

7-2-4304. Applicability of part.

Compiler's Comments

1981 Amendment: Inserted (2) relating to choice of procedure.

Interim Study Committee Bill: House Bill 54 (Ch. 130, L. 1981) was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Case Notes

Annexation Without Detraction — Methods of Annexation Separate and Distinct: The 1979 amendments to Montana municipal annexation law created methods of annexation that are

separate and independent of each other and allow a city to annex real property by statute without detraction prior to annexation. Therefore, a 1974 permanent injunction barring a city from annexing any lands outside city limits that were situated within a rural fire district was properly dissolved, and the decision set out in Missoula Rural Fire District v. Missoula, 168 M 70, 540 P2d 958 (1975), which affirmed the 1974 injunction, was statutorily overruled. Missoula Rural Fire District v. Missoula, 237 M 444, 775 P2d 209, 46 St. Rep. 936 (1989).

7-2-4305. Provision of services.

Compiler's Comments

1995 Amendment: Chapter 66 in (2) substituted "real property owners" for "freeholders"; and made minor changes in style. Amendment effective February 16, 1995.

1981 Amendment: Inserted "according to a plan provided by the municipality" after "services will be provided"; substituted "as specified in 7-2-4732" for "as specified in Title 7, chapter 2, part 47"; inserted (1) that reads: "as provided in 7-2-4736"; and inserted "in first-class cities" and "otherwise" at the beginning of (2).

Interim Committee Bill: Chapter 447, L. 1981 (HB 58), was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

7-2-4311. Annexation of contiguous land by cities or towns.

Compiler's Comments

1997 Amendment: Chapter 485 near middle, after "incorporated city", substituted "or town" for "of the first class", near end, after "boundaries", substituted "of the city or town may be extended" for "of such city of the first class extended", and at end inserted "and 7-2-4325"; and made minor changes in style.

Collateral References

56 Am. Jur. 2d Municipal Corporations §§67 through 69.

What land is contiguous or adjacent to municipality so as to be subject to annexation. 49 ALR 3d 589.

7-2-4312. Resolution of intent by city or town — notice.

Compiler's Comments

2001 Amendment: Chapter 354 in (2) substituted "publish a notice as provided in 7-1-4127" for "cause a notice to be published in the newspaper published nearest the platted tracts or parcels of land or unplatted land for which a certificate of survey has been filed, at least once a week for 2 successive weeks". Amendment effective October 1, 2001.

1997 Amendment: Chapter 485 in three places in introduction, after "city", inserted "or town", and near beginning after "judgment", substituted "of any city or town council" for "of any city council of a city of the first class"; in (1), after "writing", substituted "all registered voters" for "addressed to the address to which tax notices are sent, all owners and purchasers under contracts for deed of property"; and made minor changes in style.

1983 Amendment: In (1), after "owners" inserted "and purchasers under contracts for deed".

Case Notes

Discretion of City Council: Determination of question of whether annexation of tract of realty into city is in best interest of city and inhabitants of such area to be annexed is expressly granted to City Council by this section, and exercise of such discretion is subject to judicial review only where Council has proceeded contrary to statute or where they have acted so arbitrarily or capriciously that it may be said they exercised no discretion at all. Brodie v. Missoula, 155 M 185, 468 P2d 778 (1970); Penland v. Missoula, 132 M 591, 318 P2d 1089 (1957), distinguished in Klamm v. Miles City, 138 M 65, 353 P2d 752 (1960).

Court Review of Resolution of Intention: Exercise of discretion of City Council in passing resolution of intention to annex land may be reviewed by court only when and if they have proceeded contrary to statute. Penland v. Missoula, 132 M 591, 318 P2d 1089 (1957).

Collateral References

Municipal Corporations *key* 33(4).

62 C.J.S. Municipal Corporations §55.

56 Am. Jur. 2d Municipal Corporations §70.

7-2-4313. Contents of notice — protest period.

Compiler's Comments

1997 Amendment: Chapter 485 near beginning of introductory clause, after "notice", inserted "under 7-2-4312"; near beginning in (2), after "city", inserted "or town" and after "boundaries" substituted "of the city or town from registered voters residing in the area" for "of the city of the first class from real property owners of the area"; and made minor changes in style.

1995 Amendment: Chapter 66 in (2) substituted "real property owners of the area" for "freeholders of the territory"; and made minor changes in style. Amendment effective February 16, 1995.

Case Notes

Protest When Annexation Void — Taxpayer's Relief Not Estopped for Lack of Timely Protest: A taxpayer's failure to protest annexation or a special improvement tax at a hearing does not estop him from challenging the annexation later when the jurisdiction of the city to annex and assess is held void ab initio. When there is a substantial defect in the original proceedings that operates to deprive a city of the jurisdiction to act from the outset, estoppel does not bar a taxpayer's prayer for relief. Nilson Enterprises, Inc. v. Great Falls, 190 M 341, 621 P2d 466, 37 St. Rep. 1977 (1980), distinguishing Power v. Helena, 43 M 336, 116 P 415 (1911).

Collateral References

Municipal Corporations *key* 33(4).

62 C.J.S. Municipal Corporations §55.

56 Am. Jur. 2d Municipal Corporations §62.

Proper remedy or procedure for attacking legality of proceedings annexing territory to municipal corporation. 18 ALR 2d 1255.

7-2-4314. Hearing on question of annexation — vote on question of annexation — resolution of annexation.

Compiler's Comments

1997 Amendment: Chapter 485 in (1)(a) and (1)(b), after "city", inserted "or town"; at beginning of (1)(a), before "clerk", inserted "city or town" and after "20-day period" inserted "provided for in 7-2-4313"; at beginning of first sentence in (1)(b) substituted exception clause for former clause that read: "Except as provided in subsection (2), if after considering any written communication" and after "annexation" substituted language requiring approval of implementation of resolution by voters for "the boundaries of the city must be extended to include the platted tracts or parcels of land or unplatted land for which a certificate of survey has been filed" and in second sentence, after "on which", substituted "the proposed annexation is intended to take effect" for "the annexation takes effect"; inserted (1)(c) requiring submission of annexation resolution to voters within 45 days of adoption and requiring notification of voters by mail; inserted (1)(d) authorizing city or town council to adopt resolution for area containing less than 300 parcels and providing use and time limitations; at beginning of (2) substituted exception clause for "The resolution may not be adopted by the city council if disapproved in writing by a majority of the real property owners of the area proposed to be annexed" and at end substituted "for a period of 5 years from the date of disapproval by the voters as provided in subsection (1)" for "for a period of 1 year from the date of disapproval"; and made minor changes in style.

1995 Amendment: Chapter 66 in (2) substituted "real property owners of the area" for "resident freeholders of the territory"; and made minor changes in style. Amendment effective February 16, 1995.

Case Notes

Constitutionality — Resident Freeholder Provision: Classifications established by Legislature in limiting protests to annexation to resident freeholders (see 1995 and 1997 amendments) in first-class cities while permitting protest by freeholders without regard to residence in smaller cities is not only a rational distinction but also promotes a compelling governmental interest and is therefore constitutional. Burritt v. Butte, 161 M 530, 508 P2d 563 (1973).

Meaning of "Resident Freeholder":

Neither a corporation nor a partnership is a "resident freeholder" (see 1995 and 1997 amendments) within the meaning of this section since it is clear that this section requires actual residence on the property sought to be annexed in order to qualify for protest and excludes those

entities which possess no actual residence as distinguished from a legal residence. Burritt v. Butte, 161 M 530, 508 P2d 563 (1973).

A freeholder becomes a resident under 1-1-215 upon union of act and intent. If the intention to establish a permanent residence is ascertained, the recency of the establishment is immaterial. A resident freeholder (see 1995 and 1997 amendments) qualified to protest annexation is a resident within the area to be annexed, holding a present legal title to a freehold estate in real property located within the area to be annexed. It is not necessary for resident freeholder to reside upon his freehold in order to protest annexation. The date through which timely protest could be received determines qualifications of resident freeholders to protest annexation. Kunesh v. Great Falls, 132 M 285, 317 P2d 297 (1957).

Disapproval by Residents:

The filing of sufficient protests by resident freeholders (see 1995 and 1997 amendments) of a first-class city deprives the City Council of authority to do anything except to sustain the protests and terminate the proceedings. State ex rel. Konen v. Butte, 144 M 95, 394 P2d 753 (1964).

Residents of an area sought to be annexed must register their disapproval by showing such disapproval in writing to the City Clerk as required by statute. They cannot do so in courts of law. Penland v. Missoula, 132 M 591, 318 P2d 1089 (1957).

Mandamus for Termination of Proceedings: Where a majority of the resident freeholders (see 1995 and 1997 amendments) of a first-class city validly protested proposed annexation but City Council, instead of terminating the annexation proceedings, took arbitrary action, mandamus was proper to compel Council to terminate the process. The Uniform Declaratory Judgments Act (Title 27, ch. 8) did not furnish the protestants a plain, speedy, and adequate remedy. State ex rel. Konen v. Butte, 144 M 95, 394 P2d 753 (1964).

Number of Protests — Burden of Proof: A first-class city has the burden of determining if a majority of the resident freeholders (see 1995 and 1997 amendments) have protested the proposed annexation. State ex rel. Konen v. Butte, 144 M 95, 394 P2d 753 (1964).

Collateral References

Municipal Corporations *key* 29(3), 30, 33(1).
62 C.J.S. Municipal Corporations §§57, 61.
56 Am. Jur. 2d Municipal Corporations §70.

7-2-4325. Consolidation of proceedings for two or more tracts.

Compiler's Comments

1997 Amendment: Chapter 485 in middle, after "resolution", substituted "under this part" for "under 7-2-4321 through 7-2-4325"; and made minor changes in style.

1985 Amendment: Near beginning after "the city", inserted "or town".

7-2-4331. When land conclusively presumed to be annexed.

Compiler's Comments

Interim Study Committee Bill: Chapter 109, L. 1981 (HB 55), was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Case Notes

Former Law: Prior to the enactment of this section, the exclusive manner of annexation was through statutory provisions and failure to substantially comply with such provisions defeated annexation. Gregory v. Forsyth, 187 M 132, 609 P2d 248, 37 St. Rep. 277 (1980); Balock v. Melstone, 186 M 303, 607 P2d 545, 37 St. Rep. 288 (1980).

Part 44
Annexation of Contiguous Government Land

Part Case Notes

Statutory Requirements to Be Fulfilled Fully — Consent of State: The taxpayer, assessed special improvement taxes after a city annexed land, attacked the city's failure to file a land description, certificate of ownership, or owner's statement of a desire to have the land annexed. He argued that the city failed to comply with all the mandatory requirements because it did not obtain the state's consent to annex state land and that failure voided the annexation and taxation which followed. Without the state's consent, the city was without jurisdiction to proceed with the annexation. The court held that when statutory language provided the manner in which a city or town could annex, it had to be complied with completely and strictly. Nilson Enterprises, Inc. v. Great Falls, 190 M 341, 621 P2d 466, 37 St. Rep. 1977 (1980), reaffirming Pool v.

Townsend, 58 M 297, 191 P 385 (1920); Balock v. Melstone, 186 M 303, 607 P2d 545, 37 St. Rep. 288 (1980); Gregory v. Forsyth, 187 M 132, 609 P2d 248, 37 St. Rep. 277 (1980).

Constitutionality — Annexation Generally: Annexation, in the absence of a constitutional prohibition, is a political matter exclusively for the Legislature to control, and unless specifically restrained by the Montana Constitution, the Legislature can authorize annexation without the consent or even against the wishes of the people living in the annexed corporation or territory. Harrison v. Missoula, 146 M 420, 407 P2d 703 (1965).

7-2-4401. What constitutes contiguous land for purpose of part.

Attorney General's Opinions

Growth Policy Required Prior to Annexation of New Territory but Not for Continued Subdivision Review: Under 7-2-4734, a growth policy covering an area proposed for municipal annexation is required before a municipality may extend corporate limits under Title 7, ch. 2, part 47, but the requirement does not apply to annexations conducted under 7-2-4201, 7-2-4301, 7-2-4501, 7-2-4601, or this section. A growth policy is also required before certain subdivision review procedures and city powers of annexation are authorized. However, a growth policy is not required to continue subdivision review unless the city or county wishes to qualify for streamlined review processes. 49 A.G. Op. 23 (2002).

Collateral References

56 Am. Jur. 2d Municipal Corporations §§66, 69.

What land is contiguous or adjacent to municipality so as to be subject to annexation. 49 ALR 3d 589.

7-2-4402. Annexation of contiguous government land.

Collateral References

Municipal Corporations *key* 29(4).

62 C.J.S. Municipal Corporations §46.

56 Am. Jur. 2d Municipal Corporations §66.

7-2-4403. Request for annexation by government official.

Case Notes

Statutory Requirements to Be Fulfilled — Consent of State: The taxpayer, assessed special improvement taxes after a city annexed land, attacked the city's failure to file a land description, certificate of ownership, or the state's statement of a desire to have the land annexed. He argued that because the city did not comply with all the statutory requirements, the annexation and the taxation that followed were void. Without the state's consent, the city was without jurisdiction to proceed with the annexation. The court held that when statutory language provided the manner in which a city or town could annex, it had to be complied with completely and strictly. Nilson Enterprises, Inc. v. Great Falls, 190 M 341, 621 P2d 466, 37 St. Rep. 1977 (1980), reaffirming Pool v. Townsend, 58 M 297, 191 P 385 (1920); Balock v. Melstone, 186 M 303, 607 P2d 545, 37 St. Rep. 288 (1980); Gregory v. Forsyth, 187 M 132, 609 P2d 248, 37 St. Rep. 277 (1980).

7-2-4404. Resolution of intent to annex.

Collateral References

56 Am. Jur. 2d Municipal Corporations §70.

7-2-4405. Notice of resolution — protest period.

Collateral References

Municipal Corporations *key* 33(4).

62 C.J.S. Municipal Corporations §55.

56 Am. Jur. 2d Municipal Corporations §62.

7-2-4406. Hearing on question of annexation — resolution of annexation.

Collateral References

Municipal Corporations *key* 33(1).

62 C.J.S. Municipal Corporations §61.

56 Am. Jur. 2d Municipal Corporations §§62, 70.

7-2-4408. Applicability of part.

Compiler's Comments

1981 Amendment: Inserted (2) relating to choice of procedure.

Interim Study Committee Bill: House Bill 54 (Ch. 130, L. 1981) was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Case Notes

Annexation Without Detraction — Methods of Annexation Separate and Distinct: The 1979 amendments to Montana municipal annexation law created methods of annexation that are separate and independent of each other and allow a city to annex real property by statute without detraction prior to annexation. Therefore, a 1974 permanent injunction barring a city from annexing any lands outside city limits that were situated within a rural fire district was properly dissolved, and the decision set out in Missoula Rural Fire District v. Missoula, 168 M 70, 540 P2d 958 (1975), which affirmed the 1974 injunction, was statutorily overruled. Missoula Rural Fire District v. Missoula, 237 M 444, 775 P2d 209, 46 St. Rep. 936 (1989).

7-2-4409. Provision of services.

Compiler's Comments

1995 Amendment: Chapter 66 near end substituted "real property owners" for "freeholders"; and made minor changes in style. Amendment effective February 16, 1995.

7-2-4421. When land conclusively presumed to be annexed.

Compiler's Comments

Interim Study Committee Bill: Chapter 109, L. 1981 (HB 55), was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Case Notes

Former Law: Prior to the enactment of this section, the exclusive manner of annexation was through statutory provisions and failure to substantially comply with such provisions defeated annexation. Gregory v. Forsyth, 187 M 132, 609 P2d 248, 37 St. Rep. 277 (1980); Balock v. Melstone, 186 M 303, 607 P2d 545, 37 St. Rep. 288 (1980).

Part 45
Annexation of Wholly Surrounded Land

Part Case Notes

Wholly Surrounded Land Annexation — Constitutionality: Annexation of contiguous land and annexation of wholly surrounded land do not violate Art. III, sec. 14, 1889 Mont. Const. (similar to Art. II, sec. 29, 1972 Mont. Const.), or amendment five of the United States Constitution, which provides that private property may not be taken for public use without payment of just compensation, and do not violate Art. III, sec. 27, 1889 Mont. Const. (similar to Art. II, sec. 17, 1972 Mont. Const.), or amendments 5 and 14 of the United States Constitution, which provide that private property cannot be taken without due process of law. Brodie v. Missoula, 155 M 185, 468 P2d 778 (1970), following Harrison v. Missoula, 146 M 420, 407 P2d 703 (1965).

Constitutionality — Annexation Generally: Annexation, in the absence of a constitutional prohibition, is a political matter exclusively for the Legislature to control, and unless specifically restrained by the Montana Constitution, the Legislature can authorize annexation without the consent or even against the wishes of the people living in the annexed corporation or territory. Harrison v. Missoula, 146 M 420, 407 P2d 703 (1965).

Evidence of Annexation Benefits to Property Owners: In action for injunctive relief against resolution of intention of City Council to annex land, court properly excluded all evidence relating to benefits. Penland v. Missoula, 132 M 591, 318 P2d 1089 (1957).

Remedy for Illegal Inclusion: The remedy of injunction is available to one whose taxes would be increased by an illegal inclusion of his property within the limits of a city. Sharkey v. Butte, 52 M 16, 155 P 266 (1916).

Part Law Review Articles

Recent Developments in Montana Land Use Law, Goetz, 38 Mont. L. Rev. 97 (1977).

Annexation in Montana—A Time for Change, Burke, 35 Mont. L. Rev. 71 (1974).

Part Collateral References

Application of zoning regulations to golf courses, swimming pools, tennis courts, or the like. 63 ALR 5th 607.

Right of one governmental subdivision to challenge annexation proceedings by another such subdivision. 17 ALR 5th 195.

What zoning regulations are applicable to territory annexed to a municipality. 41 ALR 2d 1463.

Proper remedy or procedure for attacking legality of proceedings annexing territory to municipal corporation. 18 ALR 2d 1255.

Boundaries: capacity to attack the fixing or extension of municipal limits or boundary. 13 ALR 2d 1279, §§10, 13 superseded by 17 ALR 5th 195.

Validity of municipal bond issue as against owners of property annexation of which to municipality became effective after date of election at which issue was approved by voters. 10 ALR 2d 559.

Refusal of municipality to annex impoverished area as violative of federal law. 22 ALR Fed. 272.

7-2-4501. Annexation of wholly surrounded land.

Compiler's Comments

1983 Amendment: At beginning of section, after "city" deleted "of the first class".

Case Notes

Annexation of City Street Upheld as Basis for Subsequent Annexation of Other Land: The Missoula Rural Fire District and private property owners sued the city of Missoula to enjoin the annexation of their property by the city. The District Court held that the city could use previously annexed land consisting of all or parts of three city streets as a basis for subsequent annexation of parcels of land enclosed by those city streets because those parcels were "wholly surrounded" by city land. The Supreme Court affirmed the judgment of the District Court, holding that a street is an annexable "tract or parcel" of land, pursuant to 7-2-4301, and that when the contiguity of those streets with other city land at city intersections was considered with the public purpose of the annexations, the streets were valid annexations of contiguous land, pursuant to 7-2-4301. The Supreme Court then held that since the parcels of land owned by the fire district and the private property owners were then "wholly surrounded" by properly annexed city land, the contested parcels of land were themselves properly annexed, pursuant to this section. Missoula Rural Fire District v. Missoula, 286 M 387, 950 P2d 758, 54 St. Rep. 1459 (1997).

No Certificate of Survey Required: Contention that 30-acre tract was improperly annexed to city due to failure of City Council to survey unplatted land and file certificate of survey prior to annexation was without merit since entire tract was surrounded by city and therefore, under this section, no certificate of survey was necessary. Brodie v. Missoula, 155 M 185, 468 P2d 778 (1970).

Wholly Surrounded Property — Congruity Unnecessary: Contention on appeal that city had improperly annexed certain platted lots due to the fact that one side of lots was contiguous with outdoor theater and thus such lots were not "wholly surrounded" by city, as required by this section, was without merit since "wholly surrounded", as used in this section, does not mean city property must also be wholly contiguous to such property; rather it means that tract is so located that it is impossible to reach it without crossing city property. Calvert v. Great Falls, 154 M 213, 462 P2d 182 (1969), followed in Missoula Rural Fire District v. Missoula, 283 M 113, 938 P2d 1328, 54 St. Rep. 480 (1997). See also Missoula Rural Fire District v. Missoula, 286 M 387, 950 P2d 758, 54 St. Rep. 1459 (1997).

Attorney General's Opinions

Growth Policy Required Prior to Annexation of New Territory but Not for Continued Subdivision Review: Under 7-2-4734, a growth policy covering an area proposed for municipal annexation is required before a municipality may extend corporate limits under Title 7, ch. 2, part 47, but the requirement does not apply to annexations conducted under 7-2-4201, 7-2-4301, 7-2-4401, 7-2-4601, or this section. A growth policy is also required before certain subdivision review procedures and city powers of annexation are authorized. However, a growth policy is not required to continue subdivision review unless the city or county wishes to qualify for streamlined review processes. 49 A.G. Op. 23 (2002).

What Constitutes "Wholly Surrounded" Parcel: A parcel of land is "wholly surrounded" under this section when access may be gained only by crossing through the municipality. 42 A.G. Op. 41 (1987).

Collateral References

Municipal Corporations *key* 29(4).

62 C.J.S. Municipal Corporations §46.

56 Am. Jur. 2d Municipal Corporations §70.

7-2-4502. Protest not available.

Compiler's Comments

1997 Amendment: Chapter 485 at beginning of first sentence substituted "Wholly surrounded land" for "The land" and after "resolved" inserted "by the city or town council"; and inserted second sentence providing that annexation of wholly surrounded land is not subject to voter approval.

1995 Amendment: Chapter 66 near middle substituted "real property owners" for "resident freeholders"; and made minor changes in style. Amendment effective February 16, 1995.

Collateral References

Municipal Corporations *key* 29(3), 30.
62 C.J.S. Municipal Corporations §57.
56 Am. Jur. 2d Municipal Corporations §62.

7-2-4503. Restrictions on annexation power.

Case Notes

Annexation of Golf Club: The city of Billings began proceedings to annex a golf club. Upon petition of the golf club, the District Court issued a Writ of Mandamus and then ruled, after trial, that 7-2-4503 deprived the city of the authority to annex a golf club. The city appealed, claiming that it had been proceeding under the Planned Community Development Act and that golf courses were not exempt from annexation under that Act. The Supreme Court agreed with the city that golf courses were not exempt from annexation under the Planned Community Development Act but held that under that Act, the golf club could prevent annexation. The court further ruled that because the Planned Community Development Act provides for judicial review, issuance of a Writ of Mandamus was premature. State ex rel. Hilands Golf Club v. Billings, 198 M 475, 647 P2d 345, 39 St. Rep. 1132 (1982).

Each Method of Annexation as Separate Procedure: Each of the eight methods of municipal annexation is a separate and distinct procedure. Therefore, the statutory exemption for golf courses found in 7-2-4503 does not apply to annexations commenced under Title 7, ch. 2, part 47 (Planned Community Development Act). State ex rel. Hilands Golf Club v. Billings, 198 M 475, 647 P2d 345, 39 St. Rep. 1132 (1982).

"Industrial Purpose" Defined: "Industrial purpose" is limited to any factory, business, or concern that is engaged primarily in the manufacture or assembly of goods or processing of raw materials unserviceable in their natural state which are extracted, processed, or made fit for use or are substantially altered or treated so as to create commercial products or materials. Burritt v. Butte, 161 M 1, 508 P2d 563 (1973).

Incidental Agricultural Use of Land Annexed: Contention that 30-acre tract of land was improperly annexed to city since such land was being used for agricultural purposes and therefore exempt from annexation under this section was without merit, since evidence indicated that land was primarily held as developmental parcel for housing development and agricultural use was only incidental thereto. Brodie v. Missoula, 155 M 185, 468 P2d 778 (1970).

Collateral References

Municipal Corporations *key* 29(4).
62 C.J.S. Municipal Corporations §46.
56 Am. Jur. 2d Municipal Corporations §70, et seq.
Refusal of municipality to annex impoverished area as violative of federal law. 22 ALR Fed. 272.

7-2-4504. What constitutes contiguous lands.

Case Notes

Strip of Land Too Small for Platting: A triangular piece of unplatted land separated the area sought to be annexed into two tracts of land. Although the triangular strip was a part of a much larger tract, that fact was immaterial. The only part of the land which was significant was the strip separating the area sought to be annexed, not the larger area of which the separating strip was a part. If the triangular separating strip is too small or too narrow to be platted, then the tracts separated by it will be considered contiguous. Penland v. Missoula, 132 M 591, 318 P2d 1089 (1957).

Collateral References

56 Am. Jur. 2d Municipal Corporations §69.
What land is contiguous or adjacent to municipality so as to be subject to annexation. 49 ALR 3d 589.

7-2-4505. Applicability of part.

Compiler's Comments

1981 Amendment: Inserted (2) relating to choice of procedure.

Interim Study Committee Bill: House Bill 54 (Ch. 130, L. 1981) was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Case Notes

Annexation Without Detraction — Methods of Annexation Separate and Distinct: The 1979 amendments to Montana municipal annexation law created methods of annexation that are separate and independent of each other and allow a city to annex real property by statute without detraction prior to annexation. Therefore, a 1974 permanent injunction barring a city from annexing any lands outside city limits that were situated within a rural fire district was properly dissolved, and the decision set out in Missoula Rural Fire District v. Missoula, 168 M 70, 540 P2d 958 (1975), which affirmed the 1974 injunction, was statutorily overruled. Missoula Rural Fire District v. Missoula, 237 M 444, 775 P2d 209, 46 St. Rep. 936 (1989).

7-2-4506. Provision of services.

Compiler's Comments

1995 Amendment: Chapter 66 in (2) substituted "real property owners" for "freeholders"; and made minor changes in style. Amendment effective February 16, 1995.

1981 Amendment: Inserted "according to a plan provided by the municipality" after "services will be provided"; substituted "as specified in 7-2-4732" for "as specified in Title 7, chapter 2, part 47"; inserted (1) that reads: "as provided in 7-2-4736"; and inserted "in first-class cities" and "otherwise" at the beginning of (2).

Interim Committee Bill: Chapter 447, L. 1981 (HB 58), was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

7-2-4511. When land conclusively presumed to be annexed.

Compiler's Comments

Interim Study Committee Bill: Chapter 109, L. 1981 (HB 55), was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Case Notes

Former Law: Prior to the enactment of this section, the exclusive manner of annexation was through statutory provisions and failure to substantially comply with such provisions defeated annexation. Gregory v. Forsyth, 187 M 132, 609 P2d 248, 37 St. Rep. 277 (1980); Balock v. Melstone, 186 M 303, 607 P2d 545, 37 St. Rep. 288 (1980).

Collateral References

What zoning regulations are applicable to territory annexed to a municipality. 41 ALR 2d 1463.

Part 46
Annexation by Petition

Part Case Notes

Standing to Sue Government in General — Annexation Proceedings in Particular: Before one has standing to sue a governmental entity, there must be a case or controversy. The plaintiff must clearly allege past, present, or threatened injury to a property or civil right, and the injury must be distinguishable from injury to the public in general, though it need not be exclusive to the plaintiff. In an annexation protest, annexation is a political matter exclusively for legislative control, absent a constitutional prohibition. The annexation must be void ab initio, and the challenger must be a property owner who would suffer a tax increase. The available remedy is an injunction, not monetary damages. A count of petition signatures for only one of many annexed areas, by a plaintiff who used his own criteria for the count, is insufficient to support a claim that the government entity inaccurately counted the signatures. Since plaintiff here had no standing to directly attack the annexation, he could not collaterally attack it by attempting to show negligence. O'Donnell Fire Serv. & Equip. Co. v. Billings, 219 M 317, 711 P2d 822, 42 St. Rep. 2051 (1985), followed in Knudsen v. Ereaux, 275 M 146, 911 P2d 835, 53 St. Rep. 83 (1996).

Constitutionality — Annexation Generally: Annexation, in the absence of a constitutional prohibition, is a political matter exclusively for the Legislature to control, and unless specifically restrained by the Montana Constitution, the Legislature can authorize annexation without the

consent or even against the wishes of the people living in the annexed corporation or territory. Harrison v. Missoula, 146 M 420, 407 P2d 703 (1965).

Remedy for Illegal Inclusion: The remedy of injunction is available to one whose taxes would be increased by an illegal inclusion of his property within the limits of a city. Sharkey v. Butte, 52 M 16, 155 P 266 (1916).

Part Law Review Articles

Recent Developments in Montana Land Use Law, Goetz, 38 Mont. L. Rev. 97 (1977).

Annexation in Montana—A Time for Change, Burke, 35 Mont. L. Rev. 71 (1974).

Part Collateral References

Application of zoning regulations to golf courses, swimming pools, tennis courts, or the like. 63 ALR 5th 607.

Right of one governmental subdivision to challenge annexation proceedings by another such subdivision. 17 ALR 5th 195.

What zoning regulations are applicable to territory annexed to a municipality. 41 ALR 2d 1463.

Proper remedy or procedure for attacking legality of proceedings annexing territory to municipal corporation. 18 ALR 2d 1255.

Boundaries: capacity to attack the fixing or extension of municipal limits or boundary. 13 ALR 2d 1279, §§10, 13 superseded by 17 ALR 5th 195.

Validity of municipal bond issue as against owners of property annexation of which to municipality became effective after date of election at which issue was approved by voters. 10 ALR 2d 559.

Refusal of municipality to annex impoverished area as violative of federal law. 22 ALR Fed. 272.

7-2-4601. Annexation by petition.

Compiler's Comments

1995 Amendment: Chapter 66 in (3)(a)(i) substituted "resident electors owning real property in the area" for "resident freeholder electors of the territory"; in (3)(a)(ii) substituted "50% of the real property in the area" for "each parcel of property in the territory"; and made minor changes in style. Amendment effective February 16, 1995.

1985 Amendment: In (3)(a) after "municipality", substituted "need not submit the question of annexation to the qualified electors as provided in subsection (2) if it has received" for "upon receiving"; in (3)(a)(i), after "annexed", deleted "need not submit the question of annexation to the qualified electors as provided in subsection (2)"; inserted (3)(a)(ii) relating to property owners; and in (3)(b) in first sentence, after "petition", inserted "submitted under the provisions of subsection (3)(a)".

Case Notes

Lack of Property Ownership Within Proposed Annexation — No Standing to Challenge Annexation Resolution — Summary Judgment Proper Despite Lack of Notice to Parties of Intent to Convert Motion to Dismiss Into Motion for Summary Judgment: It is error for a court to fail to give formal notice of the intent to convert a motion to dismiss into a motion for summary judgment, giving the party opposing the motion an opportunity to produce additional facts by affidavit or otherwise that would create a genuine issue of material fact to preclude summary judgment. However, in this case, plaintiffs lacked standing to challenge an annexation resolution because they did not own property within the proposed annexation. Without standing to state a claim, plaintiffs could prove no set of facts in support of their action that would entitle them to relief. Therefore, failure by the court to give the parties notice of conversion of the motion to dismiss was harmless error. Knudsen v. Ereaux, 275 M 146, 911 P2d 835, 53 St. Rep. 83 (1996), following O'Donnell Fire Serv. & Equip. v. Billings, 219 M 317, 711 P2d 822 (1985).

Attorney General's Opinions

Growth Policy Required Prior to Annexation of New Territory but Not for Continued Subdivision Review: Under 7-2-4734, a growth policy covering an area proposed for municipal annexation is required before a municipality may extend corporate limits under Title 7, ch. 2, part 47, but the requirement does not apply to annexations conducted under 7-2-4201, 7-2-4301, 7-2-4401, 7-2-4501, or this section. A growth policy is also required before certain subdivision review procedures and city powers of annexation are authorized. However, a growth policy is not required to continue subdivision review unless the city or county wishes to qualify for streamlined review processes. 49 A.G. Op. 23 (2002).

Collateral References

Municipal Corporations *key* 33(5).

62 C.J.S. Municipal Corporations §56.

56 Am. Jur. 2d Municipal Corporations §71.

Refusal of municipality to annex impoverished area as violative of federal law. 22 ALR Fed. 272.

7-2-4602. Election on question of annexation by petition.

Collateral References

56 Am. Jur. 2d Municipal Corporations §62.

7-2-4603. Notice of election.

Collateral References

56 Am. Jur. 2d Municipal Corporations §62.

7-2-4606. Resolution of annexation.

Compiler's Comments

1995 Amendment: Chapter 66 in (1)(b), in first sentence, substituted "resident electors owning real property in the area" for "resident freeholder electors of the territory"; in (2), in first clause of first sentence, substituted "resident electors owning real property" for "resident freeholder electors" and substituted "50% of the area" for "all of the territory"; and made minor changes in style. Amendment effective February 16, 1995.

1985 Amendment: In (2) after "resident freeholder electors", inserted "or the owners of all".

Commissioner Correction: The term "The resolution" which originally appeared in subsection (2) was changed to "A resolution adopted pursuant to 7-2-4601(3)" by the Code Commissioner, 1979, because of rearrangement of sec. 1, Ch. 641, L. 1979, during codification.

Collateral References

56 Am. Jur. 2d Municipal Corporations §70.

Refusal of municipality to annex impoverished area as violative of federal law. 22 ALR Fed. 272.

7-2-4608. Restrictions on annexation power.

Collateral References

Municipal Corporations *key* 29(4).

62 C.J.S. Municipal Corporations §46.

56 Am. Jur. 2d Municipal Corporations §§66 through 68.

Proper remedy or procedure for attacking legality of proceedings annexing territory to municipal corporation. 18 ALR 2d 1255.

7-2-4609. Applicability of part.

Compiler's Comments

1981 Amendment: Inserted "that the municipal governing body may in its discretion choose to use" after "provides an alternative method" in (1).

Interim Study Committee Bill: House Bill 54 (Ch. 130, L. 1981) was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Composite Section: This section was amended by Ch. 250, Ch. 641, and Ch. 642, L. 1979, and a composite section was prepared by the Code Commissioner, 1979. Chapter 250 was a Code Commissioner bill and was not intended to make substantive changes in the law. Consequently a conflict of language in subsection (1) between Ch. 250 and Ch. 641 has been resolved in favor of the language used in Ch. 641.

Case Notes

Annexation Without Detraction — Methods of Annexation Separate and Distinct: The 1979 amendments to Montana municipal annexation law created methods of annexation that are separate and independent of each other and allow a city to annex real property by statute without detraction prior to annexation. Therefore, a 1974 permanent injunction barring a city from annexing any lands outside city limits that were situated within a rural fire district was properly dissolved, and the decision set out in Missoula Rural Fire District v. Missoula, 168 M 70, 540 P2d 958 (1975), which affirmed the 1974 injunction, was statutorily overruled. Missoula Rural Fire District v. Missoula, 237 M 444, 775 P2d 209, 46 St. Rep. 936 (1989).

7-2-4610. Provision of services.

Compiler's Comments

1995 Amendment: Chapter 66 in (2) substituted "real property owners" for "freeholders"; and made minor changes in style. Amendment effective February 16, 1995.

1981 Amendment: Inserted "according to a plan provided by the municipality" after "services will be provided"; substituted "as specified in 7-2-4732" for "as specified in Title 7, chapter 2, part 47"; inserted (1) that reads: "as provided in 7-2-4736"; and inserted "in first-class cities" and "otherwise" at the beginning of (2).

Interim Committee Bill: Chapter 447, L. 1981 (HB 58), was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

7-2-4621. When land conclusively presumed to be annexed.

Compiler's Comments

Interim Study Committee Bill: Chapter 109, L. 1981 (HB 55), was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Case Notes

Former Law: Prior to the enactment of this section, the exclusive manner of annexation was through statutory provisions and failure to substantially comply with such provisions defeated annexation. Gregory v. Forsyth, 187 M 132, 609 P2d 248, 37 St. Rep. 277 (1980); Balock v. Melstone, 186 M 303, 607 P2d 545, 37 St. Rep. 288 (1980).

Collateral References

What zoning regulations are applicable to territory annexed to a municipality. 41 ALR 2d 1463.

7-2-4625. Annexation district.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

Part 47
Annexation With the Provision of Services

Part Compiler's Comments

Clause Not Codified: The first paragraph of section 11-525, R.C.M. 1947, a severability clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 12, Ch. 364, L. 1974.

Part Case Notes

Each Method of Annexation as Separate Procedure: Each of the eight methods of municipal annexation is a separate and distinct procedure. Therefore, the statutory exemption for golf courses found in 7-2-4503 does not apply to annexations commenced under Title 7, ch. 2, part 47 (Planned Community Development Act). State ex rel. Hilands Golf Club v. Billings, 198 M 475, 647 P2d 345, 39 St. Rep. 1132 (1982).

Constitutionality — Annexation Generally: Annexation, in the absence of a constitutional prohibition, is a political matter exclusively for the Legislature to control, and unless specifically restrained by the Montana Constitution, the Legislature can authorize annexation without the consent or even against the wishes of the people living in the annexed corporation or territory. Harrison v. Missoula, 146 M 420, 407 P2d 703 (1965).

Remedy for Illegal Inclusion: The remedy of injunction is available to one whose taxes would be increased by an illegal inclusion of his property within the limits of a city. Sharkey v. Butte, 52 M 16, 155 P 266 (1916).

Part Law Review Articles

Recent Developments in Montana Land Use Law, Goetz, 38 Mont. L. Rev. 97 (1977).

Annexation in Montana—A Time for Change, Burke, 35 Mont. L. Rev. 71 (1974).

Part Collateral References

Application of zoning regulations to golf courses, swimming pools, tennis courts, or the like. 63 ALR 5th 607.

Right of one governmental subdivision to challenge annexation proceedings by another such subdivision. 17 ALR 5th 195.

What zoning regulations are applicable to territory annexed to a municipality. 41 ALR 2d 1463.

Proper remedy or procedure for attacking legality of proceedings annexing territory to municipal corporation. 18 ALR 2d 1255.

Boundaries: capacity to attack the fixing or extension of municipal limits or boundary. 13 ALR 2d 1279, §§10, 13 superseded by 17 ALR 5th 195.

Validity of municipal bond issue as against owners of property annexation of which to municipality became effective after date of election at which issue was approved by voters. 10 ALR 2d 559.

Refusal of municipality to annex impoverished area as violative of federal law. 22 ALR Fed. 272.

7-2-4702. Findings.

Case Notes

"Adding to and Increasing Cities Boundaries": The phrase "adding to and increasing cities boundaries" was not intended to exclude annexation of surrounded areas but rather indicated the intention to include under the Planned Community Development Act (Title 7, ch. 2, part 47) any and all forms of annexation. (Annotator's Note: See 7-2-4718 and similar provisions in Title 7, ch. 2, parts 43 through 46, enacted after this case was decided.) Missoula Rural Fire District v. Missoula, 168 M 70, 540 P2d 958 (1975).

Collateral References

56 Am. Jur. 2d Municipal Corporations §57, et seq.

7-2-4703. Purpose.

Collateral References

56 Am. Jur. 2d Municipal Corporations §57, et seq.

7-2-4704. Definitions.

Compiler's Comments

1995 Amendment: Chapter 66 in definition of municipality, after "any", inserted "incorporated" and at end deleted "under Montana law"; deleted definition of resident freeholder that read: ""Resident freeholder" means a person who maintains his residence on real property in which he holds an estate of life or inheritance or of which he is the purchaser of such an estate under a contract for deed, some memorandum of which has been filed in the office of the county clerk and recorder"; inserted definition of real property owner; and made minor changes in style. Amendment effective February 16, 1995.

Case Notes

Corporation as Resident Freeholder: A corporation that owns real property is a resident freeholder (see 1995 amendment) for the purposes of the Planned Community Development Act. State ex rel. Hilands Golf Club v. Billings, 198 M 475, 647 P2d 345, 39 St. Rep. 1132 (1982).

Law Review Articles

Freeholder Requirements in the Montana Code Annotated: Unconstitutional Restrictions on the Right of Political Participation, Hammond, 41 Mont. L. Rev. 96 (1980).

Collateral References

56 Am. Jur. 2d Municipal Corporations §69.

What land is contiguous or adjacent to municipality so as to be subject to annexation. 49 ALR 3d 589.

7-2-4705. Annexation by municipalities providing services.

Compiler's Comments

1995 Amendment: Chapter 66 in (2), near beginning, substituted "owners of real property" for "resident freeholders" and near middle substituted "real property owners" for "resident freeholders"; and made minor changes in style. Amendment effective February 16, 1995.

Case Notes

Annexation of Golf Club: The city of Billings began proceedings to annex a golf club. Upon petition of the golf club, the District Court issued a Writ of Mandamus and then ruled, after trial, that 7-2-4503 deprived the city of the authority to annex a golf club. The city appealed, claiming that it had been proceeding under the Planned Community Development Act and that golf courses were not exempt from annexation under that Act. The Supreme Court agreed with the

city that golf courses were not exempt from annexation under the Planned Community Development Act but held that under that Act, the golf club could prevent annexation. The court further ruled that because the Planned Community Development Act provides for judicial review, issuance of a Writ of Mandamus was premature. State ex rel. Hilands Golf Club v. Billings, 198 M 475, 647 P2d 345, 39 St. Rep. 1132 (1982).

Collateral References

Municipal Corporations *key* 33(5).
62 C.J.S. Municipal Corporations §56.
56 Am. Jur. 2d Municipal Corporations §§59, 62, 71.
Validity and effect of "interim" zoning ordinance. 30 ALR 3d 1196.

7-2-4706. Appeal if municipal governing body fails to act on petition.

Collateral References

Municipal Corporations *key* 33(8).
62 C.J.S. Municipal Corporations §64.
Refusal of municipality to annex impoverished area as violative of federal law. 22 ALR Fed. 272.

7-2-4707. Resolution of intention to annex.

Collateral References

56 Am. Jur. 2d Municipal Corporations §62.

7-2-4708. Notice of hearing.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) substituted "be published as provided in 7-1-4127" for "fix the date, hour, and place of the public hearing"; deleted former (2) that read: "(2) Such notice will be given by publication in a newspaper having general circulation in the municipality once a week for at least 4 successive weeks prior to the date of the hearing. The date of the last publication shall not be more than 7 days preceding the date of the public hearing. If there is no such newspaper, the municipality shall post the notice in at least five public places within the municipality and at least five public places in the area to be annexed for 30 days prior to the date of public hearing"; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

Municipal Corporations *key* 33(4).
62 C.J.S. Municipal Corporations §55.
56 Am. Jur. 2d Municipal Corporations §62.
What constitutes newspaper of "general circulation" within meaning of state statutes requiring publication of official notices and the like in such newspaper. 24 ALR 4th 822.

7-2-4709. Hearing on question of annexation.

Collateral References

Municipal Corporations *key* 29(3), 30, 33(1).
62 C.J.S. Municipal Corporations §§57, 61.
56 Am. Jur. 2d Municipal Corporations §62.

7-2-4710. Protest.

Compiler's Comments

1995 Amendment: Chapter 66 in (1), near end, substituted "real property owners of the area" for "freeholders of the territory"; in (2), near beginning, substituted "real property owners" for "freeholders" and near middle, after "annexed", inserted "may not be considered or acted upon by the governing body on its own initiative, without petition"; and made minor changes in style. Amendment effective February 16, 1995.

1985 Amendment: Near beginning of (1) increased protest period from 20 to 45 days; in (1) and (2) deleted "resident" before "freeholders".

Law Review Articles

Freeholder Requirements in the Montana Code Annotated: Unconstitutional Restrictions on the Right of Political Participation, Hammond, 41 Mont. L. Rev. 96 (1980). (See 1995 amendment to 7-2-4710.)

Collateral References

Municipal Corporations *key* 29(3), 30.

62 C.J.S. Municipal Corporations §57.
56 Am. Jur. 2d Municipal Corporations §71.
Right of one governmental subdivision to challenge annexation proceedings by another such subdivision. 17 ALR 5th 195.
Capacity to attack the fixing or extension of municipal limits or boundary. 13 ALR 2d 1279, §§10, 13 superseded by 17 ALR 5th 195.

7-2-4716. Effect of annexation.

Attorney General's Opinions
Rural Fire District Not Special Service District: A rural fire district is not considered a special service district within the context of subsection (2) of this section with regard to payments for improvements. 46 A.G. Op. 8 (1995).

Collateral References
Municipal Corporations *key* 35, 36.
62 C.J.S. Municipal Corporations §69, et seq.
56 Am. Jur. 2d Municipal Corporations §56.

7-2-4718. Construction.

Compiler's Comments
1981 Amendment: Inserted (2) relating to choice of procedure.
Interim Study Committee Bill: House Bill 54 (Ch. 130, L. 1981) was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Case Notes
Annexation Without Detraction — Methods of Annexation Separate and Distinct: The 1979 amendments to Montana municipal annexation law created methods of annexation that are separate and independent of each other and allow a city to annex real property by statute without detraction prior to annexation. Therefore, a 1974 permanent injunction barring a city from annexing any lands outside city limits that were situated within a rural fire district was properly dissolved, and the decision set out in Missoula Rural Fire District v. Missoula, 168 M 70, 540 P2d 958 (1975), which affirmed the 1974 injunction, was statutorily overruled. Missoula Rural Fire District v. Missoula, 237 M 444, 775 P2d 209, 46 St. Rep. 936 (1989).

7-2-4732. Contents of plan for extension of services.

Case Notes
Annexation Without Cost-Benefit Analysis and Resulting Increased Tax Burden Not Unconstitutional: Kudloff brought an action against the city of Billings, alleging that the city had wrongfully annexed his property because no cost-benefit analysis had been performed by the city and the annexation would result in an increase in Kudloff's tax burden. The Supreme Court held that a regulatory taking of property by a municipality is allowed even if the value of that property and its usefulness is diminished. The Supreme Court cited Harrison v. Missoula, 146 M 420, 407 P2d 703 (1965), for the proposition that the levying of future taxes after annexation does not constitute a taking of property. Kudloff v. Billings, 260 M 371, 860 P2d 140, 50 St. Rep. 1108 (1993).

7-2-4734. Standards to be met before annexation can occur.

Compiler's Comments
1999 Amendment: Chapter 582 in (3) substituted "growth policy adopted pursuant to Title 76, chapter 1" for "comprehensive plan as prescribed in Title 76, chapter 1"; and made minor changes in style. Amendment effective October 1, 1999.
Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.
Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Case Notes
Rural Fire District Land: Any annexation procedure involving rural fire district land undertaken pursuant to any other Montana annexation law would be inconsistent with the prohibitions of this part. (Annotator's Note: See 7-2-4718 and similar provisions in Title 7, ch. 2,

parts 43 through 46, that were enacted after this decision, and see 1999 amendment.) Missoula Rural Fire District v. Missoula, 168 M 70, 540 P2d 958 (1975).

Attorney General's Opinions

Growth Policy Required Prior to Annexation of New Territory but Not for Continued Subdivision Review: Under this section, a growth policy covering an area proposed for municipal annexation is required before a municipality may extend corporate limits under this part, but the requirement does not apply to annexations conducted under 7-2-4201, 7-2-4301, 7-2-4401, 7-2-4501, or 7-2-4601. A growth policy is also required before certain subdivision review procedures and city powers of annexation are authorized. However, a growth policy is not required to continue subdivision review unless the city or county wishes to qualify for streamlined review processes. 49 A.G. Op. 23 (2002).

Collateral References

Municipal Corporations *key* 29(3).
62 C.J.S. Municipal Corporations §44.
56 Am. Jur. 2d Municipal Corporations §65, et seq.

7-2-4735. Guidelines for new boundaries of municipality.

Collateral References

56 Am. Jur. 2d Municipal Corporations §65, et seq.

7-2-4736. Preservation of existing garbage or solid waste service in the event of annexation.

Compiler's Comments

1987 Amendment: In (1), near end of introductory clause, inserted "any person or business located in"; in (1)(b) substituted "after the expiration of 5 years, if a majority of the residents of the annexed or incorporated area sign a petition requesting the municipality to provide the service" for "after the expiration of 5 years, the municipality may provide such service only if a majority of the residents of the annexed or incorporated area request in writing to the municipality that such service be provided by the municipality"; in (2), after "incorporated area or", inserted "after the expiration of 5 years", after "residents" substituted "sign a petition requesting" for "request", and near end substituted "provide" for "assume sole jurisdiction for"; and inserted (3) relating to adequate motor carrier service.

Preamble: The preamble to Ch. 381, L. 1987, which amended this section, provided: "WHEREAS, the Montana Supreme Court, in D & F Sanitation Service v. Billings, [219] Mont. [437], 713 P.2d 977, 43 St. Rep. 74 (1986), interpreted section 7-2-4736, MCA; and

WHEREAS, the Supreme Court's interpretation of the section was contrary to the commonly understood intent of the statute and results in an unwieldy provision of services."

Case Notes

Adoption of Self-Government Charter — Doctrine of Implied Preemption: Appellant garbage haulers contended that the Legislature preempted the field of garbage regulation by enacting 7-2-4736. Powers specifically denied to local governments are enumerated in 7-1-111 and include the exercise of any power that prohibits the grant or denial of a certificate of public convenience and necessity. Under 69-12-314, garbage haulers are required to get a certificate of public convenience and necessity prior to doing business. The decision by Billings voters that the city should provide garbage services in no way prohibits the grant or denial of a certificate of public necessity. The Supreme Court held that the city was simply exercising its self-government powers to provide a service for its residents and was taxing them for that service. D & F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977, 43 St. Rep. 74 (1986), overruling Billings v. Weatherwax, 193 M 163, 630 P2d 1216, 38 St. Rep. 1034 (1981).

Annexation — Preservation of Existing Garbage Service — Constitutionality: The city of Billings contended that 7-2-4736 was a special or local act which violated Art. V, sec. 12, Mont. Const. The Supreme Court determined that the legislative purpose of the section to encourage private garbage service to unannexed areas was a sufficiently important governmental interest to justify the classification; hence, 7-2-4736 was held to be a general law which does not violate Art. V, sec. 12, Mont. Const. D & F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977, 43 St. Rep. 74 (1986).

Classification Rationally Related to Governmental Interest: The city of Billings alleged that 7-2-4736 violated Art. II, sec. 4, Mont. Const., by placing a greater tax on annexed taxpayers than on unannexed taxpayers, thereby denying equal protection to both classes of taxpayers. The court found that the classification of people in annexed areas using private garbage services

prior to annexation bears a rational relation to the governmental purpose of encouraging private garbage service in unannexed areas. Therefore, 7-2-4736 was held to be constitutional under Art. II, sec. 4, Mont. Const. D & F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977, 43 St. Rep. 74 (1986).

Franchise Not Irrevocable — Constitutionality: On cross-appeal, respondent city of Billings contended that 7-2-4736 violated Art. II, sec. 31, Mont. Const., because it granted an irrevocable franchise to appellant private garbage haulers. The Supreme Court agreed that 7-2-4736 conferred a special privilege or franchise upon the garbage haulers, but noted that the franchise was not an irrevocable one within the meaning of Art. II, sec. 31, Mont. Const., since the privilege could be terminated by either a showing that the private carrier was unable or refused to provide adequate service or by written request of a majority of residents after a set period of time. Therefore, 7-2-4736 was held to be constitutional under Art. II, sec. 31, Mont. Const. D & F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977, 43 St. Rep. 74 (1986).

Interpretation of Statute — Customers After Annexation: The Supreme Court upheld the District Court's interpretation of this section (prior to 1987 amendment), which interpretation stated that in the event of annexation, a private garbage carrier may continue to provide services only to those customers it had prior to annexation. D & F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977, 43 St. Rep. 74 (1986).

7-2-4741. Right to court review when area annexed.

Compiler's Comments

1995 Amendment: Chapter 66 in (1), near beginning, substituted "real property owners of the area to be annexed" for "resident freeholders in the territory" and at end, after "governing", substituted "body" for "board and serve a copy of the petition on the municipality in the manner of service of civil process"; and made minor changes in style. Amendment effective February 16, 1995.

Collateral References

Municipal Corporations *key* 33(8) through (10).
62 C.J.S. Municipal Corporations §64, et seq.
56 Am. Jur. 2d Municipal Corporations §74, et seq.

7-2-4743. Presumption that municipal actions lawful.

Law Review Articles

Statutory and Common Law Presumptions in Montana, Clarke, 37 Mont. L. Rev. 91, 115 (1976).

7-2-4745. Effect of appeal on effective date of annexation.

Collateral References

56 Am. Jur. 2d Municipal Corporations §79, et seq.

7-2-4751. Right to court review when area not annexed.

Compiler's Comments

1995 Amendment: Chapter 66 substituted (1) concerning petition to District Court for former language that read: "After the resident freeholders have properly petitioned the governing body of the municipality and the body has failed to pass a resolution of intent to annex within 60 days, the petitioners may file a complaint and a duplicate copy of the petition in the district court of the proper jurisdiction stating the reason why the proposed annexation should take place"; and made minor changes in style. Amendment effective February 16, 1995.

Collateral References

Municipal Corporations *key* 33(8).
62 C.J.S. Municipal Corporations §64.
56 Am. Jur. 2d Municipal Corporations §65, et seq.
Refusal of municipality to annex impoverished area as violative of federal law. 22 ALR Fed. 272.

7-2-4761. When land conclusively presumed to be annexed.

Compiler's Comments

Interim Study Committee Bill: Chapter 109, L. 1981 (HB 55), was introduced at the request of the Study Committee on Annexation Laws. See committee report, Legislative Council, 1980.

Case Notes

Former Law: Prior to the enactment of this section, the exclusive manner of annexation was through statutory provisions and failure to substantially comply with such provisions defeated annexation. Gregory v. Forsyth, 187 M 132, 609 P2d 248, 37 St. Rep. 277 (1980); Balock v. Melstone, 186 M 303, 607 P2d 545, 37 St. Rep. 288 (1980).

Part 48
Exclusion of Land

7-2-4801. Use of terms contiguous and adjacent.

Collateral References

56 Am. Jur. 2d Municipal Corporations §69.

7-2-4802. Exclusion of land from municipalities.

Collateral References

Municipal Corporations *key* 30.
62 C.J.S. Municipal Corporations §48.
56 Am. Jur. 2d Municipal Corporations §83, et seq.

7-2-4805. Resolution of intent to exclude land — notice.

Compiler's Comments

2001 Amendment: Chapter 354 near beginning after "resolution" deleted "duly and regularly passed and adopted" and at end substituted "publish a notice as provided in 7-1-4127" for "cause a notice to be published in the newspaper nearest such territory petitioned to be excluded, at least once a week for 2 successive weeks"; and made minor changes in style. Amendment effective October 1, 2001.

Part 49
Disincorporation of Municipalities

Part Compiler's Comments

Severability: Section 15, Ch. 99, L. 1973, was a severability clause.

7-2-4901. Automatic disincorporation.

Collateral References

Municipal Corporations *key* 50, 51.
62 C.J.S. Municipal Corporations §103.
56 Am. Jur. 2d Municipal Corporations §91.

7-2-4902. Disincorporation by election.

Compiler's Comments

1995 Amendment: Chapter 387 in (2), near middle after "order", deleted "within 60 days, that" and at end substituted "The election must be held in conjunction with a regular or primary election" for "The day for holding the election may not be less than 75 days or more than 120 days after the board orders the election"; and made minor changes in style.

1993 Amendment: Chapter 319 near beginning of (2) changed percentage of signatures needed for a local government petition from "20% of the number of electors voting in the last regular municipal election" to "at least 15% of the number of electors registered at the last municipal general election"; and made minor changes in style.

1985 Amendment: Near end of (2) substituted "75 days" for "60 days".

1981 Amendment: Inserted "or if the city governing body by a two-thirds vote of all its members resolves to disincorporate, then" near the middle of (2).

Collateral References

Municipal Corporations *key* 50, 51.
62 C.J.S. Municipal Corporations §103b.
56 Am. Jur. 2d Municipal Corporations §89, et seq.

7-2-4903. Notice of election on question of disincorporation.

Collateral References

56 Am. Jur. 2d Municipal Corporations §89, et seq.

7-2-4904. Details of election on disincorporation.

Collateral References
56 Am. Jur. 2d Municipal Corporations §89, et seq.

7-2-4906. Effect of sufficient vote to disincorporate.

Compiler's Comments
2001 Amendment: Chapter 483 in (2) after "department of" substituted "administration" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.
1983 Amendment: Substituted reference to department of commerce for reference to department of administration.
1981 Amendment: Substituted "department of administration" for "department of community affairs" in (2).

7-2-4911. Certification of financial condition.

Compiler's Comments
2001 Amendment: Chapter 483 in (1) near middle after "department of" substituted "administration" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.
1983 Amendment: Substituted reference to director of department of commerce for reference to director of department of administration.
1981 Amendment: Substituted "department of administration" for "department of community affairs" in (1).

Collateral References
56 Am. Jur. 2d Municipal Corporations §94.

7-2-4912. Management of unencumbered cash.

Compiler's Comments
2001 Amendment: Chapter 483 in (1) in first sentence substituted "director of the department of administration or the director's designee" for "director of the department of commerce or his agent"; and made minor changes in style. Amendment effective July 1, 2001.
1983 Amendment: Substituted reference to director of department of commerce for reference to director of department of administration.
1981 Amendment: Substituted "department of administration" for "department of community affairs" in (1).

Collateral References
56 Am. Jur. 2d Municipal Corporations §94.

7-2-4913. Release of public property to county commissioners.

Collateral References
56 Am. Jur. 2d Municipal Corporations §92, et seq.

7-2-4914. Disposition of city court records.

Collateral References
56 Am. Jur. 2d Municipal Corporations §§96, 97.

7-2-4915. Effect of disincorporation on prior legal rights.

Collateral References
56 Am. Jur. 2d Municipal Corporations §§96, 97.

7-2-4916. Payment of debts and collection of receivables of disincorporated municipality.

Collateral References
56 Am. Jur. 2d Municipal Corporations §49, et seq.

7-2-4917. Procedure to collect receivables.

Collateral References
56 Am. Jur. 2d Municipal Corporations §94.

7-2-4918. Tax levy in event of insolvency.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) near middle after "commissioners shall" inserted "subject to 15-10-420"; in (2) inserted second sentence providing that for purposes of 15-10-420, levy is on property in city or town until debt is paid; and made minor changes in style. Amendment effective July 1, 2001.

Collateral References

56 Am. Jur. 2d Municipal Corporations §94, et seq.

7-2-4919. Management of surplus assets deposited to special fund.

Collateral References

56 Am. Jur. 2d Municipal Corporations §94, et seq.

7-2-4920. Payment of costs and expenses from special county fund.

Collateral References

56 Am. Jur. 2d Municipal Corporations §94, et seq.

CHAPTER 3
ALTERNATIVE FORMS OF LOCAL GOVERNMENT

Chapter Compiler's Comments

Alternative Forms and Self-Government Powers Bills: Local Government Review Bulletin, Vol. 1, No. 3, November 8, 1974, published by the State Commission on Local Government, is an annual report to the Legislature that proposed and discussed the Alternative Forms Bill (passed as Ch. 344, L. 1975) and Self-Government Powers Bill (passed as Ch. 345, L. 1975).

Sections Not Codified — Officials' and Employees' Transition for 1975-1976 Voter Review: Sections 16-5115.11(part) and 16-5115.12 through 16-5115.14, R.C.M. 1947, were not codified because the sections were temporary. They cover the election of new officials and transitions of officials and employees based upon the 1976-1977 Voter Review Process. These sections have not been repealed and are still valid law. They may be referred to as sec. 14 through 17, Ch. 513, L. 1975. These sections were exempted from the automatic termination provision of sec. 23, Ch. 513, L. 1975, by sec. 12, Ch. 477, L. 1977.

Chapter Attorney General's Opinions

Elected County Official's Salary — Established by County: The Montana Constitution grants the Legislature authority to allow counties to establish the salaries of elected county officials. 38 A.G. Op. 91 (1980).

Part 1
General Provisions

Part Compiler's Comments

Section Not Codified: Section 16-5115.11(1), R.C.M. 1947, was not codified because it was redundant with 7-3-111 through 7-3-114. This subsection has not been repealed and is still valid law. It may be referred to as sec. 14, Ch. 513, L. 1975. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Part Attorney General's Opinions

Special Election on Alternative Form of Government — Study Commission to Recommend Adoption: Under 7-3-187, a special election on an alternative form of government is scheduled only if the study commission recommends an alternative. Therefore, a local government study commission may not have an alternative form of local government placed on the ballot unless the study commission recommends adoption of the alternative plan. 41 A.G. Op. 56 (1986).

Failure to Adopt Alternate Form of Government — Statutory Basis of Government: A local government which fails in an election to adopt an alternate form of government in the manner provided by Art. XI, sec. 3 and 9, Mont. Const., is bound by the features of the existing form of government. The provisions of 7-3-201 through 7-3-224 allow voters to adopt a mayor-council structure with either partisan or nonpartisan elections. The procedures for recommending such a change are set forth in 7-3-121 through 7-3-161 and 7-3-171 through 7-3-193. If a nonpartisan

election structure is not adopted, local elections must be conducted on a partisan basis after May 2, 1977, under the provisions of 7-3-113. 41 A.G. Op. 37 (1985).

Mandatory Procedure for Abandonment of Government Form: Section 7-3-4334 (now repealed) must be followed when a local government unit abandons the commission-manager form of government. 38 A.G. Op. 89 (1980).

7-3-101. Compliance with constitution.

Compiler's Comments

Severability: Section 2, Ch. 344, L. 1975, was a severability clause.

Effective Date: Section 3, Ch. 344, L. 1975, provided that the effective date of the act was May 2, 1977.

7-3-102. Adoption of alternative form.

Compiler's Comments

Severability: Section 2, Ch. 344, L. 1975, was a severability clause.

Effective Date: Section 3, Ch. 344, L. 1975, provided that the effective date of the act was May 2, 1977.

7-3-103. Amendment of self-government charter or adopted alternative form of government.

Compiler's Comments

1995 Amendment: Chapter 387 in (2), at end, substituted "submitted to the electors at the next regular or primary election" for "submitted to the electors as soon as possible after the submission of a petition or enactment of a resolution, either at a regularly scheduled election or at a special election"; and made minor changes in style.

1993 Amendment: Chapter 319 in first sentence of (2), after "electors", inserted "registered at the last general election".

Case Notes

Form of Government Unchanged by Recodification: The relevant portions of 7-3-102, et seq., contain the same essential characteristics of form of government as were presented under the former codification. Therefore, constitutional mandates were observed and an alternative and the established (whether called "present" or "existing") forms were presented to the electors for their choice. Schuman v. Study Comm'n of Yellowstone County, 176 M 313, 578 P2d 291 (1978).

Attorney General's Opinions

Election on Alternative Form of Government — Study Commission to Recommend Adoption: Under 7-3-187, an election on an alternative form of government is scheduled only if the study commission recommends an alternative. Therefore, a local government study commission may not have an alternative form of local government placed on the ballot unless the study commission recommends adoption of the alternative plan. 41 A.G. Op. 56 (1986).

Collateral References

Municipal Corporations *key* 44.

62 C.J.S. Municipal Corporations §88, et seq.

7-3-104. Limitation on change in alternative form.

Compiler's Comments

Extension of Act: Section 12, Ch. 477, L. 1977, exempted this section from the automatic termination provision of sec. 23, Ch. 513, L. 1975.

7-3-105. Plan of government.

Compiler's Comments

Extension of Act: Section 12, Ch. 477, L. 1977, exempted this section from the automatic termination provision of sec. 23, Ch. 513, L. 1975.

7-3-106. Effect of change in government.

Compiler's Comments

Extension of Act: Section 12, Ch. 477, L. 1977, exempted this section from the automatic termination provision of sec. 23, Ch. 513, L. 1975.

7-3-111. Statutory basis for elected county official government.

Compiler's Comments

Extension of Act: Section 12, Ch. 477, L. 1977, exempted this section from the automatic termination provision of sec. 23, Ch. 513, L. 1975.

Case Notes

Classification of Existing Form of Government: The classification of the existing form of government under 7-3-111 through 7-3-114 is not an imposition of any particular form of government upon a local body but rather complies with the constitutional mandates of Art. XI, Mont. Const. Schuman v. Study Comm'n of Yellowstone County, 176 M 313, 578 P2d 291 (1978).

7-3-112. Statutory basis for county manager government.

Compiler's Comments

Extension of Act: Section 12, Ch. 477, L. 1977, exempted this section from the automatic termination provision of sec. 23, Ch. 513, L. 1975.

Case Notes

Classification of Existing Form of Government: The classification of the existing form of government under 7-3-111 through 7-3-114 is not an imposition of any particular form of government upon a local body but rather complies with the constitutional mandates of Art. XI, Mont. Const. Schuman v. Study Comm'n of Yellowstone County, 176 M 313, 578 P2d 291 (1978).

7-3-113. Statutory basis for municipal council-mayor government.

Compiler's Comments

Erroneous Statutory Basis: Section 1, Ch. 216, L. 1987, provided: "A municipality with the statutory basis provided in 7-3-113, but which conducts its elections in a nonpartisan manner and did so prior to the enactment of 7-3-113, may by adoption of a resolution provide that the municipality is described under 7-3-113, except that 7-3-113(1)(k) does not apply and 7-3-219(2) does apply to the municipality. The resolution must be adopted prior to October 1, 1989. A copy of the resolution must be sent to the secretary of state."

Termination Date: Section 5, Ch. 216, L. 1987, read: "Section 1 terminates October 1, 1989."

Extension of Act: Section 12, Ch. 477, L. 1977, exempted this section from the automatic termination provision of sec. 23, Ch. 513, L. 1975.

Case Notes

Classification of Existing Form of Government: The classification of the existing form of government under 7-3-111 through 7-3-114 is not an imposition of any particular form of government upon a local body but rather complies with the constitutional mandates of Art. XI, Mont. Const. Schuman v. Study Comm'n of Yellowstone County, 176 M 313, 578 P2d 291 (1978).

Attorney General's Opinions

Nonapplicability to Proposed Alternative Forms of Government: The structural characteristics of government required by this section were intended to apply if voters did not adopt an alternate form of local government. The section does not apply to proposed alternate forms of government, which may recommend any of the structural characteristics permitted in the local government statutes; therefore, a proposed municipal commission-executive form of government is not restricted by the structural characteristics in this section. 41 A.G. Op. 88 (1986).

Failure to Adopt Alternate Form of Government: A local government which fails in an election to adopt an alternate form of government in the manner provided by Art. XI, sec. 3 and 9, Mont. Const., is bound by the features of the existing form of government. The provisions of 7-3-201 through 7-3-224 allow voters to adopt a mayor-council structure with either partisan or nonpartisan elections. The procedures for recommending such a change are set forth in 7-3-121 through 7-3-161 and 7-3-171 through 7-3-193. If a nonpartisan election structure is not adopted, local elections must be conducted on a partisan basis after May 2, 1977, under the provisions of 7-3-113. 41 A.G. Op. 37 (1985).

Provision Requiring Partisan Elections to Govern: This section provides that if a local government organized under the general statutes authorizing the mayor-council form of government did not adopt a new form of government, then it is governed by certain statutes after May 2, 1977, including 7-3-219(1) (formerly section 47A-3-203(h)(i), R.C.M. 1947), which requires partisan elections. Failure of such local government to adopt a new form of government binds it to the features of the existing government, including partisan elections; however, city officials elected on a nonpartisan basis are considered de facto public officials, and their official

acts are regarded as legal. Local elections must be conducted on a partisan basis in the future unless the voters adopt a different plan of government. 41 A.G. Op. 37 (1985).

7-3-114. Statutory basis for municipal commission-manager government.

Compiler's Comments

Extension of Act: Section 12, Ch. 477, L. 1977, exempted this section from the automatic termination provision of sec. 23, Ch. 513, L. 1975.

Case Notes

Classification of Existing Form of Government: The classification of the existing form of government under 7-3-111 through 7-3-114 is not an imposition of any particular form of government upon a local body but rather complies with the constitutional mandates of Art. XI, Mont. Const. Schuman v. Study Comm'n of Yellowstone County, 176 M 313, 578 P2d 291 (1978).

Attorney General's Opinions

Appointment of Heads of City Departments by City Council Allowed: The city council in a council-manager form of government may adopt an ordinance pursuant to 7-3-304 authorizing the city council rather than the city manager to appoint the heads of city departments. 45 A.G. Op. 1 (1993).

Increase in Number of City Commissioners — Study Commission Recommendation: A local government study commission may not recommend that the number of City Commissioners be increased from five to seven unless it does so as part of a recommendation to adopt a form of government that permits a seven-member City Commission. 41 A.G. Op. 48 (1986).

7-3-121. Purpose.

Compiler's Comments

Commissioner Correction: The free joint conference committee report on HB 851 (Ch. 675, L. 1979) deleted a section of the original bill but did not alter the internal references within the bill accordingly. The Code Commissioner, 1979, has corrected these internal references in 7-3-125, 7-3-143 through 7-3-145, and 7-3-149.

Severability: Section 28, Ch. 675, L. 1979, was a severability section.

7-3-122. Definitions.

Compiler's Comments

1981 Amendment: Substituted "parts 1 through 7" for "parts 1 through 6" at the end of (3).

7-3-123. Alteration of existing forms of local government.

Attorney General's Opinions

Election Required in 1984 on Whether to Establish Study Commission — Existing Study Committee: The question of conducting local government review and establishing a study commission must appear on the June 1984 primary election ballot pursuant to 7-3-173, notwithstanding any recommendations made by a study committee now reviewing a county government or the placing of its recommendations on the ballot. 40 A.G. Op. 30 (1984).

7-3-124. Election procedure.

Attorney General's Opinions

Timetables for Filing Declarations of Nomination and Changing Precinct Boundaries — Study Commission Recommendations: The timetable for filing declarations of nomination found in 13-10-201(6) and the timetable for changing precinct boundaries found in 13-3-102(1) apply to candidates for County Commissioner positions created by the adoption of a local government study commission proposal. 41 A.G. Op. 44 (1986).

7-3-125. Petition for alteration.

Case Notes

County Government in Transition Period After Vote to Change Form of Government — Not Empowered to Order Special Election on Further Change: In November 1982, the voters in a county voted to change the county form of government from a charter government, provided for in Title 7, ch. 3, part 7, to a commission government, provided for in Title 7, ch. 3, part 4. The new commission government was to take effect in June 1983, after election of new county officers. During the transition period, the existing charter government, in response to a petition filed under 7-3-125, authorized a special election on the question of returning to a charter government. This special election was then challenged in an action for a Writ of Prohibition

under Title 27, ch. 27. The Supreme Court upheld the District Court's issuance of the Writ, ruling that placing on the ballot the question of changing the form of county government was in excess of the charter government's jurisdiction. Allen v. Madison County Comm'n, 211 M 79, 684 P2d 1095, 41 St. Rep. 1226 (1984).

7-3-141. Permissible recommendations.

Compiler's Comments

1981 Amendment: Substituted "parts 1 through 6" for "parts 1 through 7" at the end of (2)(b).

7-3-143. Special requirements if consolidation recommended.

Compiler's Comments

1983 Amendment: In (1)(e)(i), after "absorption of" substituted "all existing boards, bureaus, special districts" for "existing boards", and near end after "school districts" deleted "authorities"; and in (1)(e)(ii) after "adjust boundaries" inserted "(and may provide a method for adjusting boundaries)", after "existing boards" inserted "bureaus, special districts", and after "school districts" deleted "authorities".

7-3-144. Special requirements if county merger recommended.

Attorney General's Opinions

County Power to Grant Franchises — Interlocal Agreements Not Precluded: Article XI, sec. 4, Mont. Const.; 7-3-144; 7-4-2611; and 7-5-2129, as well as applicable case law, imply that a county vested with general government powers may exercise the power to grant franchises. Under 7-11-104, a city-county interlocal franchise agreement is possible. 42 A.G. Op. 87 (1988).

7-3-146. Filing of petitions.

Compiler's Comments

2001 Amendment: Chapter 483 in (1) after "department of" substituted "administration" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

1983 Amendment: Substituted reference to department of commerce for reference to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs" in (1).

7-3-149. Election on alternative form.

Compiler's Comments

1995 Amendment: Chapter 387 in first sentence of (1), after "held at", inserted "the next regular or primary election that is at" and before "the date" deleted "within 120 days of", deleted former second sentence that read: "The special election may be held in conjunction with any other election", and at end of second sentence, before "election", deleted "special"; and made minor changes in style.

1985 Amendment: In (1) in first sentence, substituted "75 days" for "40 days".

1983 Amendment: In (1), after "to be held" inserted "at least 40 days after the call and".

Case Notes

County Government in Transition Period After Vote to Change Form of Government — Not Empowered to Order Special Election on Further Change: In November 1982, the voters in a county voted to change the county form of government from a charter government, provided for in Title 7, ch. 3, part 7, to a commission government, provided for in Title 7, ch. 3, part 4. The new commission government was to take effect in June 1983, after election of new county officers. During the transition period, the existing charter government, in response to a petition filed under 7-3-125, authorized a special election on the question of returning to a charter government. This special election was then challenged in an action for a Writ of Prohibition under Title 27, ch. 27. The Supreme Court upheld the District Court's issuance of the Writ, ruling that placing on the ballot the question of changing the form of county government was in excess of the charter government's jurisdiction. Allen v. Madison County Comm'n, 211 M 79, 684 P2d 1095, 41 St. Rep. 1226 (1984).

Attorney General's Opinions

Study Commission to Establish Election Date on Question of Amendments: A local government study commission, rather than a Board of County Commissioners, is authorized to call for and establish an election date on the question of amendments to the existing form of

government proposed in the study commission's final report. (See 1995 amendment.) 41 A.G. Op. 44 (1986).

Election Required in 1984 on Whether to Establish Study Commission — Existing Study Committee: The question of conducting local government review and establishing a study commission must appear on the June 1984 primary election ballot pursuant to 7-3-173, notwithstanding any recommendations made by a study committee now reviewing a county government or the placing of its recommendations on the ballot. 40 A.G. Op. 30 (1984).

7-3-150. General ballot requirements.

Attorney General's Opinions

Ballot Division by Precinct: The ballot division required for local government ballots in this section should be done according to the boundaries of precincts, as that term is defined in 13-3-101. 41 A.G. Op. 88 (1986).

Election Required in 1984 on Whether to Establish Study Commission — Existing Study Committee: The question of conducting local government review and establishing a study commission must appear on the June 1984 primary election ballot pursuant to 7-3-173, notwithstanding any recommendations made by a study committee now reviewing a county government or the placing of its recommendations on the ballot. 40 A.G. Op. 30 (1984).

7-3-151. Treatment of suboptions for alternative forms.

Compiler's Comments

1983 Amendment: In (1) inserted last sentence relating to effect of suboption of failed form.

1981 Amendment: Substituted "parts 1 through 6" for "parts 1 through 7" in (2).

7-3-153. Filing of approved plan.

Compiler's Comments

2001 Amendment: Chapter 483 in (1) and (2) after "department of" substituted "administration" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

1983 Amendment: Substituted references to department of commerce for references to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs" in (1) and (2).

7-3-154. Judicial review.

Case Notes

Judicial Review Procedure Not Plain, Speedy, and Adequate Remedy Precluding Writ of Prohibition: In an appeal of the District Court's issuance of a Writ of Prohibition prohibiting the County Commission and the County Recorder from placing on an election ballot the question of retaining the charter form of county government, appellants claimed that prohibition did not lie because there were other plain, speedy, and adequate remedies available to petitioners. The Supreme Court affirmed the Writ's issuance, ruling that a plain, speedy, and adequate remedy was not afforded by: (1) the judicial review procedure set forth in 7-3-154; (2) the injunction procedure set forth in Title 27, ch. 19; or (3) the declaratory judgment procedure set forth in Title 27, ch. 8. Allen v. Madison County Comm'n, 211 M 79, 684 P2d 1095, 41 St. Rep. 1226 (1984).

7-3-155. Three-year moratorium.

Compiler's Comments

1983 Amendment: Inserted (2) relating to computation of moratorium.

7-3-156. Effective date of alternative plan or amendment.

Attorney General's Opinions

Study Commission Recommendations — Effective Date: A local government study commission report that proposes an alternative plan of local government, if approved by the electors, takes effect when the new officers take office unless otherwise provided in any charter or consolidation plan, under 7-3-156(1). A study commission proposal involving the creation of new offices and establishing qualifications for office becomes effective immediately upon adoption of the change by the electors, under 7-3-156(2). An amendment to an existing plan of government, including changing from partisan to nonpartisan elections for officers other than County Commissioners, takes effect at the beginning of the local government's fiscal year

commencing after the election results are officially declared, under 7-3-156(3). 41 A.G. Op. 44 (1986).

7-3-158. Transition provisions affecting personnel.

Compiler's Comments

1981 Amendment: Deleted "or resolution" after "petition" in (3).

Attorney General's Opinions

Required Election Schedule for Nonelected Position: Where the existing office of city treasurer is a nonelected position and the proposed plan of local government calls for an elected city treasurer, the election schedule required by 7-3-160 is to be followed. The exceptions in this section apply only to elected officers. 41 A.G. Op. 88 (1986).

Holdover Officers — Exclusive Exceptions: Subsection (3) of 7-3-158 provides the only two exclusive exceptions regarding holdover officers of an existing governing body once a new form of local government has been adopted. If neither exception is provided for by charter or petition, then the general rule in 7-3-158(1) would operate to abolish the prior governing body at the time the new body is elected and qualified for office. 41 A.G. Op. 70 (1986).

Increase in Number of County Commissioners — Holdovers — Alteration of District Boundaries: If the electors were to adopt a proposal to increase the number of County Commissioners, all of the incumbent Commissioners would lose their positions unless otherwise required by the adopted plan, pursuant to 7-3-158. If no provision were made for holdovers in the local government study commission plan, they would remain in office only until the newly elected Commissioners take office. However, a study commission proposal is not invalid because it provides for holdover County Commissioners, even when the proposal alters the commission district boundaries. (See 40 A.G. Op. 1 (1983)). 41 A.G. Op. 44 (1986).

7-3-160. Election of new officials.

Compiler's Comments

1986 Amendment: Substituted (2) relating to scheduling of primary and general elections for former (2) that read: "The order shall specify a date for the primary election not more than 120 days or less than 75 days after the election approving the new form and a date for the general election 75 days after the primary."

1985 Amendment: In (2) after "less than", substituted "75 days" for "20 days" and near end of sentence, substituted "75 days" for "60 days".

Attorney General's Opinions

Required Election Schedule for Nonelected Position: Where the existing office of city treasurer is a nonelected position and the proposed plan of local government calls for an elected city treasurer, the election schedule required by this section is to be followed. The exceptions in 7-3-158 apply only to elected officers. 41 A.G. Op. 88 (1986).

Study Commission to Establish Election Dates for New Officers: Under 7-3-187(1)(c), a local government study commission, rather than a Board of County Commissioners, is responsible for setting the dates of a special primary and a general election for officers of a new government, if the proposal is approved by the electors. However, the dates must fall within the time periods provided in 7-3-160(2) (decided prior to 1986 amendment). 41 A.G. Op. 44 (1986).

Timetables for Filing Declarations of Nomination and Changing Precinct Boundaries — Study Commission Recommendations: The timetable for filing declarations of nomination found in 13-10-201(6) and the timetable for changing precinct boundaries found in 13-3-102(1) apply to candidates for County Commissioner positions created by the adoption of a local government study commission proposal. 41 A.G. Op. 44 (1986).

7-3-171. Purpose.

Compiler's Comments

Severability: Section 28, Ch. 697, L. 1983, was a severability clause.

7-3-173. Establishment of study commissions.

Attorney General's Opinions

Existing Nonelected Study Committee — 1984 Election Required: The question of conducting local government review and establishing a study commission must appear on the June 1984 primary election ballot pursuant to this section, notwithstanding any recommendations made by a nonelected study committee now reviewing a county government or the placing of its recommendations on the ballot. 40 A.G. Op. 30 (1984).

7-3-176. Election of commission members.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), near middle before "first", deleted "1984 general election date or at the"; and made minor changes in style.

1985 Amendments: Chapter 250 in (2) near middle of first sentence, substituted "75 days" for "60 days".

Chapter 435 in (2) at end substituted "commissioners" for "commissions"; and in (4), in first sentence inserted "which includes votes cast for candidates who have officially filed nominations and votes for write-in candidates" and inserted second sentence concerning a tie vote.

7-3-177. Composition of study commission.

Compiler's Comments

1985 Amendment: In (2) inserted second sentence relating to time of appointment.

7-3-178. Term of office — vacancies — compensation.

Compiler's Comments

1985 Amendment: In (2) inserted first sentence, relating to determination of a vacancy, and third sentence, requiring appointment within 30 days.

7-3-181. Conduct of business.

Compiler's Comments

1995 Amendment: Chapter 216 at end of (2) inserted clause allowing governing body to determine office hours after public hearing; and made minor changes in style.

7-3-184. Financial administration.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of (2)(a) substituted "Subject to 15-10-420" for "For the support of the study commission", substituted "may" for "shall", and after "study" deleted "not to exceed 1 mill, and the local government may levy up to 1 mill in excess of all other mill levies authorized by law to fund the appropriation for the support of the study commission"; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1991 Amendment: Near middle of (2)(a), after "appropriate", substituted "an amount necessary to fund the study, not to exceed 1 mill" for "the equivalent of at least 1 mill".

7-3-185. Scope of study commission recommendations.

Compiler's Comments

1985 Amendment: In both (1) and (2), in (a) substituted "examining" for "elected to examine" and inserted (b) allowing services studies.

Attorney General's Opinions

Service Consolidations Submitted to Governing Bodies: A local government study commission may recommend a change in the form or structure of local government. Recommended changes in structure are to be set forth in the study commission's final report and placed on the ballot for voter approval. A study commission may also recommend a service consolidation or transfer in cooperation with a study commission of another county or municipality. A recommendation to consolidate services is to be set forth in a supplemental report and submitted to the appropriate governing bodies for reaction within 1 year. 41 A.G. Op. 80 (1986).

Special Election on Alternative Form of Government — Study Commission to Recommend Adoption: Under 7-3-187, a special election on an alternative form of government is scheduled only if the study commission recommends an alternative. Therefore, a local government study commission may not have an alternative form of local government placed on the ballot unless the study commission recommends adoption of the alternative plan. 41 A.G. Op. 56 (1986).

Recommendation of Shorter Terms of County Commission Office: A local government study commission may recommend that terms of office for County Commissioners be less than 6 years if the county has adopted the statutory county "commission form" of government. A local government study commission may not recommend that the terms of office for County

Commissioners be less than 6 years if the county has retained the form of government organized under the statutes listed in 7-3-111. 41 A.G. Op. 51 (1986).

Increase in Number of City Commissioners — Study Commission Recommendation: A local government study commission may not recommend that the number of City Commissioners be increased from five to seven unless it does so as part of a recommendation to adopt a form of government that permits a seven-member City Commission. 41 A.G. Op. 48 (1986).

7-3-186. Study commission timetable.

Compiler's Comments

1995 Amendment: Chapter 387 in (2)(d), at end, inserted "The special election must be held in conjunction with a regular or primary election."

7-3-187. Final report.

Compiler's Comments

2001 Amendment: Chapter 483 in (4) in first sentence after "department of" substituted "administration" for "commerce". Amendment effective July 1, 2001.

1995 Amendment: Chapter 387 in (1)(b), after "with a", substituted "regular or primary" for "regularly scheduled"; at end of (3) inserted "that changes are not recommended"; and made minor changes in style.

1985 Amendment: In (4) substituted "two copies" for "one copy" and "department of commerce" for "department of administration" and inserted "one of which the department shall forward to the state library"; and inserted (6) relating to deposit of minutes and records.

Attorney General's Opinions

Service Consolidations Submitted to Governing Bodies: A local government study commission may recommend a change in the form or structure of local government. Recommended changes in structure are to be set forth in the study commission's final report and placed on the ballot for voter approval. A study commission may also recommend a service consolidation or transfer in cooperation with a study commission of another county or municipality. A recommendation to consolidate services is to be set forth in a supplemental report and submitted to the appropriate governing bodies for reaction within 1 year. 41 A.G. Op. 80 (1986).

Special Election on Alternative Form of Government — Study Commission to Recommend Adoption: Under 7-3-187, a special election on an alternative form of government is scheduled only if the study commission recommends an alternative. Therefore, a local government study commission may not have an alternative form of local government placed on the ballot unless the study commission recommends adoption of the alternative plan. 41 A.G. Op. 56 (1986).

Study Commission to Establish Election Date on Question of Amendments: A local government study commission, rather than a Board of County Commissioners, is authorized to call for and establish an election date on the question of amendments to the existing form of government proposed in the study commission's final report. (See 1995 amendment.) 41 A.G. Op. 44 (1986).

Study Commission to Establish Election Dates for New Officers: Under 7-3-187(1)(c), a local government study commission, rather than a Board of County Commissioners, is responsible for setting the dates of a special primary and a general election for officers of a new government, if the proposal is approved by the electors. However, the dates must fall within the time periods provided in 7-3-160(2) (decided prior to 1985 and 1995 amendments). 41 A.G. Op. 44 (1986).

7-3-190. Supplementary reports.

Compiler's Comments

1985 Amendment: Inserted third sentence relating to submission of reports within 1 year.

Attorney General's Opinions

Service Consolidations Submitted to Governing Bodies: A local government study commission may recommend a change in the form or structure of local government. Recommended changes in structure are to be set forth in the study commission's final report and placed on the ballot for voter approval. A study commission may also recommend a service consolidation or transfer in cooperation with a study commission of another county or municipality. A recommendation to consolidate services is to be set forth in a supplemental report and submitted to the appropriate governing bodies for reaction within 1 year. 41 A.G. Op. 80 (1986).

7-3-192. Election on recommendation.

Compiler's Comments

1995 Amendment: Chapter 387 in first sentence of (1), after "7-3-149", deleted "except that the study commission shall authorize the submission of the alternative plan of government to the voters at a special election to be held no less than 75 or more than 120 days from the date of the adoption of the final report", at beginning of second sentence, before the first "election", deleted "special" and after "election" substituted "must" for "may", and deleted third sentence that read: "Study commissions elected on the general election date in 1984 shall submit a final report allowing for a vote on any recommendation no later than the general election date in 1986"; and made minor changes in style.

1985 Amendment: In (1) near end of first sentence, substituted "no less than 75 or more than 120 days from the date of the adoption" for "within 120 days of the adoption".

Attorney General's Opinions

Study Commission to Establish Election Date on Question of Amendments: A local government study commission, rather than a Board of County Commissioners, is authorized to call for and establish an election date on the question of amendments to the existing form of government proposed in the study commission's final report. (See 1995 amendment.) 41 A.G. Op. 44 (1986).

7-3-193. Application of other sections.

Attorney General's Opinions

Holdover Officers — Exclusive Exceptions: Subsection (3) of 7-3-158 provides the only two exclusive exceptions regarding holdover officers of an existing governing body once a new form of local government has been adopted. If neither exception is provided for by charter or petition, then the general rule in 7-3-158(1) would operate to abolish the prior governing body at the time the new body is elected and qualified for office. 41 A.G. Op. 70 (1986).

Increase in Number of County Commissioners — Holdovers — Alteration of District Boundaries: If the electors were to adopt a proposal to increase the number of County Commissioners, all of the incumbent Commissioners would lose their positions unless otherwise required by the adopted plan, pursuant to 7-3-158. If no provision were made for holdovers in the local government study commission plan, they would remain in office only until the newly elected Commissioners take office. However, a study commission proposal is not invalid because it provides for holdover County Commissioners, even when the proposal alters the commission district boundaries. (See 40 A.G. Op. 1 (1983)). 41 A.G. Op. 44 (1986).

Study Commission Recommendations — Effective Date: A local government study commission report that proposes an alternative plan of local government, if approved by the electors, takes effect when the new officers take office unless otherwise provided in any charter or consolidation plan, under 7-3-156(1). A study commission proposal involving the creation of new offices and establishing qualifications for office becomes effective immediately upon adoption of the change by the electors, under 7-3-156(2). An amendment to an existing plan of government, including changing from partisan to nonpartisan elections for officers other than County Commissioners, takes effect at the beginning of the local government's fiscal year commencing after the election results are officially declared, under 7-3-156(3). 41 A.G. Op. 44 (1986).

Study Commission to Establish Election Dates for New Officers: Under 7-3-187(1)(c), a local government study commission, rather than a Board of County Commissioners, is responsible for setting the dates of a special primary and a general election for officers of a new government, if the proposal is approved by the electors. However, the dates must fall within the time periods provided in 7-3-160(2) (decided prior to 1985 and 1995 amendments). 41 A.G. Op. 44 (1986).

Part 2
Commission-Executive Government

Part Compiler's Comments

Severability: Section 2, Ch. 344, L. 1975, was a severability clause.

Effective Date: Section 3, Ch. 344, L. 1975, provided that the effective date of the act was May 2, 1977.

Part Attorney General's Opinions

Provision Requiring Partisan Elections to Govern: Section 7-3-113 provides that if a local government organized under the general statutes authorizing the mayor-council form of

government did not adopt a new form of government, then it is governed by certain statutes after May 2, 1977, including 7-3-219(1), which requires partisan elections. Failure of such local government to adopt a new form of government binds it to the features of the existing government, including partisan elections; however, city officials elected on a nonpartisan basis are considered de facto public officials, and their official acts are regarded as legal. Local elections must be conducted on a partisan basis in the future unless the voters adopt a different plan of government. 41 A.G. Op. 37 (1985).

7-3-203. Duties of executive.

Attorney General's Opinions

Administrative Assistant — Mayoral Appointment: Although the City Council's contract and budget approval powers may affect the mayor's practical ability to provide a particular compensation amount to an administrative assistant or establish other employment conditions, they do not obviate his authority to fill that position without Council approval. Under 7-3-212, a mayor may appoint an administrative assistant without the approval of the City Council. 41 A.G. Op. 45 (1986).

7-3-212. Administrative assistants.

Attorney General's Opinions

Administrative Assistant — Mayoral Appointment: Although the City Council's contract and budget approval powers may affect the mayor's practical ability to provide a particular compensation amount to an administrative assistant or establish other employment conditions, they do not obviate his authority to fill that position without Council approval. Under 7-3-212, a mayor may appoint an administrative assistant without the approval of the City Council. 41 A.G. Op. 45 (1986).

7-3-213. Supervision of personnel.

Attorney General's Opinions

Mayor Allowed to Designate Assistant Police Chief Without Approval of Municipal Council: In a council-mayor form of government, in the absence of a statutory requirement that a particular mayoral decision is subject to approval of the Municipal Council, the mayor may, in the exercise of the statutory authority to manage and supervise the municipal police force, designate an officer to serve as Assistant Police Chief without the prior approval of the Municipal Council. 46 A.G. Op. 21 (1996).

Administrative Assistant — Mayoral Appointment: Although the City Council's contract and budget approval powers may affect the mayor's practical ability to provide a particular compensation amount to an administrative assistant or establish other employment conditions, they do not obviate his authority to fill that position without Council approval. Under 7-3-212, a mayor may appoint an administrative assistant without the approval of the City Council. 41 A.G. Op. 45 (1986).

7-3-216. Administrative supervision and control.

Attorney General's Opinions

Administrative Assistant — Mayoral Appointment: Although the City Council's contract and budget approval powers may affect the mayor's practical ability to provide a particular compensation amount to an administrative assistant or establish other employment conditions, they do not obviate his authority to fill that position without Council approval. Under 7-3-212, a mayor may appoint an administrative assistant without the approval of the City Council. 41 A.G. Op. 45 (1986).

7-3-219. Type of election.

Compiler's Comments

1983 Amendment: In (1) and (2), after "basis" deleted "as provided in this title".

Attorney General's Opinions

Provision Requiring Partisan Elections to Govern: Section 7-3-113 provides that if a local government organized under the general statutes authorizing the mayor-council form of government did not adopt a new form of government, then it is governed by certain statutes after May 2, 1977, including this section, which requires partisan elections. Failure of such local government to adopt a new form of government binds it to the features of the existing government, including partisan elections; however, city officials elected on a nonpartisan basis are considered de facto public officials, and their official acts are regarded as legal. Local

elections must be conducted on a partisan basis in the future unless the voters adopt a different plan of government. 41 A.G. Op. 37 (1985).

Part 3
Commission-Manager Government

Part Compiler's Comments

Severability: Section 2, Ch. 344, L. 1975, was a severability clause.

Effective Date: Section 3, Ch. 344, L. 1975, provided that the effective date of the act was May 2, 1977.

7-3-304. Duties of manager.

Attorney General's Opinions

Appointment of Heads of City Departments by City Council Allowed: The city council in a council-manager form of government may adopt an ordinance pursuant to this section authorizing the city council rather than the city manager to appoint the heads of city departments. 45 A.G. Op. 1 (1993).

7-3-305. Employees of commission-manager government.

Attorney General's Opinions

Appointment of Heads of City Departments by City Council Allowed: The city council in a council-manager form of government may adopt an ordinance pursuant to 7-3-304 authorizing the city council rather than the city manager to appoint the heads of city departments. 45 A.G. Op. 1 (1993).

7-3-314. Type of election.

Compiler's Comments

1983 Amendment: In (1) and (2), after "basis" deleted "as provided in this title".

7-3-317. Size of commission and community councils.

Attorney General's Opinions

Increase in Number of City Commissioners — Study Commission Recommendation: A local government study commission may not recommend that the number of City Commissioners be increased from five to seven unless it does so as part of a recommendation to adopt a form of government that permits a seven-member City Commission. 41 A.G. Op. 48 (1986).

Part 4
Commission Government

Part Compiler's Comments

Severability: Section 2, Ch. 344, L. 1975, was a severability clause.

Effective Date: Section 3, Ch. 344, L. 1975, provided that the effective date of the act was May 2, 1977.

Part Case Notes

County Government in Transition Period After Vote to Change Form of Government — Not Empowered to Order Special Election to Further Change: In November 1982, the voters in a county voted to change the county form of government from a charter government, provided for in Title 7, ch. 3, part 7, to a commission government, provided for in Title 7, ch. 3, part 4. The new commission government was to take effect in June 1983, after election of new county officers. During the transition period, the existing charter government, in response to a petition filed under 7-3-125, authorized a special election on the question of returning to a charter government. This special election was then challenged in an action for a Writ of Prohibition under Title 27, ch. 27. The Supreme Court upheld the District Court's issuance of the Writ, ruling that placing on the ballot the question of changing the form of county government was in excess of the charter government's jurisdiction. Allen v. Madison County Comm'n, 211 M 79, 684 P2d 1095, 41 St. Rep. 1226 (1984).

7-3-401. Commission form.

Attorney General's Opinions

Board of County Commissioners — Right to Set Speed Limits: A Board of County Commissioners, constituted in a commission form of government, may alter otherwise statutorily established speed limits by compliance with 61-8-310. It may further adopt traffic

ordinances to the extent permitted under 61-12-101(14), and any such ordinances may include penalty provisions. 40 A.G. Op. 51 (1984).

7-3-413. Type of election.

Compiler's Comments

1983 Amendment: In (1) and (2), after "basis" deleted "as provided in this title".

7-3-418. Terms of elected officials.

Attorney General's Opinions

Recommendation of Shorter Terms of Office by Local Government Study Commission: A local government study commission may recommend that terms of office for County Commissioners be less than 6 years if the county has adopted the statutory county "commission form" of government. A local government study commission may not recommend that the terms of office for County Commissioners be less than 6 years if the county has retained the form of government organized under the statutes listed in 7-3-111. 41 A.G. Op. 51 (1986).

Part 5
Commission-Chairman Government

Part Compiler's Comments

Severability: Section 2, Ch. 344, L. 1975, was a severability clause.

Effective Date: Section 3, Ch. 344, L. 1975, provided that the effective date of the act was May 2, 1977.

7-3-513. Type of election.

Compiler's Comments

1983 Amendment: In (1) and (2), after "basis" deleted "as provided in this title".

Part 6
Town Meeting Government

Part Compiler's Comments

Severability: Section 2, Ch. 344, L. 1975, was a severability clause.

Effective Date: Section 3, Ch. 344, L. 1975, provided that the effective date of the act was May 2, 1977.

7-3-601. Town meeting form.

Compiler's Comments

1987 Amendment: Near beginning of (2), after "incorporated cities", inserted "of less than 2,000 persons and incorporated".

7-3-604. Meeting agenda.

Compiler's Comments

2001 Amendment: Chapter 354 in first sentence at end substituted "publish the notice as provided in 7-1-4127" for "post notice at least 2 weeks prior to the convening of all annual and special town meetings"; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

Inclusion or exclusion of first and last days in computing the time for performance of an act or event which must take place a certain number of days before a known future date. 98 ALR 2d 1331.

Part 7
Charter Government

Part Compiler's Comments

Severability: Section 2, Ch. 344, L. 1975, was a severability clause.

Effective Date: Section 3, Ch. 344, L. 1975, provided that the effective date of the act was May 2, 1977.

Part Case Notes

Establishment of Refuse Disposal District by County With Self-Governing Power: Title 7, ch. 13, part 2, is not mandatory upon a county charter form of government when it establishes a refuse disposal district and system. That part applies to the establishment of a refuse disposal

district by governments that are of general power status, not those with self-government status. Title 7, ch. 13, part 2, does not direct or require a local government to provide a service within the meaning of 7-1-114. Clopton v. Madison County Comm'n, 216 M 335, 701 P2d 347, 42 St. Rep. 851 (1985).

7-3-701. Charter form.

Case Notes

Suspension of Firefighters — All Cities Required to Present Charges to City Council for Hearing — Suspension Procedure Not Part of "Structure" of City Government Under Applicable Definitions — Statute Not Superseded by Charter: Elsenpeter, a Billings firefighter, was suspended from duty by the Billings fire chief. The firefighters' union filed a lawsuit in which the union contended that the suspension procedure used by the city was unlawful because the charges against Elsenpeter were not presented to the Billings City Council for hearing pursuant to 7-33-4124. The city contended that the suspension procedure that it used is part of the structure and organization of the city under its charter and that, pursuant to Art. XI, sec. 5, Mont. Const., and subsection (2) of this section, which allow the structure of a chartered city government to supersede statutory requirements, the city may override the statutory requirements for hearing contained in 7-33-4124 because the definition of "structure" contained in 7-1-4121(24) is the definition that should apply. The Supreme Court held that in as much as the definitions in 7-1-4121 are, by the terms of that section, limited in their application to 7-1-4121 through 7-1-4149, the dictionary definition of "structure" is the definition that applies. Because the dictionary definition of structure was narrower, the Supreme Court held that the disciplinary suspension procedure used by the city was not part of the "structure" of city government. Therefore, the Supreme Court held that the statutory procedure contained in 7-33-4124, requiring presentment of the charges to the City Council, was not superseded by the city charter and had to be followed for the purposes of the suspension of Elsenpeter. Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

7-3-705. Officials and personnel.

Attorney General's Opinions

Combination of Legislative and Executive Powers Under Charter County Government: Under this section, a charter may provide that the executive and administrative functions of the government will be performed by one or more members of the legislative body, which clearly allows the entire legislative body or commission to perform the executive functions. Accordingly, a county charter may provide that the legislative body or commission will perform the executive functions in addition to its legislative duties. The language of the charter determines whether the executive functions are performed by one or all of the members of the legislative body or commission. 46 A.G. Op. 14 (1996).

7-3-706. Effective date.

Case Notes

Charter of Consolidated City-County Government — Effective Date: Where the charter of a consolidated city-county government had been adopted by the voters of the city and county on November 2, 1976, and the charter provided by its own terms that it would become effective on May 2, 1977, the District Court properly held that the charter did not become effective upon the date of approval by the voters, as there is nothing in the charter to indicate an effective date other than May 2, 1977, and no provisions in the charter were effective until that date. Butler v. Local 2033 Am. Fed'n of County Employees, 186 M 28, 606 P2d 141, 37 St. Rep. 168 (1980).

7-3-708. Limitations on charter provisions.

Case Notes

Suspension of Firefighters — All Cities Required to Present Charges to City Council for Hearing — Suspension Procedure Not Part of "Structure" of City Government Under Applicable Definitions — Statute Not Superseded by Charter: Elsenpeter, a Billings firefighter, was suspended from duty by the Billings fire chief. The firefighters' union filed a lawsuit in which the union contended that the suspension procedure used by the city was unlawful because the charges against Elsenpeter were not presented to the Billings City Council for hearing pursuant to 7-33-4124. The city contended that the suspension procedure that it used is part of the structure and organization of the city under its charter and that, pursuant to Art. XI, sec. 5, Mont. Const., and 7-3-701(2), which allow the structure of a chartered city government to supersede statutory requirements, the city may override the statutory requirements for hearing

contained in 7-33-4124 because the definition of "structure" contained in 7-1-4121(24) is the definition that should apply. The Supreme Court held that in as much as the definitions in 7-1-4121 are, by the terms of that section, limited in their application to 7-1-4121 through 7-1-4149, the dictionary definition of "structure" is the definition that applies. Because the dictionary definition of structure was narrower, the Supreme Court held that the disciplinary suspension procedure used by the city was not part of the "structure" of city government. Therefore, the Supreme Court held that the statutory procedure contained in 7-33-4124, requiring presentment of the charges to the City Council, was not superseded by the city charter and had to be followed for the purposes of the suspension of Elsenpeter. Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Part 11
City-County Consolidation — Option 1

Part Compiler's Comments

Extension of Act: Section 12, Ch. 477, L. 1977, exempted 16-5115.3, R.C.M. 1947, which was recodified to create this part, from the automatic termination provision of sec. 23, Ch. 513, L. 1975.

7-3-1103. Effect of consolidation.

Case Notes

Charter of Consolidated City-County Government — Effective Date: Where the charter of a consolidated city-county government had been adopted by the voters of the city and county on November 2, 1976, and the charter provided by its own terms that it would become effective on May 2, 1977, the District Court properly held that the charter did not become effective upon the date of approval by the voters, as there is nothing in the charter to indicate an effective date other than May 2, 1977, and no provisions in the charter were effective until that date. Butler v. Local 2033 Am. Fed'n of County Employees, 186 M 28, 606 P2d 141, 37 St. Rep. 168 (1980).

7-3-1104. General powers of consolidated local governments.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Attorney General's Opinions

Authority of City-County Government to Acquire and Operate Electric and Natural Gas Utilities: A consolidated government with self-government powers, such as the city and county of Butte-Silver Bow, has the authority to acquire and operate electric and natural gas utilities both within and outside the boundaries of the local government unit. The Attorney General determined that Butte-Silver Bow was specifically authorized to do so after considering the local government's charter, constitutional ramifications, and whether the exercise of that authority was prohibited by local government law or other statutes applicable to self-government units and was consistent with state provisions in areas affirmatively subjected to state control, as described in 7-1-113. 48 A.G. Op. 14 (2000). See also State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100 (1981), D&F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977 (1986), and Lechner v. Billings, 244 M 195, 797 P2d 191 (1990).

7-3-1105. Rules, ordinances, and resolutions of consolidated unit.

Compiler's Comments

2003 Amendment: Chapter 466 inserted (2) allowing consolidated governments to adopt plans to control, remove, and restrict game animals within boundaries of consolidated government that was originally a city or town; and made minor changes in style. Amendment effective April 23, 2003.

Saving Clause: Section 7, Ch. 466, L. 2003, was a saving clause.

Part 12
City-County Consolidation — Option 2

7-3-1201. Authorization for consolidated city-county government.

Collateral References

Municipal Corporations *key* 39.
62 C.J.S. Municipal Corporations §85, et seq.

7-3-1202. Nature of consolidated government.

Compiler's Comments

Purpose for Representation in Legislature: Article VI, sec. 5, 1889 Mont. Const. (repealed effective Dec. 6, 1966), provided that each county was entitled to at least one state Senator. There is no similar provision in the 1972 Montana Constitution.

7-3-1203. General powers of consolidated government.

Collateral References

Municipal Corporations *key* 39, 57.
62 C.J.S. Municipal Corporations §§85, et seq., 106.

7-3-1204. Petition for city-county consolidated government — election required.

Case Notes

Determination of Sufficiency of Petition: The question of the sufficiency of a petition, filed under subsection (1) (prior to amendment by sec. 3, Ch. 262, L. 1979), requesting the calling of a county election submitting the proposition of the consolidation of the county and all cities and towns into one municipal corporation, is to be determined by the County Clerk and not the Board of County Commissioners, and when he certifies the petition as sufficient, it is the clear duty of the Board to order an election unless the petition is void on its face. State ex rel. Freeze v. Taylor, 90 M 439, 4 P2d 479 (1931).

7-3-1205. Certification of petition — board action.

Compiler's Comments

1995 Amendment: Chapter 387 in (2), at end of first sentence, deleted "shall be submitted to the registered electors of the county", at end of second sentence substituted "in conjunction with the next regular or primary election" for "which shall be not less than 90 or more than 120 days from and after the day when such order is made, and", and in third sentence, after "shall", deleted "immediately upon making such order"; and made minor changes in style.

7-3-1207. Conduct of election.

Collateral References

Municipal Corporations *key* 129.

7-3-1208. Election of commission upon favorable vote.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), in first sentence near middle after "held", inserted "in conjunction with the next regular or primary election" and in second sentence, after "held", deleted "which shall be not less than 90 or more than 120 days after the day when such order is made; provided, however, that if any general election is to be held in such county after 3 months but within 6 months from the date of the making of such order, then such order shall require such special election to be held at the same time as such general election"; and made minor changes in style.

7-3-1216. Term of office of commission members.

Compiler's Comments

1985 Amendment: In (1) substituted "the first Monday of January" for "July 1"; and in two places in (2) substituted "when their successors are elected and qualified" for "on June 30".

7-3-1218. Meetings of commission.

Compiler's Comments

Composite Section: This section was amended by Ch. 262 and Ch. 571, L. 1979, and a composite section was prepared by the Code Commissioner, 1979. Chapter 262 was a Code Commissioner bill and was not intended to make substantive changes in the law. Consequently a

conflict of language in subsection (1) between Ch. 262 and Ch. 571 has been resolved in favor of the language used in Ch. 571.

Collateral References

Attorney-client exception under state law making proceedings by public bodies open to the public. 34 ALR 5th 591.

7-3-1219. Organization and officers of commission.

Compiler's Comments

1985 Amendment: In (1) substituted "the first Monday of January" for "July 1".

7-3-1222. Procedure to enact ordinances and resolutions.

Compiler's Comments

2003 Amendment: Chapter 466 inserted (6) allowing consolidated governments to adopt plans to control, remove, and restrict game animals within boundaries of consolidated government that was originally a city or town; and made minor changes in style. Amendment effective April 23, 2003.

Saving Clause: Section 7, Ch. 466, L. 2003, was a saving clause.

7-3-1227. Petition for initiative.

Compiler's Comments

1999 Amendment: Chapter 584 in (1) substituted "making an appropriation" for "making a tax levy or appropriation"; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-3-1229. Submission of initiative measure to electors.

Compiler's Comments

1995 Amendment: Chapter 387 in (2), at beginning of second sentence, deleted "If a municipal election is to be held within 6 months but more than 90 days after the receipt of the clerk's certificate by the commission", deleted former third and fourth sentences that read: "If no such election is to be held within the time aforesaid, the commission may provide for submitting the proposed ordinance to the electors at a special election to be held not sooner than 90 days after receipt of the clerk's certificate. If no municipal election be held within 6 months as aforesaid and the commission does not provide for a special election, the proposed ordinance shall be submitted to the electors at the first election held after the expiration of such 6 months", and at beginning of third sentence, after "If", deleted "when submitted to the electors"; and made minor changes in style.

7-3-1231. Action on referendum petition.

Compiler's Comments

1995 Amendment: Chapter 387 in (2), in second sentence before "election", substituted "regular or primary" for "municipal" and after "election" deleted "held not less than 90 days after such final vote by the commission" and deleted former third sentence that read: "The commission, by vote of not less than two-thirds of its members, may submit the ordinance or part thereof to the electors at a special election to be held not sooner than the time aforesaid"; and made minor changes in style.

7-3-1243. Appointments by manager.

Collateral References

Municipal Corporations *key* 215.

62 C.J.S. Municipal Corporations §700, et seq.

7-3-1244. Removal of appointees.

Collateral References

Municipal Corporations *key* 218(1), et seq.

62 C.J.S. Municipal Corporations §734, et seq.

Removal of public officers for misconduct during previous term. 42 ALR 3d 691.

7-3-1258. Official bonds.

Collateral References

Public officer's bond as subject to forfeiture for malfeasance in office. 4 ALR 2d 1348.

Part 13
City-County Consolidation
Option 2 — Continued

7-3-1301. Department of finance.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (1), after "special assessments", deleted "and the assessment of property for taxation"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

7-3-1309. Division of assessment.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in first sentence of (1), in two places, substituted "may" for "shall" and in second sentence, near beginning, substituted "division of assessment has the powers of and shall perform" for "assessor and his deputies shall have the powers, qualify in the manner, and perform" and near end, after "assessors", deleted "and deputy assessors"; in (2), near beginning, substituted "division of assessment is" for "assessor shall also be"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1983 Amendment: In (2), after "owners" inserted "and purchasers of property under contracts for deed".

7-3-1310. Limitation on tax levy.

Compiler's Comments

2001 Amendment: Chapter 574 in (2) at beginning inserted "Subject to 15-10-420"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 near beginning in (1) inserted reference to 15-10-420 and after "expenses" deleted "including salaries otherwise unprovided for, in excess of the maximum levies prescribed by law for general fund purposes in the county and the cities and towns which have been consolidated into a single government"; in (2) deleted former first sentence that read: "The tax limit provided by subsection (1) shall apply only to taxes for the purposes therein specified" and substituted second sentence concerning levy for debt for former sentence that read: "Taxes required by this part or part 12 to be levied on account of the debt of the municipality or any district thereof and special taxes authorized by this part or part 12 or by the general laws of the state shall not be affected by such limits, nor shall such taxes be considered in determining the limits of taxation fixed by subsection (1)"; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-3-1311. Authority for special taxes and special service districts.

Compiler's Comments

2001 Amendment: Chapter 574 in (2) deleted former last sentence that read: "An additional levy under this section may not be more than 20 mills." Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1) and (2) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-3-1313. Special taxing districts for indebtedness existing prior to consolidation.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) at beginning of second sentence and in (2) at beginning inserted "Subject to 15-10-420"; and made minor changes in style. Amendment effective July 1, 2001.

7-3-1316. Designation of depository banks.

Collateral References

Depositaries *key* 6, 7.
26A C.J.S. Depositaries §89.

7-3-1321. Authorization to incur indebtedness — limitation.

Compiler's Comments

2001 Amendment: Chapter 29 in (2) near middle of first sentence after "aggregate" substituted "that exceeds 1.51% of the total assessed value of taxable property, determined as provided in 15-8-111, within the municipality" for "exceeding 28% of the taxable value of the taxable property therein"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1981 Amendment: Changed "The municipality shall not" to "The municipality may not" at the beginning of (2); and substituted "exceeding 28% of the taxable value" for "exceeding 5% of the value" in the middle of (2).

Validation: Section 64, Ch. 614, L. 1981, provided: "Notwithstanding any provisions of this act, any outstanding indebtedness or bond issue on January 1, 1982, of any governmental subdivision is not invalidated because of any changes in the taxable valuation of the subdivision due to removal of automobiles and trucks having a rated capacity of three-quarters of a ton or less from the tax base."

Effect of 1981 Amendment: The primary purpose of Ch. 614, L. 1981, was to replace the system of taxation of automobiles and light trucks with a fee system. With the adoption of the fee system, automobiles and light trucks are no longer taxable property. The resulting loss of taxable valuation has a direct effect on the amount of indebtedness a political subdivision can incur. Thus it was necessary in Ch. 614 to increase the percentage of taxable valuation used as a limitation on indebtedness to offset the loss of taxable valuation attributable to automobiles and light trucks.

Collateral References

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes. 30 ALR 2d 903.

7-3-1332. Public works and improvements.

Compiler's Comments

1983 Amendment: Substituted "maintenance districts" for "sprinkling districts" in three places; and at end of (2), moved "as provided by the laws of the state" from before to after "for cities and towns".

7-3-1343. Police department.

Compiler's Comments

1989 Amendment: In three places in (2) changed "patrolmen" to "patrol officers"; and in (3) changed "patrolman" to "patrol officer".

Collateral References

Municipal Corporations *key* 176(3) through (5), 180(1), et seq.
62 C.J.S. Municipal Corporations §563.

7-3-1344. Prior rights of law enforcement officers.

Compiler's Comments

1995 Amendment: Chapter 93 in (1), after "county", inserted "or a deputy sheriff employed by the county sheriff's department"; and made minor changes in style.

7-3-1345. Fire department.

Collateral References

Municipal Corporations *key* 194, et seq.
62 C.J.S. Municipal Corporations §591, et seq.

7-3-1346. Department of health.

Collateral References

Municipal Corporations *key* 177.
62 C.J.S. Municipal Corporations §651, et seq.

Part 41
Strong Mayor Municipal Government

7-3-4101. Strong mayor form of municipal government.

Compiler's Comments

1997 Amendment: Chapter 485 in (2), after "7-4-4303", substituted "7-4-4305" for "through 7-4-4306"; and made minor changes in style.

Law Review Articles

Monitoring the Mayor: Will the New Information Technologies Make Local Officials More Responsible?, Ellickson, 32 Urb. Law. 391 (2000).

Collateral References

Libel and slander: public officer's privilege as to statements made in connection with hiring and discharge. 26 ALR 3d 492.
Institutional Powers and Mayoral Leadership, Svara, St. & Loc. Gov't Rev. (1995).

Part 42
Municipal Commission Government

7-3-4205. City to be governed by mayor and councilmen.

Collateral References

Abstention from voting of member of municipal council present at session as affecting requisite voting majority. 63 ALR 3d 1072.

7-3-4208. Petition to organize under commission form — election required.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), near beginning of first sentence after "petition", inserted "on the question of reorganization under this part", near middle, after "election", deleted "praying that the question of reorganization under this part be submitted to the qualified electors of such city", after "shall" deleted "thereupon and within 30 days thereafter", and at end inserted "in conjunction with the next regular or primary election"; in (2), after "held", deleted "which must be no less than 75 or more than 90 days from the date of the city council order"; and made minor changes in style.

1985 Amendment: At end of (2) substituted "no less than 75 or more than 90 days from the date of the city council order" for "within 90 days from the date of the filing of such petition".

7-3-4213. Election for first city officers.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), near beginning of first sentence after "favor of", substituted "reorganization" for "such proposition" and in second sentence, after "be", substituted "held in conjunction with a regular or primary election" for "no less than 75 and no more than 90 days after the making of said order, and"; and made minor changes in style.

1985 Amendment: In (1) in second sentence, substituted "no less than 75 and no more than 90 days" for "within 90 days".

7-3-4220. Council meetings.

Collateral References

Attorney-client exception under state law making proceedings by public bodies open to the public. 34 ALR 5th 591.

7-3-4221. Conduct of business.

Attorney General's Opinions

Town With Weak-Mayor Government Not Authorized to Adopt Statutory Quorum Provisions: A town with a weak-mayor form of municipal government does not have authority to adopt by ordinance the quorum provisions of this section. Those provisions would conflict with 7-5-4121, which states that a majority of the members of the town council constitute a quorum and does not include the mayor as a member of the town council for the determination. 47 A.G. Op. 20 (1998).

7-3-4222. Adoption of ordinances.

Compiler's Comments

1995 Amendment: Chapter 387 in (2), at end of third sentence after "municipal", substituted "election held in conjunction with a regular or primary election" for "election to be called for that purpose"; and made minor changes in style.

1981 Amendment: Deleted references to the provisions of 7-3-4224; made minor changes in grammar, punctuation, and phraseology.

Case Notes

Application to Commission City: The fact that a city has adopted the commission form of government does not render an ordinance or resolution, enacted as required in subsection (1), any the less indispensable as a part of the proceedings for the creation of an improvement district. Shapard v. Missoula, 49 M 269, 141 P 544 (1914).

7-3-4223. Granting of franchises.

Compiler's Comments

1995 Amendment: Chapter 387 near end, after "special election", inserted "held in conjunction with a regular or primary election"; and made minor changes in style.

7-3-4227. Abandonment of commission form.

Compiler's Comments

1985 Amendment: In (2) at end of lead-in clause, substituted "75 days" for "60 days".

7-3-4252. Powers of council.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 after "attorney" deleted "assessor"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

7-3-4256. Control of conflict of interest.

Case Notes

Disqualified Commissioner — Effect on Proceedings: When a City Commissioner who was alleged to have a financial interest in the district parking participated in voting on the special improvement district in question, the entire proceedings were not void but voidable by the City Commission. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

7-3-4259. Discharge of employees.

Case Notes

Removal of Chief of Fire Department: The chief of a fire department of a city operating under the commission form of government was removed by the Council, his name, however, being restored to the roll of members, thus entitling him to the safeguards afforded him as such member under the civil service rules of 7-33-4121 through 7-33-4131. He later was suspended under this section, but a hearing on his appeal was not accorded him. Held, that failure to hear his appeal rendered the order of suspension of no effect, automatically reinstated him, and entitled him to compensation during the period of his suspension. State ex rel. Daly v. Dryburgh, 62 M 36, 203 P 508 (1921).

Removal of Police Officer:

A police officer may be suspended or discharged for neglect of duty or disobedience of orders by the Chief of Police under this section, subject to review by the Superintendent of the Police Department, from whose order of approval the accused may appeal to the City Council or the Police Commission, under 7-32-4155 through 7-32-4164, upon charges filed with it, a copy of which must be furnished to him. State ex rel. Lease v. Wilkinson, 59 M 327, 196 P 878 (1921).

Where an acting Chief of Police merely recommended to the Council that a police officer be removed from office but did not actually suspend or discharge him, in conformity with this section, there was no order from which he could appeal, and his attempted appeal was ineffectual for any purpose. State ex rel. Lease v. Wilkinson, 59 M 327, 196 P 878 (1921).

7-3-4264. Applicability of civil service provisions.

Compiler's Comments

1987 Amendment: Near beginning of section deleted reference to 7-3-4263.

7-3-4265. Violations of civil service provisions.

Compiler's Comments

1987 Amendment: In (3) deleted reference to 7-3-4263, inserted "or this section", and substituted "grounds" for "ground".

Part 43
Municipal Commission-Manager Government

Part Compiler's Comments

Sections Not Codified: Section 11-3325, R.C.M. 1947, relating to municipal officers at the time Ch. 152, L. 1917, went into effect, was not codified. It is still valid law. It may be referred to as sec. 112, Ch. 152, L. 1917.

Section 11-3327, R.C.M. 1947, a saving clause, was not codified. This section has not been repealed and is still valid law. It may be referred to as sec. 114, Ch. 152, L. 1917.

7-3-4301. Authorization for commission-manager form of municipal government.

Attorney General's Opinions

Vacation of Street by Mayor-Council Government — Legal Effect on City's Interest in Street: Under 7-14-4114, a municipality has the authority to close all or part of a street to through traffic without giving up its legal interest in the street or to vacate all or part of the street and revoke its legal interest in it. A municipality with a mayor-council form of government is bound by the procedures in 7-14-4114 rather than by 7-3-4448, which applies only to commission-manager forms of government, when it seeks to discontinue, close, or vacate a street. The choice between vacating a street and closing a street is a matter for the discretion of the municipal officers of a mayor-council form of government. 46 A.G. Op. 4 (1995), clarifying Wynia v. Great Falls, 183 M 458, 600 P2d 802 (1979).

7-3-4305. Petition to organize under commission-manager form — election required.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), near end of first sentence after "shall", deleted "within 30 days" and after "held" inserted "in conjunction with a regular or primary election"; in (2), at end after "held", deleted "which may not be less than 75 or more than 90 days from the date of the order of the council"; and made minor changes in style.

1993 Amendment: Chapter 319 near beginning of (1) decreased percentage of necessary petition signatures from 25% to 15% of qualified electors; and made minor changes in style.

1985 Amendment: At end of (2) substituted "no less than 75 and no more than 90 days from the date of the order of the council" for "within 90 days from the date of filing of such petition".

Case Notes

Filing: Filing petition seeking to reorganize city government with City Clerk is equivalent to filing with the City Council. The city must hold the election petitioned for within 90 days (see 1995 amendment) of initial filing with City Clerk. State ex rel. Espelin v. Great Falls, 160 M 135, 500 P2d 1194 (1972).

Attorney General's Opinions

Qualified Electors — Petitions: Petitions for a city election for reorganization under this section require the signatures of presently qualified electors totally not less than 25% of the number of qualified electors registered for the last preceding general municipal election. 34 A.G. Op. 49 (1972).

7-3-4310. Special election for municipal officers.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), in first sentence after "favor of", substituted "reorganization" for "such proposition" and after "held" inserted "in conjunction with a regular or

primary election" and in second sentence, at end, deleted "which must be no less than 75 or more than 90 days after the making of such order"; in (3) substituted "election must be in conjunction with a regular or primary election held" for "primary election shall be at least 85 days"; and made minor changes in style.

1985 Amendment: In (1) in second sentence, substituted "no less than 75 or more than 90 days" for "within 90 days"; and in (3) substituted "85 days" for "30 days".

1981 Amendment: In (3), substituted "7-3-4341 are" for "[7-3-4345 through 7-3-4347] and [7-3-4349(1)] are specifically"; deleted "The provisions of [7-3-4350] shall be applicable to subsection (2)" from the end of (3).

7-3-4311. Procedure for multimunicipality organization.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), near beginning after "unincorporated", deleted "which are situated in such proximity or location with reference to each other as to make single municipal control necessary or desirable, shall" and at end inserted "in conjunction with a regular or primary election"; in (2), in second sentence after "held", deleted "which must be no less than 75 or more than 90 days from the date of filing such petition"; in (3), in fourth sentence, inserted "must be held in conjunction with a regular or primary election and"; and made minor changes in style.

1985 Amendment: In (2) in second sentence, substituted "no less than 75 or more than 90 days" for "within 90 days".

7-3-4312. Effect of organization of communities into single municipal district.

Compiler's Comments

2001 Amendment: Chapter 574 in (3) near end after "city or town and" inserted "subject to 15-10-420"; and made minor changes in style. Amendment effective July 1, 2001.

7-3-4313. Powers of municipalities under commission-manager plan.

Case Notes

Punishment of Ordinance Violations: The powers granted by this section to a city operating under the commission-manager plan, with respect to punishments of violations of its ordinances, are the same as and no greater than those granted to cities generally. Bozeman v. Merrell, 81 M 19, 261 P 876 (1927).

Law Review Articles

Act Locally: Municipal Enforcement of Environmental Law, Lehner, 12 Stan. Envtl. L.J. 50 (1993).

When First Amendment Principles and Local Zoning Regulations Collide, Brody, 12 N. Ill. U.L. Rev. 671 (1992).

Negligence, Nuisance and Affirmative Duties of Action, Markesinis, 105 Law. Q. Rev. 104 (1989).

Public Nuisance—A Critical Examination, Spencer, 48 Cambridge L.J. 55 (1989).

Reflected Sunlight is a Nuisance, Alterman, 18 Envtl. L. 321 (1988).

Collateral References

62 C.J.S. Municipal Corporations §210, et seq.

Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses. 8 ALR 4th 130.

Improving City Managers' Leadership, Whitaker & Jenne, St. & Loc. Gov't Rev. (1995).

Evaluating City Manager Performance: Pennsylvania Managers Report on Methods Their Councils Use, Wheeland, St. & Loc. Gov't Rev. (1994).

7-3-4314. Composition and general authority of commission.

Attorney General's Opinions

Increase in Number of City Commissioners — Study Commission Recommendation: A local government study commission may not recommend that the number of City Commissioners be increased from five to seven unless it does so as part of a recommendation to adopt a form of government that permits a seven-member City Commission. 41 A.G. Op. 48 (1986).

7-3-4317. Vacancies.

Compiler's Comments

1985 Amendment: Substituted "period until the next general election and until a successor is elected and qualified" for "remainder of the unexpired term".

Applicability: Section 3, Ch. 175, L. 1985, provided that the act applies to vacancies occurring on or after January 1, 1986.

7-3-4320. Role of mayor.

Case Notes

City Manager Chief Executive Under Commissioner-Manager Form of Government: The city manager filed an order confirming the recommendation of the police commission directing the permanent discharge of a police officer. A few days later, the Mayor signed an order to retain the police officer subject to certain conditions and limitations. The city filed a declaratory judgment action appealing the decision of the Mayor. The District Court held that under 7-32-4153 the city manager, rather than the Mayor, was the proper party to review the decision of the police commission. The Supreme Court affirmed the District Court decision and held that under the commissioner-manager form of government, the city manager, not the Mayor, is the chief executive with power to affirm, modify, or veto decisions of the police commission. Raynes v. Great Falls, 215 M 114, 696 P2d 423, 42 St. Rep. 224 (1985).

7-3-4323. Conduct of commission business.

Collateral References

62 C.J.S. Municipal Corporations §385, et seq.

7-3-4324. Procedure to enact ordinance or resolution.

Case Notes

Resolution Creating Special Improvement District — Not Subject to Referendum: A resolution creating a municipal special improvement district that encompasses less area than the municipal limits is not subject to referendum because the resolution affects only the people within the improvement district rather than the people of the municipality as a whole. The Supreme Court further held that the resolution creating a special improvement district is part of an administrative procedure, not a legislative action subject to referendum. Shelby v. Sandholm, 208 M 77, 676 P2d 178, 41 St. Rep. 186 (1984), distinguished in The Greens at Fort Missoula, LLC v. Missoula, 271 M 398, 897 P2d 1078, 52 St. Rep. 501 (1995).

Collateral References

62 C.J.S. Municipal Corporations §411, et seq.

7-3-4325. Effective date of ordinance or resolution.

Compiler's Comments

1993 Amendment: Chapter 309 in (1), after "ordinances", deleted "and resolutions"; inserted (2) providing that resolutions are effective immediately unless otherwise specified; in (3), after "vote", inserted "of two-thirds"; and made minor changes in style.

7-3-4326. Emergency measures.

Case Notes

Disqualified Commissioner — Effect on Proceedings: When a City Commissioner who was alleged to have a financial interest in the district parking participated in voting on the special improvement district in question, the entire proceedings were not void but voidable by the City Commission. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

Collateral References

Conclusiveness of declaration of emergency in ordinance. 35 ALR 2d 586.

7-3-4327. Petition for initiative.

Compiler's Comments

1993 Amendment: Chapter 319 at end of first sentence of (1) substituted "15% of the total number of electors registered at the last general municipal election" for "10% of the total number of registered voters in the municipality"; and made minor changes in style.

Clause Not Codified: A part of section 11-3237, R.C.M. 1947, relating to the effective date of an ordinance, was not codified because it is redundant with 7-3-4332(1). That clause has not been

repealed and is still valid law. It may be referred to as sec. 38, Ch. 152, L. 1917. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Collateral References

62 C.J.S. Municipal Corporations §449, et seq.

7-3-4363. Powers and duties of city manager.

Case Notes

City Manager Chief Executive Under Commissioner-Manager Form of Government: The city manager filed an order confirming the recommendation of the police commission directing the permanent discharge of a police officer. A few days later, the Mayor signed an order to retain the police officer subject to certain conditions and limitations. The city filed a declaratory judgment action appealing the decision of the Mayor. The District Court held that under 7-32-4153 the city manager, rather than the Mayor, was the proper party to review the decision of the police commission. The Supreme Court affirmed the District Court decision and held that under the commissioner-manager form of government, the city manager, not the Mayor, is the chief executive with power to affirm, modify, or veto decisions of the police commission. Raynes v. Great Falls, 215 M 114, 696 P2d 423, 42 St. Rep. 224 (1985).

Attorney General's Opinions

Appointment of Heads of City Departments by City Council Allowed: The city council in a council-manager form of government may adopt an ordinance pursuant to 7-3-304 authorizing the city council rather than the city manager to appoint the heads of city departments. 45 A.G. Op. 1 (1993).

7-3-4367. Control of conflict of interest.

Case Notes

Disqualified Commissioner — Effect on Proceedings: When a City Commissioner who was alleged to have a financial interest in the district parking participated in voting on the special improvement district in question, the entire proceedings were not void but voidable by the City Commission. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

Part 44
Municipal Commission-Manager Government
Continued

7-3-4402. Appointment of department directors.

Attorney General's Opinions

Appointment of Heads of City Departments by City Council Allowed: The city council in a council-manager form of government may adopt an ordinance pursuant to 7-3-304 authorizing the city council rather than the city manager to appoint the heads of city departments. 45 A.G. Op. 1 (1993).

7-3-4405. Establishment of civil service board.

Collateral References

62 C.J.S. Municipal Corporations §711, et seq.

7-3-4407. Classification of civil service.

Collateral References

Municipal Corporations *key* 217(3).

62 C.J.S. Municipal Corporations §712.

7-3-4415. Prohibition on discrimination in employment.

Collateral References

Circumstances which warrant finding of constructive discharge in cases under Age Discrimination in Employment Act (29 USCS §§621 et seq.). 93 ALR Fed. 10.

Religion, establishment and free exercise of religion clauses of Federal Constitution's First Amendment as applied to employment — Supreme Court cases. 86 L. Ed. 2d 797.

7-3-4417. Fixing compensation.

Collateral References

62 C.J.S. Municipal Corporations §720, et seq.

7-3-4431. Department of finance.

Compiler's Comments

1983 Amendment: In (3), after "owners" inserted "and purchasers of property under contracts for deed".

7-3-4432. Accounting procedures.

Compiler's Comments

2001 Amendment: Chapter 278 inserted second sentence regarding accounting procedures; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

7-3-4441. Department of public service.

Collateral References

62 C.J.S. Municipal Corporations §556, et seq.

7-3-4444. Supervision of plats.

Case Notes

Authority of Board of County Commissioners to Approve Subdivisions Within Three-Mile Area Outside Corporate Limits: The city of Bozeman sought a reversal of 43 A.G. Op. 26 (1989), in which the Attorney General held that the Board of County Commissioners has final authority to approve subdivisions that are within the 3-mile area immediately outside the corporate limits of the city when the city has a commission-manager form of government. Bozeman asserted that 76-2-312 was not a limitation on the authority of commission-manager governments but rather an acknowledgement by the Legislature that such municipal governments already had extraterritorial subdivision authority under this section and that 76-2-312 exempted cities with a commission-manager form of government from procedural requirements that other forms of municipal government have to follow in order to exercise their extraterritorial subdivision authority. However, this section does not refer to the city commission, but instead clearly provides that the authority granted is to the city director of public services to ensure that the involved plat complies with platting regulations. If the plat complies, the director must approve it. The District Court properly found that 76-2-312 took away the extraterritorial subdivision authority over subdivisions that Bozeman, as a commission-manager form of government, would otherwise have had under 76-2-310 and 76-2-311. Bozeman v. Racicot, 253 M 204, 832 P2d 767, 49 St. Rep. 435 (1992).

Attorney General's Opinions

Authority of County Commissioners to Approve Subdivisions Under Commission-Manager Government: The Board of County Commissioners has final authority to approve subdivisions that are within the 3-mile area immediately outside the corporate limits of the city when the city has a commission-manager form of government. 43 A.G. Op. 26 (1989).

Law Review Articles

The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action, Shultz & Groy, 1988 Utah L. Rev. 569 (1988).

7-3-4448. Vacating or changing name of street.

Compiler's Comments

1983 Amendment: In (2), after "persons" deleted "whose" and inserted "who are owners or purchasers under contracts for deed of"; and after "property" inserted "that".

Case Notes

Closure Versus Vacation: Closure and vacation are not synonymous. The former merely alters the use of a street, while the latter effects the vacation of the city's legal interest in the street. Therefore, a city may close a street without meeting the notice requirements of 7-3-4448 if it complies with the notice requirements of 7-14-4114, and in such a case the requirement of 7-3-4448 that the right of access be maintained does not apply. Further, there is no reversion to the lot owners of half the closed street since the city retains its rights in the street. Wynia v. Great Falls, 183 M 458, 600 P2d 802, 36 St. Rep. 1589 (1979).

Standing: Plaintiffs whose property abutted a portion of the street affected had standing to bring action to invalidate ordinance vacating street for parking facilities, even though plaintiffs'

property did not abut portion of street vacated. Kemmer v. Bozeman, 158 M 354, 492 P2d 211 (1971).

Attorney General's Opinions

Vacation of Street by Mayor-Council Government — Legal Effect on City's Interest in Street: Under 7-14-4114, a municipality has the authority to close all or part of a street to through traffic without giving up its legal interest in the street or to vacate all or part of the street and revoke its legal interest in it. A municipality with a mayor-council form of government is bound by the procedures in 7-14-4114 rather than by this section, which applies only to commission-manager forms of government, when it seeks to discontinue, close, or vacate a street. The choice between vacating a street and closing a street is a matter for the discretion of the municipal officers of a mayor-council form of government. 46 A.G. Op. 4 (1995), clarifying Wynia v. Great Falls, 183 M 458, 600 P2d 802 (1979).

7-3-4453. Assessments for snow, ice, weed, and rubbish removal.

Compiler's Comments

1985 Amendment: Near end, after "therefrom", changed "obnoxious weeds" to "nuisance weeds".

Law Review Articles

Public Nuisance—A Critical Examination, Spencer, 48 Cambridge L.J. 55 (1989).

Collateral References

Tort liability of governmental unit for injury or damage resulting from insecticide and vermin eradication operations. 25 ALR 2d 1057.

7-3-4461. Department of law.

Collateral References

62 C.J.S. Municipal Corporations §695.

7-3-4462. Office of city judge.

Compiler's Comments

Section Not Codified: Section 11-3271.2, R.C.M. 1947, relating to initial election of the City Judge, was not codified because it was temporary. This section is still valid law and has not been repealed. It may be referred to as sec. 3, Ch. 219, L. 1977. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Case Notes

Termination at Will Unconstitutional: Former provision of this section which allowed termination of a Police Judge at the will of the City Commission was unconstitutional as a violation of the mandate of the doctrine of separation of powers. State ex rel. Morales v. City Comm'n, 174 M 237, 570 P2d 887 (1977). (Annotator's Note: The constitutional infirmity was corrected by amendment effective April 4, 1977.)

Attorney General's Opinions

Appointment of City Judge by Third-Class City: Under 7-4-4102, the governing body of a third-class city has the authority to determine by ordinance how a City Judge is selected. However, nothing in statute precludes the city from amending the ordinance in order to provide for the election of the judge. Therefore, when a city of the third class adopts a commission-manager form of government, the city is not bound by this section, which requires election of a City Judge, but may continue to appoint its judge under an ordinance passed pursuant to 7-4-4102. 45 A.G. Op. 15 (1993).

7-3-4463. Department of public welfare.

Law Review Articles

Public Nuisance—A Critical Examination, Spencer, 48 Cambridge L.J. 55 (1989).

Collateral References

62 C.J.S. Municipal Corporations §651, et seq.

Public swimming pool as a nuisance, 49 ALR 3d 652.

7-3-4464. Department of public safety.

Collateral References

62 C.J.S. Municipal Corporations §§692, 698.

7-3-4465. Police department.

Compiler's Comments

1989 Amendment: In three places in (1) changed "patrolmen" to "patrol officers".

Collateral References

62 C.J.S. Municipal Corporations §563, et seq.

7-3-4466. Fire department.

Collateral References

62 C.J.S. Municipal Corporations §591, et seq.

CHAPTER 4
OFFICERS AND EMPLOYEES

Chapter Attorney General's Opinions

Elected County Official's Salary — Established by County: The Montana Constitution grants the Legislature authority to allow counties to establish the salaries of elected county officials. 38 A.G. Op. 91 (1980).

Chapter Law Review Articles

Absolute Immunity for Local Legislators, Schwartz, 219 (114) N.Y.L.J. 3 (1998).

Part 1
General Provisions

7-4-102. Office hours.

Compiler's Comments

1995 Amendment: Chapter 216 in (1), in first sentence after "business", substituted "during the office hours determined by the governing body by resolution after a public hearing and only if consented to by any affected elected county officer" for "continuously from 8 a.m. until 5 p.m." and deleted second sentence that read: "Every officer shall keep his office open at such other times as the accommodation of the public or the proper transaction of business requires"; in (3), at end, deleted "that are different from the days and times required by subsection (1)"; and made minor changes in style.

1989 Special Session Amendment: In (1), after "requires", deleted "except county"; in (2), at beginning, inserted "County" and after "city treasurers" deleted "who in their discretion"; inserted (3) allowing third-class cities and towns to establish the days and times municipal offices are open; and made minor changes in phraseology and form. Amendment effective July 1, 1989.

Attorney General's Opinions

Secretarial Services for Private Practice of County Attorney: A secretary employed by the county to assist a County Attorney may work on the County Attorney's private business during time when the secretary's services are not needed on county business. The County Attorney must account for the time that the secretary spends on private business and reimburse the county for any county-compensated time spent on the County Attorney's private business. A claim by a County Attorney for secretarial services reasonably required for the conduct of the County Attorney's official duties is a legitimate claim against the county. The reasonableness of the claim is a question of fact vested in the sound discretion of the county governing body. 46 A.G. Op. 10 (1995). See also 46 A.G. Op. 20 (1996), in which the Attorney General held that a County Attorney may not compel the County Commissioners to authorize the hiring as a county employee of a legal secretary for the County Attorney absent a showing that any other arrangement would prevent the County Attorney from performing the minimum statutory duties.

Establishment of City Court Office Hours by Governing Body: Subsection (3) of this section permits the governing body of a third-class city or town to set the office hours of the City Court at times other than between 8 a.m. and 5 p.m. Monday through Friday, except on Sundays and other legal holidays. (See 1995 amendment.) 43 A.G. Op. 61 (1990).

Legality of Evening City Court Hours: A City Judge is not prohibited by 3-1-301, 3-1-302, or 3-11-101 from establishing regular sessions of the court during evening hours as long as regular sessions are not convened on Sundays or other legal holidays and the court is open for business

on judicial days. These sections place no limitations on the hours of business. Although this section requires that City Court offices be open for business continuously from 8 a.m. until 5 p.m. on weekdays, this does not prohibit a City Judge from setting office hours after 5 p.m. on weekdays. As long as the office is open during the required hours for the transaction of business, such as the filing of court documents with the clerk, the City Judge may set additional hours for regular court sessions. (See 1995 amendment.) 43 A.G. Op. 61 (1990).

City Not Authorized to Reduce Office Hours: The phrase "unless otherwise provided by law", as used in this section, does not authorize a city to enact a municipal ordinance reducing the number of hours during which city offices must be open. Subsection (1)(f) of 7-1-114 prohibits a city from reducing its office hours beyond those required by this section. (See 1995 amendment.) 43 A.G. Op. 16 (1989).

Heritage Day — Single Calendar Day Only: The governing body of a political subdivision must schedule the Heritage Day legal holiday on a single calendar day each year. 42 A.G. Op. 22 (1987).

Office Closure When Employees Observe Holidays: Public officer must close on the appropriate day if office employees are entitled to have off the Friday preceding a legal holiday falling on a Saturday or the Monday following a legal holiday falling on a Sunday. 34 A.G. Op. 27 (1971).

Part 5
Local Government Employee Incentive Award Program

Part Compiler's Comments

Effective Date: Section 7, Ch. 87, L. 1991, provided: "[This act] is effective July 1, 1991."

Part 21
County Commissioners

Part Case Notes

Manner of Exercising Power:

Where by law the Board of County Commissioners or other county officer is required to do an act but the method of doing it is not provided, any reasonable and suitable means may be adopted for performing it. Ransom v. Pingel, 104 M 119, 65 P2d 616 (1937); Simpson v. Silver Bow County, 87 M 83, 285 P2d 195 (1930); Arnold v. Custer County, 83 M 130, 269 P 396 (1928), distinguished in Judith Basin County ex rel. Vralsted v. Livingston, 89 M 438, 298 P 356 (1931).

Where the Legislature has prescribed with particularity the essential steps necessary to be taken by a county in the exercise of a power granted, the statute must be held to exclude any other mode of procedure, under the doctrine expressio unius est exclusio alterius. Franzke v. Fergus County, 76 M 150, 245 P 962 (1926).

Contracts:

While the Board of County Commissioners is without power to enter into a contract for services the performance of which is cast upon another county official or board, it may contract with a private individual for information relative to matters of taxation to aid it in the performance of its duties as a County Board of Equalization (now County Tax Appeal Board), even though, incidentally, the information received may aid other officials in the performance of their duties, provided the grant power is to be found in the statutes. Simpson v. Silver Bow County, 87 M 83, 285 P 195 (1930).

A contract made by a Board of County Commissioners, a few weeks before the expiration of its term of office and upon the expiration of a prior contract, for county printing for the 2 succeeding years, is valid in the absence of fraud or bad faith in the making and is not against public policy. Picket Publishing Co. v. Bd. of County Comm'rs, 36 M 188, 92 P 524 (1907).

A contract with an attorney for his services, entered into by the Chairman of the Board individually, is not binding on the county, since the Commissioners have power to bind the county only where they act as a legal entity. Williams v. Bd. of Comm'rs, 28 M 360, 72 P 755 (1903).

Existence of Power:

The Board of County Commissioners may exercise powers not specifically granted if they are necessarily implied from those granted, and under its implied power it may contract to have work done which is necessary for the proper management of the county's business and the preservation of its property, if the law does not make it the duty of some county officer to do the work. Arnold v. Custer County, 83 M 130, 269 P 396 (1928).

Counties and school districts are subdivisions of the state government with fixed powers and duties, and any act taken by the Commissioners of the former or the trustees of the latter must be justified by the provisions of the statutes defining and limiting their powers. State ex rel. School District v. McGraw, 74 M 152, 240 P 812 (1925).

A Board of County Commissioners is one of limited powers and must in every instance justify its action by reference to the provisions of law defining and limiting these powers. If, however, there is no question of the existence of the power to do the act proposed [decided prior to the adoption of Art. XI, sec. 4(2), Mont. Const.—Annotator], and the mode of its exercise is not pointed out, the Board is left free to use its own discretion in selecting the mode it shall adopt or the course it shall pursue, and the result cannot be called in question if the course pursued is reasonably well adapted to the accomplishment of the end proposed. Hersey v. Neilson, 47 M 132, 131 P 30 (1913); Morse v. Granite County, 44 M 78, 119 P 286 (1911); State ex rel. Gillett v. Cronin, 41 M 293, 109 P 144 (1910); State ex rel. Lambert v. Coad, 23 M 131, 57 P 1092 (1899).

Part Attorney General's Opinions

Office of County Commissioner Incompatible With Office of School Trustee: The current nature and duties of the offices of County Commissioner and county high school trustee could give rise to possible conflicts of governmental interest if one person were to retain both offices simultaneously. The Attorney General affirmed the decision in 8 A.G. Op. at 402 (1920), holding that the offices are incompatible in light of the fact that under state law a County Commissioner has certain supervisory powers over a school trustee. However, nothing in state law prohibits an individual from holding one of these offices while seeking the other. 42 A.G. Op. 94 (1988).

Absence of County Commissioner From State: A County Commissioner is subject to the provisions of 7-4-2208 requiring all county officers to secure consent of the Board of County Commissioners before absenting themselves from the state for a period of more than 5 days. 37 A.G. Op. 19 (1977).

7-4-2101. Composition of board of county commissioners.

Collateral References

20 C.J.S. Counties §74, et seq.

7-4-2102. Division of county into commissioner districts.

Compiler's Comments

1983 Amendment: At end of (1), substituted "primary election" for "general election".

Case Notes

Applicability of Deadline to Redistricting: The Supreme Court, in Barthelmess v. Bergerson, 218 M 398, 708 P2d 1010, 42 St. Rep. 1685 (1985), ordered the redistricting of Custer County to comply with 7-4-2102, including the provision that "no change in the boundary lines of any commissioner district shall be made within 6 months next preceding a primary election". A primary election was scheduled for June 2, 1986, necessitating a December 2, 1985, deadline for redistricting. On December 3, 1985, the two judges of the district issued a memorandum expressing concern over the inability to create new districts within the time prescribed by 7-4-2102, and not until January 3, 1986, was a redistricting plan reviewed and approved. The Supreme Court noted that the purpose of the deadline was to prevent gerrymandering and to provide sufficient time for candidates for County Commissioner to file for election. The provision should not be construed so as to prevent the formation and filing of districts when, as here, the former districts did not meet the statutory requirements of compactness and equality of population. Strict enforcement of the 6-month provision in this case would prevent the residents from legally electing their Commissioners, disenfranchising the voters and impeding county business. The court stated the concept in 1-3-201 that when the reason for a rule ceases, the reason for its enforcement also ceases. By way of declaratory relief, the court upheld the January 3, 1986, districting plan and allowed the County Commissioners to append to the plan a copy of the court order in lieu of the requirement of 7-4-2103 that the certificate shall be dated and signed by the District Judges. Barthelmess v. Bergerson, 220 M 74, 713 P2d 990, 43 St. Rep. 186 (1986).

Equality of Area: Custer County Commissioner district lines were redrawn according to the latest federal census report to achieve simple, identifiable districts as equal in population as possible. No attempt was made to equalize geographic area, as required by this section. The Supreme Court held that the County Commissioners have limited discretion in determining boundaries and mathematical exactness is required only when reasonably possible. However, compliance with the statute requires at least an attempt to equalize both area and population,

and hence the new districts are void and the prior districts remain valid until the county is redistricted. Barthelmess v. Bergerson, 218 M 398, 708 P2d 1010, 42 St. Rep. 1685 (1985).

Attorney General's Opinions

Eligibility for Election of Person Transferred Into County Commission District Through Reapportionment: A person who is transferred into a County Commission district by virtue of a reapportionment conducted pursuant to this section is not disqualified from standing for election as long as the person has resided at the same address in the new district for the requisite 2-year period set out in 7-4-2104. 49 A.G. Op. 17 (2002).

Increase in Number of County Commissioners — Holdovers — Alteration of District Boundaries: If the electors were to adopt a proposal to increase the number of County Commissioners, all of the incumbent Commissioners would lose their positions unless otherwise required by the adopted plan, pursuant to 7-3-158. If no provision were made for holdovers in the local government study commission plan, they would remain in office only until the newly elected Commissioners take office. However, a study commission proposal is not invalid because it provides for holdover County Commissioners, even when the proposal alters the commission district boundaries. (See 40 A.G. Op. 1 (1983)). 41 A.G. Op. 44 (1986).

7-4-2103. Filing of certificate designating districts.

Case Notes

Supreme Court Order in Lieu of Certificate: The Supreme Court, in Barthelmess v. Bergerson, 218 M 398, 708 P2d 1010, 42 St. Rep. 1685 (1985), ordered the redistricting of Custer County to comply with 7-4-2102, including the provision that "no change in the boundary lines of any commissioner district shall be made within 6 months next preceding a primary election". A primary election was scheduled for June 2, 1986, necessitating a December 2, 1985, deadline for redistricting. On December 3, 1985, the two judges of the district issued a memorandum expressing concern over the inability to create new districts within the time prescribed by 7-4-2102, and not until January 3, 1986, was a redistricting plan reviewed and approved. The Supreme Court noted that the purpose of the deadline was to prevent gerrymandering and to provide sufficient time for candidates for County Commissioner to file for election. The provision should not be construed so as to prevent the formation and filing of districts when, as here, the former districts did not meet the statutory requirements of compactness and equality of population. Strict enforcement of the 6-month provision in this case would prevent the residents from legally electing their Commissioners, disenfranchising the voters and impeding county business. The court stated the concept in 1-3-201 that when the reason for a rule ceases, the reason for its enforcement also ceases. By way of declaratory relief, the court upheld the January 3, 1986, districting plan and allowed the County Commissioners to append to the plan a copy of the court order in lieu of the requirement of this section that the certificate shall be dated and signed by the District Judges. Barthelmess v. Bergerson, 220 M 74, 713 P2d 990, 43 St. Rep. 186 (1986).

7-4-2104. Commissioners to be elected by district.

Compiler's Comments

2001 Amendment: Chapter 183 in (2) after "county commissioners" substituted "unless the person has resided in the county and the district for at least 2 years preceding the general election" for "who has not resided in the county for at least 2 years next preceding the time he shall become a candidate for said office and was not a resident of the district at the time of filing for the primary election"; and made minor changes in style. Amendment effective April 3, 2001.

1987 Amendment: In (2) substituted "the county" for "said district"; and at end of (2) inserted "and was not a resident of the district at the time of filing for the primary election".

Case Notes

Separation of Powers Doctrine Not to Preclude Compliance With Employee Grievance Procedure by Justice's Court: A Justice of the Peace involved in a disciplinary action against the court office manager contended that a grievance hearing before the County Commission would violate the separation of powers doctrine by interfering with the independence of the court by requiring the Justice of the Peace to be an adverse witness against court personnel, allowing the Justice of the Peace's decision on personnel matters to be overruled by another branch of government, and possibly requiring the Justice of the Peace to accept an employee believed to be unsatisfactory. However, as established in Hillis v. Sullivan, 48 M 320, 137 P 392 (1913), the hiring by the County Commission of a clerk to assist a court does not violate the separation of powers doctrine. In addition, the County Commission is statutorily required to provide a Justice

of the Peace with clerical assistance. Thus, a grievance hearing before the County Commission does not violate the separation of powers doctrine because the County Commission's independent hiring of the office manager is consistent with the doctrine; nor does the County Commission's hearing of the grievance constitute an exercise of authority belonging to the Judicial Branch. Clark v. Dussault, 265 M 479, 878 P2d 239, 51 St. Rep. 642 (1994).

Election of Nonresident — Redistricting: Custer County Commissioner district lines were redrawn prior to election of respondent as County Commissioner. Respondent ran for and was elected to the office of County Commissioner for new district 2, although he resided in new district 3. Appellants claimed this section precluded respondent from holding office because of nonresidency. However, the new district boundaries were held void in this decision as not having been established in compliance with 7-4-2102, so respondent was allowed to hold office from the previous district 2 (of which he was a resident) until the next general election, at which time the district boundaries were to be reestablished. Barthelmess v. Bergerson, 218 M 398, 708 P2d 1010, 42 St. Rep. 1685 (1985).

Attorney General's Opinions

Eligibility for Election of Person Transferred Into County Commission District Through Reapportionment: A person who is transferred into a County Commission district by virtue of a reapportionment conducted pursuant to 7-4-2102 is not disqualified from standing for election as long as the person has resided at the same address in the new district for the requisite 2-year period set out in this section. 49 A.G. Op. 17 (2002).

Residency Requirements for County Commissioners — Study Commission Recommendations: The residency requirements of 7-4-2104(2) apply to candidates for County Commissioner positions created by the adoption of a local government study commission proposal. 41 A.G. Op. 44 (1986).

7-4-2105. Term of office.

Compiler's Comments

1997 Amendment: Chapter 421 in (1) substituted "at 12:01 a.m. on January 1" for "on the first Monday of January"; and inserted (2) relating to taking the oath of office.

Preamble: The preamble attached to Ch. 421, L. 1997, provided: "WHEREAS, current law requires an elected official to take the oath of office on the first Monday of January succeeding the election; and

WHEREAS, the first Monday in January can be as late as the 7th day of January; and

WHEREAS, employing two elected officials in the same month can cause confusion and disagreement regarding compensation and benefits to each official; and

WHEREAS, employing the newly elected official on January 1 would simplify the payroll process, save local governments and taxpayers money, and make it easier for all concerned to remember the official transition date."

1985 Amendment: Inserted second sentence relating to when commissioner takes office.

Attorney General's Opinions

Recommendation of Shorter Terms of Office by Local Government Study Commission: A local government study commission may recommend that terms of office for County Commissioners be less than 6 years if the county has adopted the statutory county "commission form" of government. A local government study commission may not recommend that the terms of office for County Commissioners be less than 6 years if the county has retained the form of government organized under the statutes listed in 7-3-111. 41 A.G. Op. 51 (1986).

7-4-2106. Vacancy on board of county commissioners.

Compiler's Comments

1997 Amendment: Chapter 42 in (4) substituted "subsection (2)" for "7-4-2106(2)"; and made minor changes in style. Amendment effective March 12, 1997.

1985 Amendments: Chapter 250 throughout section substituted references to 75 days for references to 50 days; and in (3)(b) in fourth sentence, substituted "75th day" for "40th day".

Chapter 551 in (2), near middle of first sentence, substituted "remaining county commissioners" for "district judge or judges in whose district the vacancy occurs" and after first sentence, inserted lead-in to (a) and (b) and inserted (a) and (b) relating to procedure based upon party affiliation or lack thereof; and in (4) near end, substituted "remaining county commissioners" for "district judge".

Case Notes

Prospective Appointment to Fill Vacancy: Under 2-16-501, refusal or neglect of an officer-elect to file his bond within the time prescribed creates a vacancy in the office, and in the case of a County Commissioner (prior to the 1985 amendment of this section) the District Judge had authority under this section, upon the expiration of the 30-day period provided for the filing of a bond, to declare the office vacant and make a prospective appointment, to fill the vacancy when it did occur, i.e., at the commencement of the new term. State ex rel. Wallace v. Callow, 78 M 308, 254 P 187 (1927).

Annulment of Order Filling Vacancy: The power to fill a vacancy in the office of County Commissioner was conferred by Art. XVI, sec. 4, 1889 Mont. Const., upon the District Judge of the district in which the vacancy occurred. The provisions of this section were enacted in pursuance thereof (amended in 1985 to change power of appointment to remaining commissioners). Such appointing power is ministerial, not judicial, in character. Certiorari does not lie to annul an order filling a vacancy deemed by the Judge to exist in that office in a newly created county because of the alleged unconstitutionality of the act under which the office was filled by election and because the incumbent was holding two other offices regarded by him as incompatible. State ex rel. Dowen v. District Court, 50 M 249, 146 P 467 (1915).

Attorney General's Opinions

Filling Vacant Office: Prior to the 1979 amendment of this section, the Attorney General held that if the office of County Commissioner has become vacant with no opportunity to nominate candidates in the primary election, the selection of candidates for the general election will be made by each political party according to 13-10-327; and, pursuant to 13-12-208 (now repealed), write-in candidates may also seek the office. The appointee to fill the immediate vacancy will hold that office until the next general election. 37 A.G. Op. 147 (1978).

Collateral References

20 C.J.S. Counties §96.

7-4-2107. Compensation of county commissioners.

Compiler's Comments

2001 Amendment: Chapter 507 in (1) in first sentence at beginning substituted "Subject to subsection (2)" for "Except as provided in subsection (3)" after "board of county commissioners" deleted "in counties of the first, second, third, and fourth class" and deleted former second sentence that read: "However, the county commissioners may, for all or the remainder of each fiscal year, in conjunction with setting salaries for other officers as provided in 7-4-2504(1), set their salaries at the prior fiscal year level if that level is lower than the level required by this subsection"; in (2) in first sentence at beginning substituted "Each board may elect to serve on a part-time rather than a full-time basis and receive part-time annual salaries based on the annual salary established in 7-4-2503(1)(a)" for "Each member of the board in all other counties may receive an annual salary equal to the annual salary established in 7-4-2503(1)(a)(ii)" and at end after "clerk and recorder" deleted "or a salary at a per-day rate determined by using the salary established in 7-4-2503(1)(a)(ii) for the clerk and recorder" and deleted former second and third sentences that read: "However, the county commissioners may, for all or the remainder of each fiscal year, in conjunction with setting salaries for other officers as provided in 7-4-2504(1), set their salaries at the prior fiscal year level if that level is lower than the level required by this subsection. The salary determined by the board must apply uniformly to all board members"; deleted former (3) that read: "(3) Each member of the board of fourth-class counties may receive a salary at a daily rate determined by using the salary established in subsection (1). If a daily rate is used, then all board members must be paid on that basis"; and made minor changes in style. Amendment effective May 1, 2001.

1993 Amendment: Chapter 28 in (1), at beginning, inserted exception clause; inserted (3) regarding salary of Board members of fourth-class counties at a daily rate; and made minor changes in style. Amendment effective February 10, 1993.

1991 Amendment: Near beginning of (2), after "counties", substituted language concerning Board member salary being equal to annual salary or per-day rate based upon salary established in 7-4-2503 for Clerk and Recorder for language setting salary for Board member of $60 per day beginning July 1, 1985, and adjusted every July 1 thereafter by adding a cost-of-living adjustment to $60 amount and inserted last sentence concerning established salary being applied uniformly to all Board members. Amendment effective April 22, 1991.

1986 Amendment: In (1) following "$2,000" inserted remainder of subsection allowing a uniform freeze in compensation; and in (2) following "calculated as provided in 7-4-2504" inserted remainder of subsection allowing a uniform freeze in compensation.

1985 Amendment: In (2) in first sentence, after "salary", deleted "of not more than $50", and inserted the second and third sentences setting $60, then $60 plus a cost-of-living increment, for a daily salary.

1981 Amendment: Substituted "an annual salary equal to the annual salary established in 7-4-2503 for the clerk and recorder plus $2,000" for "an annual salary to be established by resolution of the board in an amount not to exceed the annual salary established in the schedule in 7-4-2503 for the clerk and recorder" at the end of (1); and substituted (2) establishing a $50-maximum daily salary for "Each member of the board in all other counties is entitled to a salary to be established by the board by resolution in an amount not to exceed $40 per day for each day's attendance on the sessions of the board."

Attorney General's Opinions

Change in County Classification — Adjustment of Salaries of County Officials: When the classification of a county under 7-1-2111 changes, salaries of County Commissioners, the County Attorney, and county officials listed in 7-4-2503(1) must be adjusted as of July 1 of the following year. Adjustments are computed as follows: (1) for County Commissioners, according to this section; (2) for a part-time County Attorney, according to 7-4-2503(3); and (3) for county officials listed in 7-4-2503(1), according to 7-4-2503. (See 2001 amendment.) 42 A.G. Op. 85 (1988).

Timing of Salary Increases Caused by County Classification Change: Under the reasoning of 40 A.G. Op. 81 (1984), when a county's classification changes according to 7-1-2111, the salaries of the County Commissioners, as provided for in 7-4-2107, must change as of July 1 of the following year, the onset of a new fiscal year for the county. 41 A.G. Op. 6 (1985).

Computation of Cost-of-Living Increase: The cost-of-living increase authorized for county officials by this section applies only to the annual base salary plus population increment established by 7-4-2503(1) and not to the additional sums included in the salaries of the Superintendent of Schools, Sheriff, and Commissioners under 7-4-2503(2) and this section. (See 2001 amendment.) 39 A.G. Op. 65 (1982).

Board of County Commissioners Not to Reduce Workload of One County Commissioner and Reduce His Pay Accordingly: A County Commissioner of a first-, second-, third-, or fourth-class county may not reduce his workload relative to the workloads of the other Commissioners and have his pay reduced accordingly. 36 A.G. Op. 48 (1976).

Collateral References

20 C.J.S. Counties §79.

7-4-2110. Supervision of county and other officers.

Compiler's Comments

2003 Amendment: Chapter 112 inserted (5) authorizing the board to require officers to supervise staff in the manner provided in personnel policies of the county's governing body; and made minor changes in style. Amendment effective October 1, 2003.

Case Notes

County Assessor as Agent of Department of Revenue: This section grants to the Board of County Commissioners supervisory control of County Assessors "under such limitations and restrictions as are prescribed by law". Section 15-8-102 is such a limitation and removes supervision of all internal operations of the County Assessor's office from the County Commissioners and places it with the Department of Revenue. Cantwell v. Geiger, 228 M 330, 742 P2d 468, 44 St. Rep. 1574 (1987).

Supervision of Officers: The Board of County Commissioners has general supervision and control over the officers, affairs, and finances of its county, and it may be conceded that, unless authority therefor shall be found in the statutes, no other county officer may bind the county by contract. A person dealing with a county through one of its agents is bound to know the extent of such agent's authority, and if he enters into an unauthorized contract, he does so at his own risk. Hicks v. Stillwater County, 84 M 38, 274 P 296 (1929). See also Pue v. Lewis & Clark County, 75 M 207, 243 P 573 (1926).

Attorney General's Opinions

County Attorney as Employee for Purposes of Lawsuit Regarding Administrative Actions: A County Attorney is not liable for civil damages for conduct within the scope of his prosecutorial duties; however, that immunity does not extend to the discretionary administrative business of

running a County Attorney's office. Thus, a County Attorney is considered a county employee for purposes of the Montana Comprehensive State Insurance Plan and Tort Claims Act whenever the County Attorney is named in a civil lawsuit for actions regarding county administrative business, such as the hiring and firing of staff. 44 A.G. Op. 29 (1992).

Office of County Commissioner Incompatible With Office of School Trustee: The current nature and duties of the offices of County Commissioner and county high school trustee could give rise to possible conflicts of governmental interest if one person were to retain both offices simultaneously. The Attorney General affirmed the decision in 8 A.G. Op. at 402 (1920), holding that the offices are incompatible in light of the fact that under state law a County Commissioner has certain supervisory powers over a school trustee. However, nothing in state law prohibits an individual from holding one of these offices while seeking the other. 42 A.G. Op. 94 (1988).

Departmental Responsibility for Operation of County Assessor's Office — Exceptions: The Department of Revenue is responsible for the internal operation of a County Assessor's office, including employment practices, except with regard to County Assessors and their deputies, who serve at the instance of the electorate or appointing power, as determined statutorily. 42 A.G. Op. 52 (1988).

Manner in Which Duties Performed — No Control by Commissioners: The County Commissioners, in the exercise of their statutory supervisory control over county officers, may assure that the officers fulfill their statutory duties but may not assume control over the manner in which those duties are performed. 38 A.G. Op. 85 (1980).

Supervisory Power Over All Enumerated County Officers: The supervisory power of the County Commissioners under 7-4-2110 extends to all county executive officers enumerated in 7-4-2203. 38 A.G. Op. 85 (1980).

Collateral References

20 C.J.S. Counties §§81, 82.

Part 22
County Officers in General

Part Law Review Articles

Anderson v. Creighton [107 S. Ct. 3034] and Qualified Immunity, 50 Ohio St. L.J. 447 (1989).

7-4-2201. General qualifications for county office.

Compiler's Comments

1999 Amendment: Chapter 60 inserted (3)(b) providing that when an office is consolidated between two or more counties, a person must be an elector of any county in which the duties of the office are to be exercised to be qualified for the office; and made minor changes in style. Amendment effective October 1, 1999.

Collateral References

20 C.J.S. Counties §102.

7-4-2203. County officers.

Compiler's Comments

1989 Amendment: In (2), at beginning of second sentence, substituted "More" for "Not more"; and made minor change in phraseology. Amendment effective July 1, 1989.

Attorney General's Opinions

No Authority of Board of County Commissioners to Reduce County Auditor Office to Part-Time Position: Montana statutes contemplate a full-time County Auditor with a full-time salary in every county with a population of greater than 15,000. Although County Commissions do have the authority to consolidate certain county offices, including the County Auditor's office, no existing statute contemplates a reduction of the office of County Auditor to a part-time position. Had the Legislature intended to expressly authorize County Commissions to reduce the office, it would have adopted legislation similar to that for County Attorneys and County Superintendents. The authority in 7-6-2412 extends to the imposition of additional County Auditor duties, not to the reduction of hours worked. There is no express or implied authority for counties with general powers to reduce the office of County Auditor to a half-time position. 47 A.G. Op. 18 (1998).

Departmental Responsibility for Operation of County Assessor's Office — Exceptions: The Department of Revenue is responsible for the internal operation of a County Assessor's office, including employment practices, except with regard to County Assessors and their deputies, who

serve at the instance of the electorate or appointing power, as determined statutorily. 42 A.G. Op. 52 (1988).

Manner in Which Duties Performed — No Control by Commissioners: The County Commissioners, in the exercise of their statutory supervisory control over county officers, may assure that the officers fulfill their statutory duties but may not assume control over the manner in which those duties are performed. 38 A.G. Op. 85 (1980).

Supervisory Power Over All Enumerated County Officers: The supervisory power of the County Commissioners under 7-4-2110 extends to all county executive officers enumerated in 7-4-2203. 38 A.G. Op. 85 (1980).

County Employee Elected to Public Office: A county employee who is elected or appointed to a public office of the state, county, or city thereby terminates his employment and is entitled to receive vacation and sick leave benefits accumulated during his employment unless he falls within the mandatory leave provision of 2-18-620. 38 A.G. Op. 12 (1979).

Collateral References

20 C.J.S. Counties §100.

7-4-2204. Township officers.

Compiler's Comments

Township Officers: There are no townships or township officers in Montana.

7-4-2205. Term of office — oath.

Compiler's Comments

1997 Amendment: Chapter 421 in (3), after "part", inserted "and who is elected to office"; inserted (3)(a) relating to taking the oath on the last business day of December; in (3)(b) substituted "at 12:01 a.m. on January 1 following the officer's election" for "on the first Monday of January succeeding their election"; and made minor changes in style.

Preamble: The preamble attached to Ch. 421, L. 1997, provided: "WHEREAS, current law requires an elected official to take the oath of office on the first Monday of January succeeding the election; and

WHEREAS, the first Monday in January can be as late as the 7th day of January; and

WHEREAS, employing two elected officials in the same month can cause confusion and disagreement regarding compensation and benefits to each official; and

WHEREAS, employing the newly elected official on January 1 would simplify the payroll process, save local governments and taxpayers money, and make it easier for all concerned to remember the official transition date."

1983 Amendment: At end of (3), deleted "except the county treasurer, whose term begins on the first Monday of March next succeeding his election".

Transition: Section 2, Ch. 71, L. 1983, read: "A county treasurer holding office on the effective date of this act [October 1, 1983] or a person appointed to fill the unexpired term of such a treasurer continues to serve until the first Monday of March after the election of his successor. Notwithstanding the provisions of 7-4-2205(1), the successor's term expires on the first Monday in January following the election of his successor."

7-4-2206. Vacancies.

Compiler's Comments

1997 Amendments: Chapter 42 in (4) substituted "subsection (2)" for "7-4-2206(2)"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 226 in (2), in second sentence, substituted exception clause for "Except for the justice of the peace", near middle, after "until the", inserted "person elected at the", and after "election" substituted "is certified pursuant to 13-15-406" for "unless otherwise provided in subsection (3) or (4)"; in (4) substituted "subsection (2)" for "7-4-2206(2)"; and made minor changes in style. Amendment effective April 10, 1997.

1985 Amendment: Throughout section substituted references to 75 days for references to 50 days; and in (3)(b) in fourth sentence, substituted "75th day" for "40th day".

Case Notes

Appointment to Fill Vacancy: County Commissioners who appointed a person in November to the office of County Attorney to take office in January were not acting to forestall the rights and prerogatives of the Board which would be in office in January since only one of the members would be new in January. State ex rel. Koch v. Lexcen, 131 M 161, 308 P2d 974 (1957).

Person Elected to Fill Vacancy Not Elected for Four Years: Plaintiff was appointed Sheriff to fill vacancy caused by the death of his predecessor. At the next general election he was elected Sheriff. He was elected only to fill the unexpired term of his predecessor and not for a full 4-year term, notwithstanding that the ballot did not specify length of time for which candidate sought office. Bailey v. Knight, 118 M 594, 168 P2d 843 (1946).

Attorney General's Opinions

Appointee to County Attorney's Office — Term of Office: The term of an individual appointed to fill a vacancy in the office of County Attorney, due to a tie vote, extends until the next general election. 42 A.G. Op. 48 (1987).

Vacancy in Office of County Attorney — Term of Successor: After an appointment to fill a vacancy in the office of County Attorney, the successor chosen at the next election holds office for the remainder of the unexpired term that was originally determined to be vacant. 42 A.G. Op. 48 (1987).

Collateral References

20 C.J.S. Counties §138.

7-4-2207. Duty of officers to complete official business.

Collateral References

Officers *key* 94.

67 C.J.S. Officers and Public Employees §§234 through 246.

7-4-2208. Absence of county officers from state.

Compiler's Comments

1991 Amendment: Near middle of (1) increased from 5 to 15 the number of days a county officer may be absent from the state without permission of the County Commissioners.

Case Notes

Sheriff's Unauthorized Absence From State — Reimbursement of Expenses: A Sheriff predicated his demand for reimbursement for expenses incurred by him for services performed beyond the state line upon his legal rights incident to his position as Sheriff and not upon a contract of employment by the County Attorney at whose direction he acted. The Sheriff did not show that he first obtained the consent of the Board of County Commissioners to absent himself from the state, thus he was not entitled to recover on the theory that the claim was allowable under authority of 7-6-2426, making the county chargeable with expenses necessarily incurred by the County Attorney in criminal cases arising within the county. Brannin v. Sweet Grass County, 88 M 412, 293 P 970 (1930).

Attorney General's Opinions

Absence of County Commissioner From State: A County Commissioner is subject to the provisions of 7-4-2208 requiring all county officers to secure consent of the Board of County Commissioners before absenting themselves from the state for a period of more than 5 days. 37 A.G. Op. 19 (1977).

Collateral References

Counties *key* 88.

20 C.J.S. Counties §139.

7-4-2211. County offices.

Compiler's Comments

1995 Amendment: Chapter 216 in (2)(a), after "business", substituted "during the office hours determined by the governing body by resolution after a public hearing and only if consented to by any affected elected county officer" for "from 8 a.m. until 5 p.m. continuously", before "holidays" inserted "legal", and at end deleted "provided, however, that the offices enumerated herein shall be kept open on Saturdays and on holidays and at other times when the business of said offices requires them to be kept open"; and made minor changes in style.

Case Notes

Application of Section: A county extension officer is not a county officer subject to this section. Neither the law relating to his office nor section 16-2403, R.C.M. 1947 (since repealed), enumerating county officers, designates him as county officer. Turnbull v. Brown, 128 M 254, 273 P2d 387 (1954).

Attorney General's Opinions

Secretarial Services for Private Practice of County Attorney: A secretary employed by the county to assist a County Attorney may work on the County Attorney's private business during time when the secretary's services are not needed on county business. The County Attorney must account for the time that the secretary spends on private business and reimburse the county for any county-compensated time spent on the County Attorney's private business. A claim by a County Attorney for secretarial services reasonably required for the conduct of the County Attorney's official duties is a legitimate claim against the county. The reasonableness of the claim is a question of fact vested in the sound discretion of the county governing body. 46 A.G. Op. 10 (1995). See also 46 A.G. Op. 20 (1996), in which the Attorney General held that a County Attorney may not compel the County Commissioners to authorize the hiring as a county employee of a legal secretary for the County Attorney absent a showing that any other arrangement would prevent the County Attorney from performing the minimum statutory duties.

7-4-2212. Official bonds of county officers.

Collateral References

20 C.J.S. Counties §104.

Public officer's bond as subject to forfeiture for malfeasance in office. 4 ALR 2d 1348.

7-4-2213. Inspection of official bonds.

Collateral References

20 C.J.S. Counties §§104, 156, et seq.

7-4-2221. Manner of keeping records and storing documents.

Compiler's Comments

1993 Amendment: Chapter 420 near middle substituted "photographic, micrographic, electronic" for "photostatic, microphotographic, microfilm"; deleted (2) regarding the manner of recording or photographing and storing of loose pages (see 1993 Session Law for text); and made minor changes in style. Amendment effective April 20, 1993.

Attorney General's Opinions

County Clerk and Recorder — No Refusal to Record a Valid Deed: Since the Clerk and Recorder of a county is not a law enforcement officer and enforcement of a criminal statute is not within his prescribed duties, he may not refuse to record a deed that has not met the prerequisite, set forth in the Montana Subdivision and Platting Act (Title 76, ch. 3), that an approved, certified plat be filed before the land is transferred. 35 A.G. Op. 25 (1973).

7-4-2222. Substitution of reproduction for original document.

Compiler's Comments

1993 Amendment: Chapter 420 in (1), after "7-4-2221", deleted reference to subsection (1) and deleted "the original of which is not less than 10 years old"; in (2), at beginning after "The", deleted "photostatic, microphotographic, or microfilmed"; and made minor changes in style. Amendment effective April 20, 1993.

7-4-2223. Duplicate records — safe storage of one copy.

Compiler's Comments

1993 Amendment: Chapter 420 in (1), after "or reproduced", deleted "by microphotographic, microfilm, or other mechanical process"; in (2), near beginning of first sentence after "place", substituted "the master" for "one" and in second sentence, after "equipment for", substituted "reproducing the record or document" for "displaying such record by projection to not less than its original size or for preparing copies of the record"; and made minor changes in style. Amendment effective April 20, 1993.

Part 23
Consolidation of County Offices

7-4-2301. Authorization to consolidate county offices.

Attorney General's Opinions

Consolidated Offices — Ballot Listing: It is within the discretion of the Board of County Commissioners to designate how consolidated county offices may be listed on the primary and general election ballots. 37 A.G. Op. 141 (1978).

7-4-2302. Petition for consolidation of county offices.

Compiler's Comments

1987 Amendment: In (1) substituted "45 days before the date on which declarations for nomination may first be filed for any county office" for "7 months before the date of any general election at which any county officers are to be elected"; and in (2) substituted "registered electors" for "qualified electors" and at end deleted "whose names appear on the registration records thereof".

Attorney General's Opinions

Consolidation of Offices: Offices of County Treasurer and County Superintendent of Schools may be consolidated into one office provided the officeholder meets the minimum qualifications of both offices. 35 A.G. Op. 31 (1973).

7-4-2303. Petition for intercounty consolidation of offices.

Compiler's Comments

1987 Amendment: In (2) substituted "registered electors" for "qualified electors".

7-4-2304. Petition details.

Compiler's Comments

1987 Amendment: In (2), before "post-office address", inserted "printed last name" and substituted "signature" for "name"; and inserted (3) concerning means of determining number of signatures needed on petition.

7-4-2306. Processing of petition — resolution of intent and hearing.

Compiler's Comments

1987 Amendment: In (2), in first sentence, substituted "registered electors of the county" for "qualified electors of the county whose names appear on the registration records".

7-4-2307. Notice of hearing.

Compiler's Comments

1985 Amendment: Substituted "as provided in 7-1-2121" for "one time in the official newspaper of the county, which publication must be at least 10 days before the date set for said hearing. If there is no newspaper of general circulation printed and published in said county, then such notice must be posted by the county clerk or clerks, at least 10 days before the date set for such hearing, in three public places in the county or counties"; and deleted former (2) that read: "Said notice shall either contain a copy of said petition, with the signatures omitted, or a copy of the resolution of intent passed by the board or boards of county commissioners and shall state the time and place fixed for hearing the same and that on such hearing, any taxpayer of the county may appear and be heard in support of or in opposition to said petition."

7-4-2309. Conduct of hearing — decision.

Compiler's Comments

1987 Amendment: In (1), at beginning of second sentence, substituted "registered elector" for "qualified elector"; and in (2) inserted "Such order must be made at least 7 days before the date on which declarations for nominations may first be filed for any county office."

7-4-2310. Order for consolidation of offices.

Compiler's Comments

1987 Amendment: In middle of (1) substituted clauses requiring Commissioners to enter order for office consolidation not less than either 7 days before filing of nominations or 6 months prior to appointment to consolidated office for "6 months prior to the general election held for the purpose of filling the offices to be consolidated".

Part 24
Deputy Officers in General

7-4-2401. Deputy officers.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (1), after "justice of the peace", inserted "and the county assessor"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Case Notes

No Legal Duty to Fund Deputy Position: The Lewis and Clark County Auditor petitioned for a Writ of Mandamus to compel the Board of County Commissioners to fund a Deputy Auditor position eliminated by the Commissioners because of budget cuts. The District Court dismissed the petition on the ground that there was no legal duty of the Commissioners to fund the position. On appeal, the Supreme Court had to reconcile three statutes: 7-4-2401(1), under which county officers may appoint as many deputies or assistants as necessary to discharge the duties of the office; 7-4-2402, which provides the County Commissioners with authority to fix and determine the number of county deputy officers; and 7-6-2413, which provides that the number of Deputy Auditors in first-, second-, and third-class counties must not exceed one. The court held that the specific statute, 7-6-2413, must control over the general statute, 7-4-2401(1). The specific statute does not mandate a Deputy Auditor but merely permits one deputy. Based on 7-4-2402, the court held that the authority to determine whether to appoint a deputy resides with the Commissioners and not the Auditor. Based on this statutory scheme, the court held that the Commissioners had no clear legal duty to fund the position of Deputy Auditor. Spotorno v. Bd. of Comm'rs, 212 M 253, 687 P2d 720, 41 St. Rep. 1722 (1984).

Appointment of Deputy County Attorneys:

Although 7-4-2703 provides that a County Attorney of a first- or second-class county may appoint only one Chief Deputy and one Deputy County Attorney, this section provides for appointment of such additional Deputy County Attorneys as may be reasonably necessary to discharge the duties of the office. The prosecutors here were appointed properly and had the lawful authority to prosecute the matter. St. v. Poncelet, 187 M 528, 610 P2d 698, 37 St. Rep. 760 (1980).

Under 2-16-213 and this section, a County Attorney may appoint a deputy to serve without compensation and such deputy may legally act in the name of his principal in the filing of informations and the prosecution of criminal action. St. v. Crouch, 70 M 551, 227 P 818 (1924).

The provisions of this section have no application to the appointment by the court of counsel to assist a County Attorney in prosecuting persons charged with crime. St. v. Whitworth, 26 M 107, 66 P 748 (1901).

Attorney General's Opinions

Authority of County Commission to Restrict Number of Deputies Hired by Elected Officials: A Board of County Commissioners has authority through control of the county budget to restrict the number of deputies hired by elected officials. Therefore, a Clerk of the District Court may not employ a chief deputy or any other deputies without authorization of the Board. 43 A.G. Op. 77 (1990).

Departmental Responsibility for Operation of County Assessor's Office — Exceptions: The Department of Revenue is responsible for the internal operation of a County Assessor's office, including employment practices, except with regard to County Assessors and their deputies, who serve at the instance of the electorate or appointing power, as determined statutorily. (See 1993 special session amendment.) 42 A.G. Op. 52 (1988).

Addition or Elimination of Salaried Deputy Position — Authority Resident With County Commission: As between the County Assessor and the Board of County Commissioners, the authority to add or eliminate a salaried deputy position resides with the Board of County Commissioners. 42 A.G. Op. 23 (1987).

Establishment and Elimination of Deputy Position in County Office — Authority Resident With County: As between the state and county governments, the authority to establish a deputy position and the commensurate authority to eliminate a deputy position in the office of the county reside with county government. 42 A.G. Op. 23 (1987).

7-4-2402. Authorization to exceed limitation on number of deputy officers.

Compiler's Comments

Section Not Codified: The phrase relating to payment of deputies in section 16-3704, R.C.M. 1947, was not codified because it was redundant with 7-4-2505. That phrase has not been repealed and is still valid law. It may be referred to as sec. 1, Ch. 365, L. 1971. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Case Notes

No Legal Duty to Fund Deputy Position: The Lewis and Clark County Auditor petitioned for a Writ of Mandamus to compel the Board of County Commissioners to fund a Deputy Auditor position eliminated by the Commissioners because of budget cuts. The District Court dismissed the petition on the ground that there was no legal duty of the Commissioners to fund the position.

On appeal, the Supreme Court had to reconcile three statutes: 7-4-2401(1), under which county officers may appoint as many deputies or assistants as necessary to discharge the duties of the office; 7-4-2402, which provides the County Commissioners with authority to fix and determine the number of county deputy officers; and 7-6-2413, which provides that the number of Deputy Auditors in first-, second-, and third-class counties must not exceed one. The court held that the specific statute, 7-6-2413, must control over the general statute, 7-4-2401(1). The specific statute does not mandate a Deputy Auditor but merely permits one deputy. Based on 7-4-2402, the court held that the authority to determine whether to appoint a deputy resides with the Commissioners and not the Auditor. Based on this statutory scheme, the court held that the Commissioners had no clear legal duty to fund the position of Deputy Auditor. Spotorno v. Bd. of Comm'rs, 212 M 253, 687 P2d 720, 41 St. Rep. 1722 (1984).

Authority of Sheriff to Appoint Deputies — Consolidated City-County Government: Where the charter of a consolidated city-county government, which was approved by the voters on November 2, 1976, and took effect on May 2, 1977, specified the manner in which promotions of Sheriff's deputies were to be made, promotions made on April 12, 1977, were governed not by the provisions of the charter but by provisions of state law requiring that the appointment of a greater number of deputies than that allowed by statute is subject to the approval of the Board of County Commissioners. As the promotions were not so approved, they are void. Butler v. Local 2033 Am. Fed'n of County Employees, 186 M 28, 606 P2d 141, 37 St. Rep. 168 (1980).

Employee on Commission Basis: If the services the County Commissioners seek to have done involve only an investigation of county offices for abstracting purposes, that can be done by a regularly appointed deputy county officer. There is no statutory authority for the Commissioners to employ anyone to perform such services on a commission basis. Kelly v. Silver Bow County, 125 M 272, 233 P2d 1035 (1951).

Attorney General's Opinions

Authority of County Commission to Restrict Number of Deputies Hired by Elected Officials: A Board of County Commissioners has authority through control of the county budget to restrict the number of deputies hired by elected officials. Therefore, a Clerk of the District Court may not employ a chief deputy or any other deputies without authorization of the Board. 43 A.G. Op. 77 (1990).

Addition or Elimination of Salaried Deputy Position — Authority Resident With County Commission: As between the County Assessor and the Board of County Commissioners, the authority to add or eliminate a salaried deputy position resides with the Board of County Commissioners. 42 A.G. Op. 23 (1987).

Establishment and Elimination of Deputy Position in County Office — Authority Resident With County: As between the state and county governments, the authority to establish a deputy position and the commensurate authority to eliminate a deputy position in the office of the county reside with county government. 42 A.G. Op. 23 (1987).

7-4-2403. Official mention of principal officer includes deputies.

Attorney General's Opinions

Performance of Duties of Clerk of District Court by Deputy District Court Clerk: Under the plain meaning of this section, any deputy clerk of the District Court may act on behalf of the Clerk of Court in performing any of the Clerk's functions and duties. 43 A.G. Op. 77 (1990).

Disposition of Money Received by County Officers for Preparation of Abstracts: Preparation of abstracts by a Clerk of District Court, a County Clerk, or their respective deputies is an official service of the office. Therefore, compensation paid to them by title companies, credit bureaus, banks, realtors, and others for preparation on a regular basis of abstracts of instruments recorded in their respective offices may not be retained for their personal use, but rather must be paid to the county general fund, District Court fund, or state, as provided by law. 43 A.G. Op. 75 (1990).

Part 25
Compensation and Official Fees

Part Attorney General's Opinions

Authority of Public Safety Commission to Set Salary of Deputy Sheriff: In a department of public safety created pursuant to Title 7, ch. 32, part 1, the public safety commission may set the salary of a department Deputy Sheriff under 7-32-104 at any level at or above the amount that would be paid to the deputy under 7-4-2508. To the extent that 7-4-2508 and 7-32-104 conflict,

the provisions of 7-32-104, which allow the public safety commission to set the salaries of department employees, are the more specific and therefore are controlling. 48 A.G. Op. 20 (2000).

Part-Time Deputy County Attorney Entitled to Longevity Pay — Year of Service Composed of Calendar Year: The Legislature did not distinguish full-time Deputy County Attorneys from part-time Deputy County Attorneys for purposes of eligibility pay. Therefore, a part-time Deputy County Attorney is entitled to longevity pay under 7-4-2503 after completing the required years of service. As used in that section, the term "year of service" means a calendar year rather than 2,080 hours of employment. 48 A.G. Op. 19 (2000), following Phillips v. Lake County, 222 M 42, 721 P2d 326 (1986), and overruling 39 A.G. Op. 78 (1982), 40 A.G. Op. 61 (1984), and 43 A.G. 77 (1990), to the extent that a different definition of year of service was applied.

Calculation of Years of Service of Part-Time County Employee: The Board of County Commissioners may calculate the years of service of a part-time county employee based on the number of hours worked rather than the number of calendar years in part-time service. 43 A.G. Op. 77 (1990), overruled in 48 A.G. Op. 19 (2000), in which, pursuant to Phillips v. Lake County, 222 M 42, 721 P2d 326 (1986), the term "year of service" was construed to mean a calendar year.

Computation of Salaries, Longevity Payments, and Overtime for Sheriffs, Undersheriffs, and Deputy Sheriffs: Chapter 603, L. 1981, amended 7-4-2505 and 39-3-406 and enacted 7-4-2507 through 7-4-2510. Under Ch. 603, the following holdings were made:

(1) an individual Undersheriff or Deputy Sheriff is entitled to an initial longevity payment on his first employment anniversary occurring after October 1, 1981;

(2) years of service prior to October 1, 1981, must be considered in determining the amount of longevity payments to Deputy Sheriffs and Undersheriffs;

(3) the "minimum base annual salary" for calculating longevity payments is the statutory minimum level for the county involved, as specified in 7-4-2508;

(4) the "salary" of a Sheriff, for purposes of calculating the annual compensation of Deputy Sheriffs and Undersheriffs, includes the additional $2,000 received by the Sheriff pursuant to 7-4-2503; and

(5) the payment of overtime compensation to Undersheriffs and Deputy Sheriffs is within the discretion of the individual Boards of County Commissioners. 39 A.G. Op. 21 (1981).

7-4-2501. Compensation of county officers.

Compiler's Comments

1981 Amendments: Chapter 518 and Ch. 575 deleted subsection (3) which provided: "The coroner is entitled to receive a salary established prior to July 1 of each year by the board of county commissioners. The salary must be in effect upon the first day of each ensuing fiscal year."

Composite Section: This section was amended by Ch. 371 and Ch. 443, L. 1979, and a composite section was prepared by the Code Commissioner, 1979. Chapter 443 was a Code Commissioner bill and was not intended to make substantive changes. Consequently a conflict of language in subsection (1) between Ch. 371 and Ch. 443 has been resolved in favor of the language used in Ch. 371.

Compensation Plan: Chapter 545, L. 1979, established a County Compensation Board to consider the salaries of elected county officials and present to the Legislature an ongoing salary plan.

Case Notes

"Fees" Defined: In this section the term "fees" means a mode of compensation different from salary. St. v. Story, 53 M 573, 165 P 748 (1917).

Officers Receive Salaries: Subsection (2) is unnecessary, unless its purpose is to advise the people that salaried officers are not to have "fees and emoluments" other than salaries from the state or county. Scharrenbroich v. Lewis & Clark County, 33 M 250, 83 P 482 (1905).

Collateral References

20 C.J.S. Counties §§109 through 114.

7-4-2502. Payment of salaries of county officials and assistants.

Compiler's Comments

2003 Amendment: Chapter 114 in (3) near end deleted reference to subsection (1) of 7-4-2504. Amendment effective October 1, 2003.

1999 Amendment: Chapter 75 at beginning of (1) deleted exception clause; at beginning of (2)(a) deleted "salaries of the county attorney and deputy county attorneys authorized by

7-4-2703 are payable monthly, with" and inserted last sentence concerning payment of state's share every 2 weeks; and made minor changes in style. Amendment effective March 16, 1999.

1995 Amendment: Chapter 325 in (2)(a), at end of first sentence, and (2)(b), in second and third sentences, substituted "state treasurer" for "auditor"; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 332 in (2)(a), in first sentence after "county and", inserted "if the county has supplied the information to the department of justice for inclusion in its budget" and inserted last sentence providing that if the county has not provided a proposed County Attorney salary increase to the Department for inclusion in the budget, the county must pay the increase; and made minor changes in style.

1991 Amendment: In (2)(b), at end of first sentence after "appointment to the", substituted "department of justice" for "state auditor, who shall thereafter draw warrants for such salary in the same manner as for state officers", inserted second and third sentences concerning Department notifying State Auditor of salary of County Attorney and Auditor drawing warrants for County Attorney salary, and in fourth sentence, near middle after "notify the", substituted "department of justice" for "state auditor" and before "shall compute" substituted "department" for "auditor". Amendment effective July 1, 1991.

1986 Amendments: Chapter 12 in (3) following "payment of the same" inserted remainder of subsection allowing a uniform freeze in compensation.

Chapter 17 in (2)(a) substituted "salary of the county attorney" for "salaries of the county attorney and no more than two deputies"; at end of (2)(a) deleted "Such salaries for the deputy county attorneys include the longevity increases provided by 7-4-2503(3)(d)"; and in first sentence of (2)(b) after "county attorney" deleted "or within 30 days after the appointment of a deputy county attorney authorized by 7-4-2703".

1985 Amendment: In (2)(a) substituted "The salaries of the county attorney and deputy county attorneys authorized by 7-4-2703 are payable monthly, with the salaries of the county attorney and no more than two deputies payable one-half from the general fund of the county and the other one-half from the state treasury upon the warrant of the state auditor. Such salaries for the deputy county attorneys include the longevity increases provided by 7-4-2503(3)(d)" for "The salary of the county attorney is payable monthly, with one-half from the general fund of the county and the other one-half from the state treasury upon the warrant of the state auditor"; and in (2)(b) near middle of first sentence, after "office of county attorney", inserted "or within 30 days after the appointment of a deputy county attorney authorized by 7-4-2703".

Composite Section: This section was amended by Ch. 109 and Ch. 443, L. 1979, and a composite section was prepared by the Code Commissioner, 1979. Ch. 109 provided for twice monthly and biweekly paychecks in subsection (1)(a) and in former subsection (1)(b). Ch. 443, a Code Commissioner bill, deleted subsection (1)(b) referring to payment from the contingency fund as inconsistent with subsection (1)(a) referring to payment from the general fund. The composite deleted subsection (1)(b) to avoid the inconsistency. The intent of Ch. 109 is preserved in subsection (1).

Case Notes

Deputy Sheriffs — Number and Compensation: The Board of County Commissioners has the power to determine, within the maximum limits prescribed by law, the number and compensation of deputies allowed by the Sheriff. (Decided prior to the enactment of 7-4-2507 through 7-4-2510, and see 1999 amendment.) Jobb v. Meagher County, 20 M 424, 51 P 1034 (1898), explained in Penwell v. Bd. of County Comm'rs, 23 M 351, 59 P 167 (1899), and Hogan v. Cascade County, 36 M 183, 92 P 529 (1907).

Attorney General's Opinions

Justice of the Peace — Reduction From Full-Time Status: Absent a voluntary waiver by the incumbent, the proper time at which to reduce a full-time Justice of the Peace position to a part-time position is before the next election. 38 A.G. Op. 90 (1980).

Justice of the Peace — When Pay Raise May Be Diminished: Any pay raises given a Justice of the Peace must stand for the remainder of the term, and only at the beginning of the next term may such raises be diminished. 38 A.G. Op. 90 (1980).

Salary Diminution Prohibited for Justices of the Peace: The reduction of a full-time Justice of the Peace to a part-time Justice of the Peace with a salary commensurate to the workload and office hours constitutes a prohibited salary diminution within the language of Art. VII, sec. 7, Mont. Const. 38 A.G. Op. 90 (1980).

Increase in County Attorney's Salary: A county having self-government powers may grant an increase in salary to its County Attorney in excess of the amount provided in 7-4-2503, but the increase must be borne by the general fund of the county. 37 A.G. Op. 70 (1977).

Joint Employment: A County Attorney, for purposes of administration, is jointly employed by both the county and the state. 36 A.G. Op. 32 (1975).

Method of Setting Salary of County Attorney: The County Commissioners must set the salary of the County Attorney by resolution and must forward a copy of the resolution to the State Auditor (see 1995 and 1999 amendments) for proper payment of the County Attorney. 35 A.G. Op. 24 (1973).

Method of Paying County Attorneys' Salaries: Upon implementation of the 1972 Constitution of Montana, on July 1, 1973, the salaries of County Attorneys shall be payable monthly, one-half from the general fund of the county and the other half from the state treasury, upon the warrant of the State Auditor (function now transferred to State Treasurer — see 1995 and 1999 amendments). 35 A.G. Op. 15 (1973).

7-4-2503. Salary schedule for certain county officers — county compensation board.

Compiler's Comments

2003 Amendment: Chapter 487 in (4)(a) in first sentence substituted "two to four resident taxpayers" for "two resident taxpayers" and in two places substituted "one or two taxpayer members" for "one taxpayer member"; and inserted (4)(d) relating to inapplicability of subsection (4) to certain forms of local government. Amendment effective October 1, 2003.

2001 Amendments — Composite Section: Chapter 7 near end of (1)(a)(i) and near end of (1)(a)(ii) substituted "latest federal decennial census" for "1990 federal decennial census"; and made minor changes in style. Amendment effective October 1, 2001. The amendment by Ch. 507, rendered the amendment by Ch. 7 void.

Chapter 507 in (1)(a) inserted reference to justice of the peace and at end substituted "established by the county governing body based upon the recommendations of the county compensation board provided for in subsection (4)" for "established by the county governing body at no less than 80% of the annual base salary of:

(i) $25,000 for counties of the first through fifth class added to the population increment of $10 for each 100 persons or major fraction of 100 persons included in the county's population as determined by the 1990 federal decennial census; or

(ii) $18,000 for counties of the sixth and seventh class added to the population increment of $10 for each 100 persons or major fraction of 100 persons in the county's population as determined by the 1990 federal decennial census"; in (1)(b) substituted "annual salary established pursuant to subsection (1)(a)" for "annual base established by the county governing body in subsection (1)" and at end substituted "subsection (1)(a)" for "subsection (1)"; in (2)(c) near beginning of first sentence substituted "1% of the salary determined under subsection (1)" for "1% of the base salary set forth in subsection (1)" and near middle of second sentence substituted "salary" for "base salary"; in (3)(a) at end of first sentence inserted reference to adjustment made in subsection (3)(c), in second sentence after "part-time official" deleted "for a county of the first, second, or third class" and substituted "receive an annual base salary equal to the salary received for the fiscal year ending June 30, 2001" for "receive an annual salary equal to 60% of the annual salary of a full-time county attorney", and deleted former third sentence that read: "A county attorney who is a part-time official for a county of the fourth, fifth, sixth, or seventh class is entitled to receive an annual salary equal to 50% of the annual salary of a full-time county attorney"; in (3)(c) substituted "Each county attorney is entitled to an increase in salary based upon the schedule developed and approved by the county compensation board as provided in subsection (4)" for "On August 1 of each year, each county attorney is entitled to an increase in salary calculated by adding to the annual salary a percentage of up to 100% of the previous calendar year's consumer price index for all urban consumers, U.S. department of labor, bureau of labor statistics, or other index that the bureau of business and economic research of the university of Montana-Missoula may in the future recognize as the successor to that index. However, the county commissioners may, for all or the remainder of each fiscal year, in conjunction with setting salaries for other officers as provided in 7-4-2504(1), set the salary at the prior fiscal year level if that level is lower than the level required by this subsection (3)(c). The cost-of-living increment for each fiscal year must be added to all cost-of-living increments granted for previous years unless salaries were set for the fiscal year at the level of salaries received in the prior fiscal year. Unless restored pursuant to 7-4-2504(2), a cost-of-living increment that would have been received for the fiscal year, computed on the prior fiscal year, may not be added to previous increments"; in (3)(d)(i) near middle of third sentence substituted

"for each year of additional service" for "for each year of service thereafter"; at end of (3)(d)(ii) after "longevity increase" deleted "but, unless longevity increases are restored pursuant to 7-4-2504(2), the years of service during a year in which the salary was set at the level of the salary of the prior fiscal year may not be included in a calculation of longevity increases"; deleted former (4) that read: "(4) The latest federal decennial census statistics are the basis for computation of population increments under this section. During the intervening 9 years, the computation of population increments applicable on July 1 of each year is based on the most current calendar year's estimates of counties' populations compiled by the federal-state cooperative program for estimates of the university of Montana-Missoula bureau of business and economic research and the U.S. bureau of the census or other estimate that the bureau of business and economic research may certify"; inserted (4)(a) establishing county compensation board; inserted (4)(b) requiring board to establish compensation schedule for county officials; inserted (4)(c) requiring majority vote of board to establish recommended compensation schedule, including at least two county commissioners; and made minor changes in style. Amendment effective May 1, 2001.

1999 Amendment: Chapter 411 in four places in (3)(a) and two places in (3)(b) before "salary" inserted "base"; inserted (3)(d)(ii) authorizing county with full-time county attorney to pay same longevity increase provided for deputy county attorneys; at beginning of (3)(d))(iii) deleted "The years of service as a deputy county attorney accumulated prior to July 1, 1985, must be included in the calculation of the longevity increase, but"; and made minor changes in style. Amendment effective July 1, 1999, and terminates July 1, 2001.

1995 Amendments: Chapter 230 near end of (1)(a), after "authorized", deleted "for the fiscal year beginning July 1, 1991, and each year thereafter"; at beginning of (3)(c) substituted "On August 1 of each year" for "Beginning July 1, 1991, and on July 1 of each succeeding year"; and made minor changes in style. Amendment effective March 24, 1995.

Chapter 233 in (1)(a), (3)(a), (3)(b), and in two places in (3)(c) deleted provision applying law beginning July 1, 1991; in first sentence of (3)(c) substituted "a percentage of up to 100% of" for "the percentage change in" and in third sentence deleted provision applying law beginning July 1, 1983; at beginning of (4) deleted "For each 10th year after the fiscal year beginning July 1, 1981"; and made minor changes in style. Amendment effective July 1, 1995.

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula".

1993 Amendment: Chapter 10 in (3)(c), near middle of first sentence after "1991", substituted "the percentage change in" for "an increment of 100% of the last"; in (4), in second sentence, substituted "most current calendar year's estimates" for "last calendar year's annual estimates"; and made minor changes in style.

1991 Amendments: Chapter 527 near end of (1)(a) substituted "1991" for "1981" and substituted "and each year thereafter must be established by the county governing body at no less than 80% of" for "is computed by adding"; at beginning of (1)(a)(i) increased base salary from $14,000 to $25,000 and near end updated reference from 1980 to 1990 federal decennial census; in (1)(a)(ii) increased base salary from $12,000 to $18,000, decreased population increment from $20 to $10, and near end updated reference from 1980 to 1990 federal decennial census; inserted (1)(b) concerning annual base established by county governing body being uniform for subject county officers; near beginning of (3)(c) substituted "1991" for "1982" and near middle substituted "1991" for "1981" and increased increment from 70% to 100%; and made minor changes in style. Amendment effective April 22, 1991.

Chapter 667 in (3)(a), (3)(b), and (3)(c) substituted "1991" for "1981"; in (3)(a), at end of first sentence, increased County Attorney salary from $36,500 to $50,000; in (3)(b), at end after "shall be", substituted "the same as that established for full-time county attorneys in subsection (3)(a)" for "$36,500"; and in (3)(c), near beginning of first sentence, substituted "1991" for "1982" and near middle increased increment of consumer price index from 70% to 100%. Amendment effective July 1, 1991.

1989 Amendments: Chapter 257 at beginning of last sentence of (3)(c) substituted "Unless restored pursuant to 7-4-2504(2), any" for "In such case the"; and in middle of (3)(d)(ii) inserted "unless longevity increases are restored pursuant to 7-4-2504(2), the". Amendment effective June 30, 1989.

Chapter 505 inserted (1)(c) providing for longevity payment of 1% of base salary for County Sheriffs and excluding additional salary from use in computing compensation for Deputy Sheriffs and undersheriffs; and made minor changes in phraseology. Amendment effective July 1, 1989.

1986 Amendment: In (3)(c) inserted second sentence allowing a uniform freeze in compensation and following "previous years" inserted remainder of subsection relating to increments occurring after a freeze in compensation; and at end of (3)(d)(ii) following "longevity increase" inserted remainder of subsection relating to calculation when compensation had been frozen.

1985 Amendments: Chapter 562 in (2)(a), at beginning of sentence substituted "An elected county superintendent" for "The county superintendent" and at end of sentence, after "$400 per year", inserted remainder of (a) relating to increased compensation for greater education and endorsement.

Chapter 719 in (1) in introductory clause after "clerk of the district court", deleted "part-time county attorney"; in former (2)(c) deleted first sentence that read: "In counties with a population less than 30,000, the county attorney who is a part-time official shall receive, in addition to the salary based upon subsection (1), the sum of $1,200 per year"; renumbered second sentence of former (2)(c) as (3)(a) and in (3)(a) inserted second and third sentences all relating to part- or full-time County Attorney status and salary percentages; renumbered first sentence of former (2)(d) as (3)(b) (full time pursuant to 7-4-2706); renumbered remainder of former (2)(d) as (3)(c) (computation of cost-of-living increments); inserted (3)(d)(i) and (3)(d)(ii) concerning longevity increases; and renumbered former (2)(e) as (4) (computation of population).

1981 Amendment: Rewrote entire section (see sec. 1, Ch. 518, L. 1981, for text) to substitute language for specific dollar amounts based on population. For former text see sec. 1, Ch. 459, L. 1979, and sec. 4, Ch. 669, L. 1979. For language of former composite section, see 7-4-2503, MCA 1979.

Attorney General's Opinions

Part-Time Deputy County Attorney Entitled to Longevity Pay — Year of Service Composed of Calendar Year: The Legislature did not distinguish full-time Deputy County Attorneys from part-time Deputy County Attorneys for purposes of eligibility pay. Therefore, a part-time Deputy County Attorney is entitled to longevity pay under this section after completing the required years of service. As used in this section, the term "year of service" means a calendar year rather than 2,080 hours of employment. 48 A.G. Op. 19 (2000), following Phillips v. Lake County, 222 M 42, 721 P2d 326 (1986), and overruling 39 A.G. Op. 78 (1982), 40 A.G. Op. 61 (1984), and 43 A.G. 77 (1990), to the extent that a different definition of year of service was applied.

County Attorney Longevity Increase for Time as Deputy County Attorney — 1999 Statutory Amendment: The 1999 amendment to subsection (3)(d)(ii) of this section authorizes a Board of County Commissioners to grant a longevity increase to a full-time County Attorney for years served as a Deputy County Attorney, in addition to years served as a County Attorney. 48 A.G. Op. 8 (1999).

Provision of Office Space and Equipment by County for Part-Time County Attorney: A county governing body may satisfy its obligation to provide office space for a part-time County Attorney by providing space in a county building or, if no suitable space is available, by renting office space. Use of the space for the County Attorney's private practice is allowed only through a written agreement between the county and the County Attorney leasing the use of the space for private business purposes. Alternatively, the governing body may allow a claim by the County Attorney for the rental of office space needed to conduct the county's business if suitable office space is not available in county buildings. A county governing body may satisfy its obligation to provide necessary equipment for a part-time County Attorney by providing the use of the equipment owned by the county or, if no suitable equipment is available, by renting equipment. Use of the equipment for the County Attorney's private practice is allowed only through a written agreement between the county and the County Attorney leasing the use of the equipment for private business purposes. 46 A.G. Op. 10 (1995), followed in 46 A.G. Op. 20 (1996).

Office Manager/Secretary Defined as Assistant — Determination of Salary: An office manager/secretary hired as a county employee to assist a County Attorney is considered an assistant whose compensation may be set by the Board of County Commissioners under 7-4-2505. However, the statute is limited to persons who serve as county employees and does not apply to independent contractors or consultants. Assistants must be paid a salary to be determined by the Commissioners at no more than 90% of the principal officer's salary, unless a specific provision allows greater compensation. 46 A.G. Op. 6 (1995).

Calculation of Base Salary of Sheriff — Longevity to Include Total Years of Service: The base salary of a Sheriff under this section is based on the class of the county and the county

population. For purposes of calculating a Sheriff's longevity payments, total years of service with the Sheriff's Department are included. 43 A.G. Op. 44 (1989).

Change in County Classification — Adjustment of Salaries of County Officials: When the classification of a county under 7-1-2111 changes, salaries of County Commissioners, the County Attorney, and county officials listed in 7-4-2503(1) must be adjusted as of July 1 of the following year (see 1995 amendment). Adjustments are computed as follows: (1) for County Commissioners, according to 7-4-2107; (2) for a part-time County Attorney, according to 7-4-2503(3); and (3) for county officials listed in 7-4-2503(1), according to 7-4-2503. (See 2001 amendment.) 42 A.G. Op. 85 (1988).

Change in County Classification — Time for Setting County Officials' Salaries: When a county's classification changes pursuant to 7-1-2111, the salaries of the county officials listed in 7-4-2503(1) must also change. The salaries must change as of July 1 of the following year (see 1995 and 2001 amendments), with the onset of a new fiscal year for the county. 40 A.G. Op. 81 (1984), followed in 41 A.G. Op. 6 (1985).

Computation of Cost-of-Living Increases: The cost-of-living authorized for county officials by 7-4-2504 applies only to the annual base salary plus population increment established by subsection (1) of this section and not to the additional sums included in the salaries of the Superintendent of Schools, Sheriff, and Commissioners under subsection (2) of this section and 7-4-2107. (See 2001 amendment.) 39 A.G. Op. 65 (1982).

Compensation of County Clerk and Recorder for Work as Election Administrator: A County Clerk and Recorder is not entitled to compensation for services as an election administrator. Without a specific grant of authority to allow additional compensation beyond that for the duties as a County Clerk and Recorder, no additional compensation is allowed. An election administrator who is not also the County Clerk and Recorder may be compensated for his election duties. 39 A.G. Op. 7 (1981).

Full-Time County Attorney — County Population Requirements: A county with a population of less than 30,000 may establish a full-time County Attorney position. The position need not be filled on July 1 but may be filled at some specified reasonable time after July 1 (see 1995 amendment). The salary for such a full-time County Attorney is the same as a full-time County Attorney in a county having more than 30,000 population. (See 1999 and 2001 amendments.) 38 A.G. Op. 22 (1979).

Full-Time County Attorney — Residency Requirements: A practicing attorney who has declared his intention to make a county his permanent home, is actively seeking a permanent residence in that county, and is in the process of terminating his personal business affairs at his former residence has become a resident of the county and is eligible for appointment as a full-time County Attorney once he has resided in the county for 30 days if he becomes a qualified registered elector and meets other qualifications for the office. 38 A.G. Op. 22 (1979).

Self-Government Powers: This section does not apply to self-government units since it may be superseded by ordinance or resolution of the Commission and is not prohibited by 7-1-114(g). 37 A.G. Op. 68 (1977).

Collateral References

20 C.J.S. Counties §§115 through 122.

7-4-2504. Salaries to be fixed by resolution — cost-of-living increments.

Compiler's Comments

2001 Amendment: Chapter 507 near middle inserted reference to justice of the peace and at end substituted "by adding to the annual salary provided for in 7-4-2503(1) a cost-of-living increment based upon the schedule developed and approved by the county compensation board provided for in 7-4-2503(4)" for "The salaries fixed may be no less than 80% of the annual base salary provided for in 7-4-2503(1) plus a cost-of-living increment based on a percentage of up to 100% of the previous calendar year's consumer price index for all urban consumers, U.S. department of labor, bureau of labor statistics, or other index that the bureau of business and economic research of the university of Montana-Missoula may in the future recognize as the successor to that index" and deleted former third, fourth, and fifth sentences that read: "The county governing body may, however, for all or the remainder of each fiscal year, in conjunction with setting salaries for the same action on the salaries of justices of the peace (if applicable), the county governing body, the county attorney, and the coroner, set the salary at the prior fiscal year level if that level is lower than the level required by this subsection. The cost-of-living increment for each fiscal year must be added to all cost-of-living increments granted for previous years unless salaries were set for the fiscal year at the level of salaries received in the prior fiscal

year. In such a case, the cost-of-living increment that would have been received for the fiscal year, computed on the prior fiscal year, may not be added to previous increments"; deleted former (2) and (3) that read: "(2) The county governing body may, in any subsequent fiscal year, restore for 1 or more years the annual cost-of-living increments withheld pursuant to subsection (1). If cost-of-living increments are restored, the longevity increases provided for sheriffs in 7-4-2503, for deputy county attorneys in 7-4-2503(3)(d)(i), and for undersheriffs and deputy sheriffs in 7-4-2510 must also be restored for the years for which the cost-of-living increment was restored.

(3) The county governing body shall by resolution, prior to August 1 of each year, establish the salary of the coroner and may, for all or the remainder of each fiscal year, in conjunction with setting salaries for other officers as provided in subsection (1), set the salary at the prior fiscal year level. The salary must be in effect on the first day of each ensuing fiscal year"; and made minor changes in style. Amendment effective May 1, 2001.

1995 Amendments: Chapter 230 in (1), in first sentence after "before", substituted "August 1 of each year" for "July 1, 1992, and on or before July 1 of each year thereafter" and in fourth sentence, after "increment for", deleted "the fiscal year beginning July 1, 1992"; deleted former (3) that read: "(3) If the application of 7-4-2503 does not qualify a county official for a salary increase, the salary base for the fiscal year beginning July 1, 1991, must be the fiscal year 1990-91 salary plus 100% of the last previous calendar year's consumer price index for all urban consumers, as set forth in subsection (1)"; near beginning of (3) substituted "August" for "July"; and made minor changes in style. Amendment effective March 24, 1995.

Chapter 233 in two places in (1) deleted references to July 1, 1992, and subsequent years and at beginning of second sentence deleted "Except as provided in subsection (3)" and near middle inserted "a percentage of up to 100%"; deleted former (3) establishing a salary base for fiscal 1991 and subsequent years; and made minor changes in style. Amendment effective July 1, 1995.

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula".

1993 Amendment: Chapter 10 in (1), near middle of second sentence, deleted "last" before "previous calendar year's"; and made minor changes in style.

1991 Amendment: Near beginning of (1) substituted "1992" for "1982", at end of first sentence, after "salary)", deleted "for cost-of-living increase by adding to the annual salary computed under 7-4-2503 an increment calculated by applying to the annual salary established by 7-4-2503(1) plus previous cost-of-living increments, 70% of", at beginning of second sentence inserted exception clause and language fixing salaries at no less than 80% of annual base salary plus a cost-of-living increment, and near beginning of fourth sentence substituted "1992" for "1983"; and in (3), after "increase", substituted language concerning salary for fiscal year beginning July 1, 1991, being the 1990-91 salary plus 100% of previous calendar year's consumer price index for "of at least 7% on July 1, 1981, his salary on that date shall be increased by an amount sufficient to provide him total salary equal to 7% more than during the previous year". Amendment effective April 22, 1991.

1989 Amendments: Chapter 257 inserted (2) authorizing restoration of cost-of-living increments and longevity increases for Deputy County Attorneys, undersheriffs, and Deputy Sheriffs. Amendment effective June 30, 1989.

Chapter 505 inserted (2) authorizing restoration of cost-of-living increments and longevity increases for County Sheriffs. Amendment effective July 1, 1989.

1989 Composite: The language of the amendments made by Ch. 257 and Ch. 505 was identical except for the officials dealt with. The Code Commissioner has combined the amendments in order to keep internal references correct.

1986 Amendment: In (1) inserted second sentence allowing a uniform compensation freeze and following "previous years" inserted remainder of subsection relating to cost-of-living increments after a compensation freeze; and in (3) following "coroner" inserted remainder of first sentence relating to a compensation freeze.

1981 Amendments: Chapter 518 rewrote entire section (see sec. 3, Ch. 518, L. 1981, for text) to provide for cost-of-living increments. For former text see sec. 10, Ch. 443, L. 1979, and sec. 2, Ch. 459, L. 1979. For language of composite section, see 7-4-2504, MCA 1979.

Chapter 575 deleted "(if he receives a salary)" after "county coroner" in two places. Chapter 518 also deleted this language.

Attorney General's Opinions

Seven Percent Increase as Cost of Living Increment — Addition to 1982 Base Salary: The 7% increase in subsection (3) (prior to the 1991 amendment; see also 1995 amendment) of this section must be considered a cost-of-living adjustment (COLA) used to determine salaries for elected county officials in fiscal year 1982 and must be added to the base salary on July 1, 1982, before computing the COLA for fiscal year 1982-83. 43 A.G. Op. 58 (1990).

County Reclassification — Section Application Limited to Initial Salary Computation: The language of this section confines its application to the initial computation of salaries in accordance with the 1981 amendments; therefore, subsection (2) of this section is not applicable to salary adjustments due to reclassification of counties. A county official's base salary established under this section on July 1, 1981, lasts only until county reclassification necessitates a salary adjustment in accordance with 7-4-2503. 42 A.G. Op. 85 (1988).

Change in County Classification — Time for Setting County Officials' Salaries: When a county's classification changes pursuant to 7-1-2111, the salaries of the county officials listed in 7-4-2503(1) must also change. The salaries must change as of July 1 of the following year (see 1995 amendment), with the onset of a new fiscal year for the county. (See 2001 amendment.) 40 A.G. Op. 81 (1984).

Computation of Cost-of-Living Increase: The cost-of-living increase authorized for county officials by this section applies only to the annual base salary plus population increment established by 7-4-2503(1) and not to the additional sums included in the salaries of the Superintendent of Schools, Sheriff, and Commissioners under 7-4-2503(2) and 7-4-2107. (See 2001 amendment.) 39 A.G. Op. 65 (1982).

Full-Time County Attorney — County Population Requirements: A county with a population of less than 30,000 may establish a full-time County Attorney position. The position need not be filled on July 1 but may be filled at some specified reasonable time after July 1 (see 1995 amendment). The salary for such a full-time County Attorney is the same as a full-time County Attorney in a county having more than 30,000 population. 38 A.G. Op. 22 (1979).

Full-Time County Attorney — Residency Requirements: A practicing attorney who has declared his intention to make a county his permanent home, is actively seeking a permanent residence in that county, and is in the process of terminating his personal business affairs at his former residence has become a resident of the county and is eligible for appointment as a full-time County Attorney once he has resided in the county for 30 days if he becomes a qualified registered elector and meets other qualifications for the office. 38 A.G. Op. 22 (1979).

7-4-2505. Amount of compensation for deputies and assistants.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 deleted former (1)(d) that listed the assessor; deleted (2)(c) that provided for deputy assessors' salaries; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1985 Amendment: In (2)(a), in first sentence near middle, after "subsection (1)", inserted "other than a deputy county attorney", and inserted second sentence limiting total salary of a Deputy County Attorney.

1981 Amendment: In (1), substituted "Subject to" for "Except as provided in", and deleted "sheriff" from the list of officers; in (2)(a), substituted "The salary of a deputy or an assistant listed in subsection (1) may not be" for "Except as provided in subsection (2)(b), the salary of no deputy or assistant shall be"; and deleted former subsection (2)(b), which read:

"In fixing the compensation allowed the undersheriff, the board must fix the same at 95% of the salary of the officers under whom such undersheriff is serving. In fixing the compensation allowed the deputy sheriffs, the board must fix the same at 90% of the salary of the officer under whom such deputy sheriff is serving, except in counties of the first, second, or third class, in which the board must fix the same at not less than 75% or more than 90% of the salary of the officer under whom such deputy sheriff is serving."

Case Notes

Salary of Deputy Sheriff: Plaintiff was not entitled to the salary of a Deputy Sheriff when she did not perform duties required of a Deputy Sheriff. Bynum v. Howard, 34 St. Rep. 1285 (D.C. Mont. 1977) (apparently not reported in Federal Supplement).

Salary for Time Not Served — Illness: Where Deputy Sheriff did not serve for 3 months because of illness, the County Commissioners could not be forced to pay him his salary for those 3 months. State ex rel. Rusch v. Bd. of County Comm'rs, 121 M 162, 191 P2d 670 (1948).

Fixing Compensation:

Board of County Commissioners may exercise its statutory power to fix the compensation of deputies and assistants in the county offices by providing for such compensation in the annual budget. State ex rel. Thompson v. Gallatin County, 120 M 263, 184 P2d 998 (1947).

Designation of compensation in the budget is not the only way in which the Board of County Commissioners can exercise its power to fix salaries, but the Board can fix such salaries by minute entry, motion, or in any of the ways employed before passage of the Budget Act (Ch. 148, L. 1929, codified in Title 7, ch. 6, part 23, now repealed). State ex rel. Thompson v. Gallatin County, 120 M 263, 184 P2d 998 (1947).

Where Board of County Commissioners appropriated funds for office at rate of $170 a month but in their journal stated that the salary for the office was fixed by the Board at $150 a month, the salary for the office was $150 a month. State ex rel. Thompson v. Gallatin County, 120 M 263, 184 P2d 998 (1947).

Extra Deputies — Temporary Service: While the Board of County Commissioners had no power to decrease the compensation of regular deputies of county officers fixed by section 25-603, R.C.M. 1947 (since repealed), it has discretion, under this section, to fix the compensation of extra deputies appointed for temporary service at any rate it may deem expedient, provided it does not exceed the rate paid the regular deputies. Modesitt v. Flathead County, 57 M 216, 187 P 911 (1920). See also Farrell v. Yellowstone County, 68 M 313, 218 P 559 (1923).

Attorney General's Opinions

Office Manager/Secretary Defined as Assistant — Determination of Salary: An office manager/secretary hired as a county employee to assist a County Attorney is considered an assistant whose compensation may be set by the Board of County Commissioners under this section. However, the statute is limited to persons who serve as county employees and does not apply to independent contractors or consultants. Assistants must be paid a salary to be determined by the Commissioners at no more than 90% of the principal officer's salary, unless a specific provision allows greater compensation. 46 A.G. Op. 6 (1995).

Authorization by County Commission of Increase in Salary of County Officer: Even if the county budget allows for an increase in the salary of a county officer, only the Board of County Commissioners may authorize an increase through the budgetary process. Therefore, a Clerk of Court is not authorized to promote a deputy clerk to a chief deputy position at a higher pay scale without authorization in the county budget and approval of the Board. 43 A.G. Op. 77 (1990).

No Salary Limitation as to Assistants to County Commissioners: The salaries of administrative assistants employed by a Board of County Commissioners are not limited by 7-4-2505, since County Commissioners are not included in the definitive list of county officers to which that section applies. Salaries of the administrative assistants may be set pursuant to 7-5-2107, which contains no limitation as to amount. 38 A.G. Op. 43 (1979).

Deputies as Ambulance Drivers — Stipends: Deputy Sheriffs receiving maximum statutory salary may receive a stipend for operating the county ambulance in addition to their regular salary. 37 A.G. Op. 13 (1977).

7-4-2507. Deputy sheriff and undersheriff provisions — construction.

Case Notes

Deputy Sheriffs' Overtime and On-Call Time Before and After "Garcia Decision": Section 39-3-405 relates to overtime compensation generally, while 7-4-2507 through 7-4-2509 specifically address the salary and overtime compensation of Deputy Sheriffs. Therefore, under the rule that the specific statute governs over the general, 39-3-405 does not apply to Deputy Sheriffs. Furthermore, 7-4-2507 provides that 7-4-2508 through 7-4-2510 govern if they conflict with any other law. Under 7-4-2509, payment of overtime for time worked beyond the regularly scheduled work period is not mandatory and lies in the discretion of the Board of County Commissioners. Since 39-3-405 does not apply to the deputies, the Fair Labor Standards Act (FLSA) and Garcia v. San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985), set the threshold (171 hours per 28-day work period) above which the deputies must be paid overtime, retroactive to April 15, 1985, the date Garcia was decided; it could not be argued that the FLSA intended that the lower of the FLSA and the 39-3-405 (160 hours) threshold for a 28-day period should be used to determine when overtime begins. The deputies' claim for compensation for on-call time was another claim for overtime, and payment

for on-call time prior to Garcia was in the discretion of the County Commissioners. On-call time since Garcia did not constitute work under a United States Supreme Court test that for FLSA purposes work is physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. Phillips v. Lake County, 222 M 42, 721 P2d 326, 43 St. Rep. 1046 (1986).

Salary for Time Not Served — Illness: Where deputy did not serve 3 months because of illness, he could not, by mandamus, force payment of his salary for those 3 months. State ex rel. Rusch v. Bd. of County Comm'rs, 121 M 162, 191 P2d 670 (1948).

7-4-2508. Compensation of undersheriff and deputy sheriff.

Case Notes

Deputy Sheriffs' Overtime and On-Call Time Before and After "Garcia Decision": Section 39-3-405 relates to overtime compensation generally, while 7-4-2507 through 7-4-2509 specifically address the salary and overtime compensation of Deputy Sheriffs. Therefore, under the rule that the specific statute governs over the general, 39-3-405 does not apply to Deputy Sheriffs. Furthermore, 7-4-2507 provides that 7-4-2508 through 7-4-2510 govern if they conflict with any other law. Under 7-4-2509, payment of overtime for time worked beyond the regularly scheduled work period is not mandatory and lies in the discretion of the Board of County Commissioners. Since 39-3-405 does not apply to the deputies, the Fair Labor Standards Act (FLSA) and Garcia v. San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985), set the threshold (171 hours per 28-day work period) above which the deputies must be paid overtime, retroactive to April 15, 1985, the date Garcia was decided; it could not be argued that the FLSA intended that the lower of the FLSA and the 39-3-405 (160 hours) threshold for a 28-day period should be used to determine when overtime begins. The deputies' claim for compensation for on-call time was another claim for overtime, and payment for on-call time prior to Garcia was in the discretion of the County Commissioners. On-call time since Garcia did not constitute work under a United States Supreme Court test that for FLSA purposes work is physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. Phillips v. Lake County, 222 M 42, 721 P2d 326, 43 St. Rep. 1046 (1986).

Attorney General's Opinions

Authority of Public Safety Commission to Set Salary of Deputy Sheriff: In a department of public safety created pursuant to Title 7, ch. 32, part 1, the public safety commission may set the salary of a department Deputy Sheriff under 7-32-104 at any level at or above the amount that would be paid to the deputy under this section. To the extent that 7-32-104 and this section conflict, the provisions of 7-32-104, which allow the public safety commission to set the salaries of department employees, are the more specific and therefore are controlling. 48 A.G. Op. 20 (2000).

Calculation of Base Salary of Deputy Sheriff and Undersheriff — Longevity to Include Each Year of Service: The minimum base annual salary of a Deputy Sheriff or undersheriff for purposes of determining longevity payments under 7-4-2510 is based on the Sheriff's base salary as set forth in this section. Each year of service with the Sheriff's Department is included when calculating longevity payments for a Deputy Sheriff or undersheriff. 43 A.G. Op. 44 (1989).

7-4-2509. Sheriff's department — work period in lieu of workweek — overtime compensation.

Case Notes

Deputy Sheriffs' Overtime and On-Call Time Before and After "Garcia Decision": Section 39-3-405 relates to overtime compensation generally, while 7-4-2507 through 7-4-2509 specifically address the salary and overtime compensation of Deputy Sheriffs. Therefore, under the rule that the specific statute governs over the general, 39-3-405 does not apply to Deputy Sheriffs. Furthermore, 7-4-2507 provides that 7-4-2508 through 7-4-2510 govern if they conflict with any other law. Under 7-4-2509, payment of overtime for time worked beyond the regularly scheduled work period is not mandatory and lies in the discretion of the Board of County Commissioners. Since 39-3-405 does not apply to the deputies, the Fair Labor Standards Act (FLSA) and Garcia v. San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985), set the threshold (171 hours per 28-day work period) above which the deputies must be paid overtime, retroactive to April 15, 1985, the date Garcia was decided; it could not be argued that the FLSA intended that the lower of the FLSA and the 39-3-405 (160 hours) threshold for a 28-day period should be used to determine when overtime begins. The

deputies' claim for compensation for on-call time was another claim for overtime, and payment for on-call time prior to Garcia was in the discretion of the County Commissioners. On-call time since Garcia did not constitute work under a United States Supreme Court test that for FLSA purposes work is physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. Phillips v. Lake County, 222 M 42, 721 P2d 326, 43 St. Rep. 1046 (1986).

Deputy Sheriffs' Retroactive Overtime — Conflict of Laws: Since deputies' award of retroactive overtime compensation was grounded in federal rather than state law, the state laws relating to penalties, interest, attorney fees, and costs did not apply. Phillips v. Lake County, 222 M 42, 721 P2d 326, 43 St. Rep. 1046 (1986).

Attorney General's Opinions

Applicability of State Law Other Than Montana Minimum Wage and Maximum Hours Law to Workers Covered by Fair Labor Standards Act: The federal Fair Labor Standards Act of 1938 requires provisions of state law other than the Montana minimum wage and maximum hours law (Title 39, ch. 3, part 4), which set shorter workweeks for specified groups of employees, to be given effect. 41 A.G. Op. 58 (1986).

Deputy Sheriffs and Undersheriffs — Compensatory Time: Since no statutory right to compensation for overtime for Deputy Sheriffs and undersheriffs existed prior to enactment of 7-4-2509 in 1981, they are not entitled to a cash payment in lieu of compensatory time off for overtime hours worked before July 1, 1981. The enactment of 7-4-2509 was not expressly retroactive. 40 A.G. Op. 55 (1984).

7-4-2510. Sheriff's department — longevity payments.

Compiler's Comments

1986 Amendment: Following "service with the department" inserted remainder of first sentence relating to longevity payments and a compensation freeze.

Case Notes

"Year of Service" Defined: As used in this section, "year of service" means calendar year, not 2,080 hours of work. Phillips v. Lake County, 222 M 42, 721 P2d 326, 43 St. Rep. 1046 (1986).

Attorney General's Opinions

Calculation of Base Salary of Deputy Sheriff and Undersheriff — Longevity to Include Each Year of Service: The minimum base annual salary of a Deputy Sheriff or undersheriff for purposes of determining longevity payments under this section is based on the Sheriff's base salary as set forth in 7-4-2508. Each year of service with the Sheriff's Department is included when calculating longevity payments for a Deputy Sheriff or undersheriff. 43 A.G. Op. 44 (1989).

Mandatory Method of Calculating Longevity — Collective Bargaining Not Applicable: A Board of County Commissioners sought to implement a collective bargaining agreement provision that authorized longevity increases to Deputy Sheriffs, predicated on years of service, including any years during which the Deputy's base salary was set at the same level as the previous year. However, this section constitutes a mandatory condition of employment that a Board of County Commissioners may not deviate from or alter through collective bargaining. Therefore, the collective bargaining agreement provision was held unenforceable to the extent it permitted inclusion of service years for the purpose of calculating longevity pay increases expressly excluded under this section. 43 A.G. Op. 34 (1989). See also 42 A.G. Op. 37 (1987).

Effect of Pay Freeze on Deputy Sheriff's Longevity Pay: If the County Commissioners set the salary of a Deputy Sheriff at the same level as for the previous fiscal year, that year may not be used when calculating longevity pay and the Deputy's longevity pay is, in effect, frozen. If the pay freeze is lifted and the salary increased, the Deputy's longevity pay does not include additional longevity pay for the period when the salary was set at the same level as the prior fiscal year. Pursuant to this section, loss of an increase in longevity pay due to a pay freeze is permanent. 42 A.G. Op. 76 (1988).

Part-Time Deputies — "Year of Service" Defined: Under this section, "year of service" means each 2,080 hours of employment when used to compute longevity payments for deputy sheriffs or undersheriffs who have worked for the department on a part-time basis. 39 A.G. Op. 78 (1982), overruled in 48 A.G. Op. 19 (2000), in which, pursuant to Phillips v. Lake County, 222 M 42, 721 P2d 326 (1986), the term "year of service" was construed to mean a calendar year.

7-4-2511. Collection and disposal of fees.

Compiler's Comments

1987 Amendment: In (1), after "treasury", substituted "by the 10th day" for "on the first Monday".

Case Notes

Passport Execution Not "Official Service": Execution of a passport by a Clerk of District Court is not an "official service" within the meaning of subsection (2) of this section. Platz v. Hamilton, 201 M 184, 653 P2d 144, 39 St. Rep. 2041 (1982).

Retention of Passport Execution Fees by Clerk of District Court: Because the execution of passport applications is not an official duty imposed upon a Clerk of District Court by state statute and since the Legislature has not enacted a specific statute with regard to the disposition of execution fees, the Clerk has no duty to remit the fees to the county general fund. Platz v. Hamilton, 201 M 184, 653 P2d 144, 39 St. Rep. 2041 (1982).

"Fees" Defined: The term "fees", as used in this section, imports specific charges to be collected from private individuals for particular services. St. v. Story, 53 M 573, 165 P 748 (1917).

Clerk of District Court — Probate Fees: The fees of the Clerk in probate proceedings, exacted under section 25-233, R.C.M. 1947 (since repealed), must be paid by him to the County Treasurer, and they become a part of the public money of the county. Hauser v. Miller, 37 M 22, 94 P 197 (1908).

Attorney General's Opinions

Sheriff Authorized to Accept Compensation From Federal Agency for Performance of Services Outside Official Duties: A Sheriff may receive compensation from a federal agency under the terms of a cooperative law enforcement agreement without violating any Montana statutory or constitutional provision, so long as the services rendered by the Sheriff fall outside the scope of the Sheriff's official duties. 49 A.G. Op. 12 (2001).

Court Reporter Filing Fee — Clerk of District Court to Collect Fee in Appeal From Justice's Court or City Court — Appeal Is "Civil Action" Under Statutes: The Attorney General was asked whether a Clerk of District Court must collect the $20 filing fee, required by 25-1-202 and used to help pay the salary of the court reporter, in appeals filed in District Court from judgments of a Justice's or City Court. The Attorney General concluded that: (1) a private legal action in a Justice's or City Court is a civil action; (2) an appeal from a Justice's or City Court may include appeal of a civil action; (3) an appeal from either of those courts results in most cases in a new trial in District Court and that the need for a court reporter in that instance is obvious; and (4) the payment of the additional $20 filing fee required by 25-1-202 is mandatory. 48 A.G. Op. 1 (1999).

District Court Clerk Not Authorized to Charge Nonparty State Agency for Copies and Certification of Public Records: Access to and fees for copying public court records are not absolute and are controlled by state law. Fees allowed by law are enumerated in 25-1-201, and the collection of those fees is mandatory. Fees for preparing copies and for certification of documents are also specified in that section. Section 25-10-405 clarifies that fees are collectible from state agencies that are a party to an action but has no effect in cases in which the agency is not a litigant. In those cases, the rule in 7-4-2516 applies, exempting agencies of state and county government from paying official fees. Therefore, a Clerk of District Court may not charge a nonparty state agency for copies and certification of public District Court records. 47 A.G. Op. 3 (1997).

County Attorney Serving as City Attorney — Acceptance of Fee From Private Company Prohibited: A full-time County Attorney serving as city attorney pursuant to an interlocal agreement may not personally receive a fee from a private company for work performed on a city-county bond issue. Attorney fees so paid should be remitted to the county general fund. 45 A.G. Op. 14 (1993).

Disposition of Money Received by County Officers for Preparation of Abstracts: Preparation of abstracts by a Clerk of District Court, a County Clerk, or their respective deputies is an official service of the office. Therefore, compensation paid to them by title companies, credit bureaus, banks, realtors, and others for preparation on a regular basis of abstracts of instruments recorded in their respective offices may not be retained for their personal use, but rather must be paid to the county general fund, District Court fund, or state, as provided by law. 43 A.G. Op. 75 (1990).

Passport Fees — Retention by Clerk of Court: County Clerks of Court may personally retain the fees collected for issuance of passports. 34 A.G. Op. 41 (1972).

Motor Vehicle Ownership Transfer — Late Penalty: Penalties assessed for failure to register a motor vehicle pursuant to 61-3-201 must be credited to the county general fund by the County Treasurer. 34 A.G. Op. 38 (1972).

7-4-2512. Statement and affidavit of fees collected.

Compiler's Comments

1999 Amendment: Chapter 51 in (2) near beginning of affidavit form after "month of ....." substituted "20..." for "19...", and near end after "day of ....." substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

1987 Amendment: In (1), after "treasurer", substituted "by the 10th day" for "on the first Monday".

7-4-2514. Filing required to receive salary.

Compiler's Comments

2001 Amendment: Chapter 278 at end after "required in this part" deleted "and filed the report prescribed in 7-6-2213"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

7-4-2515. Fees to be paid in advance.

Case Notes

Clerk's Refusal to File Until Fee Paid: It was proper for the Clerk of the District Court to hold proffered answer in suspense and not file it until the officially required filing fee had been paid. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Payment of Fees to County Clerk: Under subsection (2), the County Clerk may but is not required to demand prepayment of filing or other fees. Subsection (1), having to do with the payment of fees in advance, is inapplicable. Minneapolis Steel & Mach. Co. v. Thomas, 54 M 132, 168 P 40 (1917).

Insufficient Demand: A statement of the amount of the fee for filing made upon a request for the fee amount is not a demand for prepayment as contemplated by subsection (2). Minneapolis Steel & Mach. Co. v. Thomas, 54 M 132, 168 P 40 (1917).

"Fees" Defined: The term "fees", as used in this section, imports specific charges to be collected from private individuals for particular services. St. v. Story, 53 M 575, 165 P 748 (1917).

What Constitutes Filing: Where a paper entitled to be filed is deposited with the proper custodian, and if prepayment of the filing fee is required, the fee tendered, it is filed, the marking thereof as "filed" not constituting the filing. In re Dewar's Estate, 10 M 426, 25 P 1026 (1891).

Recovery of Illegal Fees: A civil suit to recover illegal fees that had been demanded and received under color of office can be brought against an officer who has not been convicted in a criminal action. Ming v. Truett, 1 M 322 (1871), overruled on another point in Ming v. Foote, 9 M 201, 23 P 515 (1890).

7-4-2516. Fees not required in certain cases.

Case Notes

Irrigation Districts: An irrigation district created under Title 85, ch. 7, must be considered a subdivision of the state under this section relieving it from payment of fees for recordation in the County Clerk's office. Crow Creek Irrigation District v. Crittenden, 71 M 66, 227 P 63 (1924), explained in Buffalo Rapids Irrigation District v. Colleran, 85 M 466, 279 P 369 (1929).

Attorney General's Opinions

District Court Clerk Not Authorized to Charge Nonparty State Agency for Copies and Certification of Public Records: Access to and fees for copying public court records are not absolute and are controlled by state law. Fees allowed by law are enumerated in 25-1-201, and the collection of those fees is mandatory. Fees for preparing copies and for certification of documents are also specified in that section. Section 25-10-405 clarifies that fees are collectible from state agencies that are a party to an action but has no effect in cases in which the agency is not a litigant. In those cases, the rule in this section applies, exempting agencies of state and county government from paying official fees. Therefore, a Clerk of District Court may not charge a nonparty state agency for copies and certification of public District Court records. 47 A.G. Op. 3 (1997).

Liability for County Recording and Copying Fees: The Department of Natural Resources and Conservation must pay the fees set forth in 7-4-2631 for recording of water use permits, despite

the language in 7-4-2516, but the County Clerk and Recorder may not collect a fee from the Department for the copying of documents on file with the county. 38 A.G. Op. 36 (1979), overruling 37 A.G. Op. 146 (1978).

7-4-2519. Prohibition upon receiving other fees.

Case Notes

Reward Not a Fee: The State sought treble damages from a County Sheriff for receiving prohibited fees. Summary judgment was granted the Sheriff and upheld on appeal. The Supreme Court held the reward money received by the Sheriff from the state prison was not a fee under 7-4-2519. Further, it was noted that 7-32-2301 deals with the entitlement of Sheriffs to rewards. It does not address rewards from the state prison but does indicate rewards are not equivalent to fees. Finally, the plain language indicates rewards are not covered by the prohibitions of 7-4-2519. "Fees" in that section refers to charges authorized by law to be made by the Sheriff for the performance of specific services enumerated in 7-32-2141 and 7-32-2142. It does not refer to or include reward money. Because 7-4-2519 was the only statute the Sheriff was charged with violating, he was entitled to summary judgment as a matter of law. St. v. DeMers, 192 M 367, 628 P2d 676, 38 St. Rep. 877 (1981), distinguishing State ex rel. Holt v. District Court, 103 M 438, 63 P2d 1026 (1936), and State ex rel. Matson v. O'Hern, 104 M 126, 65 P2d 619 (1937).

Recovery of Illegal Fees: A civil suit to recover illegal fees that had been demanded and received under color of office can be brought against an officer who has not been convicted in a criminal action. Ming v. Truett, 1 M 322 (1871); overruled on other grounds, Ming v. Foote, 9 M 201, 23 P 515 (1890).

7-4-2521. Designation of person to receive decedent's warrants or paychecks — reissuance.

Compiler's Comments

Source: Section 1, Ch. 113, L. 1983, was based on 2-18-412, state provisions for payment of a decedent's warrants.

7-4-2525. Fees of sheriff to be fixed by resolution.

Compiler's Comments

Effective Date: Section 4, Ch. 372, L. 1989, provided that this section is effective March 29, 1989.

Part 26
Office of County Clerk

7-4-2611. Role and duties of county clerk and election administrator.

Compiler's Comments

1995 Amendment: Chapter 216 in (4) substituted "during the office hours determined by the governing body by resolution after a public hearing" for "during regular office hours"; and made minor changes in style.

1991 Amendment: At beginning of (3) and (4) substituted "An election administrator" for "A county clerk and recorder".

1981 Amendment: Substituted "under the provisions of Title 13, chapters 35, 36, and 37, in" for "with" in (4).

1980 Name Change: Section 19, Initiative No. 85, 1980, provided: "The office of the commissioner of campaign finances and practices, created by 13-37-102, shall be known as the office of the commissioner of political practices." The Code Commissioner has changed the name in this section accordingly. See 1-11-101(2)(g).

Case Notes

Right to Question Legality of Claims against County: The duty of the County Clerk to issue warrants for claims passed upon by the Board of County Commissioners is ministerial only, and he is not clothed with supervisory power to either question or determine the legality of the claims, except where they are void upon their face as without the jurisdiction of the Board to pass upon. State ex rel. Lockwood v. Tyler, 64 M 124, 208 P 1081 (1922).

May Not Question Constitutionality of Statute: A ministerial officer, such as a County Clerk, to whom no injury can result and to whom no violation of duty can be imputed by reason of his compliance with a statute cannot refuse to perform a duty imposed by it on the ground of its unconstitutionality, since such an officer is not liable for his official acts when acting under

process, warrants, or other instruments fair upon their face and issued from a superior tribunal or board. State ex rel. Lockwood v. Tyler, 64 M 124, 208 P 1081 (1922).

Attorney General's Opinions

County Power to Grant Franchises — Interlocal Agreements Not Precluded: Article XI, sec. 4, Mont. Const.; 7-3-144; 7-4-2611; and 7-5-2129, as well as applicable case law, imply that a county vested with general government powers may exercise the power to grant franchises. Under 7-11-104, a city-county interlocal franchise agreement is possible. 42 A.G. Op. 87 (1988).

Record of Board Proceedings: The responsibility of the County Clerk and Recorder, as it relates to proceedings of the Board of County Commissioners, is to record the minutes of the proceedings into the minute book maintained pursuant to 7-5-2129, and to make the book available for public examination upon request. The Board is responsible for the preparation, content, and publication of the minutes. The County Clerk and Recorder is not required to attend the meetings of the Board and take the original notes, unless the Board so requests. 41 A.G. Op. 19 (1985).

Collateral References

20 C.J.S. Counties §133.

7-4-2612. Books for recording documents.

Compiler's Comments

1993 Amendment: Chapter 420 near beginning, after "books", inserted "or other recording materials"; and made minor changes in style. Amendment effective April 20, 1993.

7-4-2613. Documents subject to recording.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 37 in (1)(c) at beginning substituted "an acknowledged statement indicating that the holder of a nonprobate interest in real property is deceased" for "except as provided in 72-16-503, a document on a form provided by the department of revenue certifying that the holder of a nonprobate interest in real property is deceased and that the deceased's interest is terminated", at end of second sentence deleted "or any other interest not requiring probate", deleted former third sentence that read: "The document may be on the form used by the department of revenue for responding to the application for determination of estate tax", and at beginning of last sentence substituted "The acknowledged statement" for "It"; deleted former (3)(b) that read: "(b) a certification by the county treasurer that the estate tax, if any tax was due, has been paid or that estate tax was not due"; in (1)(c)(ii) before "description" inserted "legal"; and made minor changes in style. Amendment effective March 13, 2001.

Chapter 412 in (1)(a)(i) near middle after "mortgages" inserted "reconveyances by trustees of deeds of trust, assignments of mortgages and deeds of trust"; inserted (2) concerning instrument qualifying for recording incorporating language by reference from another properly recorded instrument; and made minor changes in style. Amendment effective October 1, 2001.

Retroactive Applicability: Section 4, Ch. 37, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to deaths occurring after December 31, 2000."

2000 Amendment by Referendum: Chapter 9 in (3) and twice in (3)(b) before "estate tax" deleted references to inheritance tax. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

1995 Amendment: Chapter 391 in (3), at beginning, inserted exception clause; and made minor changes in style. Amendment effective April 12, 1995.

Retroactive Applicability: Section 5, Ch. 391, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to deaths of holders of nonprobate interests occurring after July 1, 1979."

1993 Amendments — Composite Section: Chapter 366 at beginning of (1)(a) inserted "subject to subsection (1)(b)"; inserted (1)(b) requiring County Clerk to record instrument or deed evidencing a division or merger of real property only if accompanied by certification from County Treasurer that taxes and special assessments have been paid; and made minor changes in style.

Chapter 420 near beginning of introductory clause, after "record", deleted "photograph, or correctly copy, separately, in large and well-bound or to be bound separate books, either in a fair hand or" and near end, after "photographic", inserted "micrographic, or electronic"; and made minor changes in style. Amendment effective April 20, 1993.

Style changes in introductory clause, (3)(a), and (3)(b) were slightly different in the two chapters. In each case, the codifier chose the more appropriate of the two.

1981 Amendment: Inserted (3) relating to certification to Department of Revenue on termination of deceased person's interest in nonprobate property.

Case Notes

Recording Not Condition Precedent to Judgment Becoming a Lien: This section and 70-21-306 define the effect of recording a final judgment as far as imparting constructive notice is concerned, but they are not controlling as to when the judgment becomes a lien. Section 25-9-301 determines when the lien becomes effective—that the lien attaches when the judgment is docketed; recordation of the judgment is not made a condition precedent to its becoming a lien. Gaines v. Van Demark, 106 M 1, 74 P2d 454 (1937).

Option to Purchase Land: Since an option to purchase land is not itself a contract to purchase the land, the book kept for the recording of contracts for the purchase or sale of real property is not the proper book for recordation. The miscellaneous record book for the entry of such other items required or permitted by law to be recorded is the proper book for such contracts. Guerin v. Sunburst Oil & Gas Co., 68 M 365, 218 P 949 (1923).

Attorney General's Opinions

Blanket Document Listing Multiple Reconveyances of Trust Indentures Allowed: Generally, a County Clerk and Recorder must record reconveyances of trust indentures, which operate the same as a release or satisfaction of a mortgage. In order to effectuate release of a mortgage, the mortgagee or its agent must acknowledge and certify that a release has taken place by presenting a certificate to the County Clerk and Recorder. There is no requirement that each certificate be on a separate piece of paper. As long as each reconveyance meets the statutory requirements for release of a mortgage, the County Clerk and Recorder is obligated to accept for filing a multiple page or "blanket" document listing more than one reconveyance on each page. 48 A.G. Op. 23 (2000).

Survey Requirements for Remainder Created When Highway Right-of-Way Obtained by State: A County Clerk and Recorder may not require a survey or plat for the recordation of an instrument transferring title to a remainder that was created when the state obtained property for a highway right-of-way. 44 A.G. Op. 25 (1992).

Recordation of Trust Indenture — Amount and Maturity Date Not Required: A County Clerk and Recorder may not refuse to accept for filing a trust indenture that does not include an amount secured and a maturity date because there are no specific requirements that such matters be set forth in the instrument. 41 A.G. Op. 11 (1985).

No Duty to Accept Invalid Continuation of Financing Statement: The County Clerk and Recorder is not required to accept for filing a continuation statement made under 30-9-403 (now repealed) but filed outside the 6-month period required by that section. 40 A.G. Op. 60 (1984).

Recording Prerequisites: Transfers of land that do not involve "divisions of land" or "subdivisions", as defined by the Montana Subdivision and Platting Act (Title 76, ch. 3), do not require the certificate of survey or a plat before being recorded by the Clerk and Recorder. (See 1993 amendment.) 37 A.G. Op. 88 (1977). See also 44 A.G. Op. 25 (1992).

County Clerk and Recorder — No Refusal to Record a Valid Deed: Since the Clerk and Recorder of a county is not a law enforcement officer and enforcement of a criminal statute is not within his prescribed duties, he may not refuse to record a deed that has not met the prerequisite, set forth in the Montana Subdivision and Platting Act (Title 76, ch. 3), that an approved, certified plat be filed before the land is transferred. 35 A.G. Op. 25 (1973).

7-4-2614. Records of certificates of discharge from military service.

Compiler's Comments

2003 Amendment: Chapter 116 inserted (2) prohibiting disclosure of military discharge certificates unless disclosure is to authorized persons or entities; and made minor changes in style. Amendment effective March 25, 2003.

7-4-2617. Procedure to record documents.

Compiler's Comments

1989 Amendment: In middle of (4), after "pages", inserted "or document number".

1983 Amendment: Inserted (2) relating to refusal to duplicate illegible material.

Case Notes

No Duty of Clerk and Recorder to Record Invalid Deed — Writ of Mandamus Improper: Under this section, a County Clerk and Recorder is obligated to record only an instrument, paper, or

notice that is authorized by law to be recorded. Under 76-3-302, a County Clerk and Recorder has a mandatory duty not to accept and record an otherwise proper deed if it fails to comply with the applicable survey requirements. The District Court did not err in refusing to issue a writ of mandamus requiring recording of deeds when a landowner attempted to divide a large parcel of land into smaller parcels by executing a deed in which the landowner was both grantor and grantee, which is not authorized by law, and when the statutorily required plat was not filed. Rocky Mtn. Timberlands, Inc. v. Lund, 265 M 463, 877 P2d 1018, 51 St. Rep. 653 (1994).

Attorney General's Opinions

No Duty in County Clerk and Recorder to Accept Common-Law Liens for Filing: Although a County Clerk and Recorder has a statutory duty to accept for filing any instrument, paper, or notice authorized by law to be recorded, there is no apparent authority in Montana law for allowing the filing of a common-law lien. It is unclear whether Montana even recognizes common-law liens. Because a common-law lien is not authorized by law to be received, County Clerk and Recorders may refuse to accept for filing written instruments purporting to be liens when the writing does not qualify as a statutory lien or lien created by contract. 38 A.G. Op. 114 (1980).

County Clerk and Recorder — No Refusal to Record a Valid Deed: Since the Clerk and Recorder of a county is not a law enforcement officer and enforcement of a criminal statute is not within his prescribed duties, he may not refuse to record a deed that has not met the prerequisite, set forth in the Montana Subdivision and Platting Act (Title 76, ch. 3), that an approved, certified plat be filed before the land is transferred. 35 A.G. Op. 25 (1973).

7-4-2619. Indexes to recorded documents.

Compiler's Comments

1985 Amendment: At end of (6) deleted "To whom powers are executed" and inserted "Where powers are recorded"; and in (17) before "columns", deleted "six".

Case Notes

Tract Index — Implied Powers: In view of the provisions of 15-18-202 through 15-18-204 (since repealed), the general powers conferred upon the Board of County Commissioners by law and under the rule that any appropriate means of carrying out a statutory power conferred on a public officer or board without prescribing the mode of its exercise may be adopted, the Commissioners, under their implied powers, may authorize the installation and maintenance of a tract index in the County Clerk's office for information on tax sales and application for tax deed. Ransom v. Pingel, 104 M 119, 65 P2d 616 (1937).

Attorney General's Opinions

Blanket Document Listing Multiple Reconveyances of Trust Indentures Allowed: Generally, a County Clerk and Recorder must record reconveyances of trust indentures, which operate the same as a release or satisfaction of a mortgage. In order to effectuate release of a mortgage, the mortgagee or its agent must acknowledge and certify that a release has taken place by presenting a certificate to the County Clerk and Recorder. There is no requirement that each certificate be on a separate piece of paper. As long as each reconveyance meets the statutory requirements for release of a mortgage, the County Clerk and Recorder is obligated to accept for filing a multiple page or "blanket" document listing more than one reconveyance on each page. 48 A.G. Op. 23 (2000).

County Clerk — Joint Tenancy Terminations: County Clerk and Recorders are not required to issue "transfers of title" to survivors of a joint tenancy interest. Rather, upon filing of the application and certificates (form INH-3), the Clerk should index the transfer in the grantor and grantee index, noting the time and place of filing. 37 A.G. Op. 134 (1978).

7-4-2620. Details relating to indexes.

Case Notes

Failure to Index Recorded Instrument: No rights under a recorded instrument will be impaired or affected by the failure of a County Clerk and Recorder to index or enter the same, as required by statute. Palmer v. Murray, 8 M 174, 19 P 553 (1888).

7-4-2621. Search of records.

Compiler's Comments

2001 Amendment: Chapter 156 in introductory clause substituted "payment of the applicable fees" for "payment or tender of the fees therefor"; in (1) after "instruments" deleted "papers, or notices"; in (2) after "instruments" deleted "papers, and notices" and near middle deleted

requirement that the certificate state the extent to which the instruments purport to affect the property to which they relate; and made minor changes in style. Amendment effective October 1, 2001.

7-4-2623. Liability of clerk relating to duties as recorder.

Compiler's Comments

2001 Amendment: Chapter 156 in introductory clause after "clerk" deleted "as ex officio recorder" and after "to whom an instrument" deleted "proved or acknowledged according to law, or any paper or notice which may be recorded by law"; in (1) after "instrument" deleted "paper, or notice"; in (2) substituted "falsely records an instrument or records an instrument in any other manner than as directed in this part" for "records any instruments, papers, or notices untruly or in any other manner than as hereinbefore directed"; deleted former (4) relating to neglecting or refusing to make searches and give certificates and incomplete or defective searches or certificates; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

Liability of clerk of court, county clerk or prothonotary, or surety on bond, for negligent or wrongful acts of deputies or assistants. 71 ALR 2d 1140.

7-4-2631. Fees of county clerk.

Compiler's Comments

2003 Amendment: Chapter 571 in (1) near beginning of introductory clause after "7-4-2632" inserted "and 7-4-2637". Amendment effective July 1, 2005.

1999 Amendment: Chapter 305 in (1)(j) substituted "Title 30, chapter 9, part 5 [now repealed]" for "30-9-401 through 30-9-407"; and made minor changes in style. Amendment effective July 1, 2001.

1991 Amendment: In (1)(c) increased fee for filing and indexing from $2 to $5; in (1)(m) increased birth certificate fee from $3 to $5; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendments: Chapter 37 in (1)(m) changed fee for certified copy of birth or death certificate from $2 to $3. Amendment effective July 1, 1989.

Chapter 292 at beginning of second sentence of (2) substituted "If a" for "These fees must be paid by a", after "agency" inserted "or political subdivision has requested an account with the county clerk, any applicable fees must be paid", and before "basis" substituted "periodic" for "monthly".

1987 Amendment: In (1)(j) substituted "under" for "in".

1985 Amendments: Chapter 14 inserted (1)(l) relating to instruments not expressly provided for.

Chapter 27 in (1)(f)(ii) increased fee from $1 to $2; and deleted former (1)(k) that read: "for documents requiring multiple indexing (including but not limited to mortgages; releases; deeds; certificates of location; affidavits of annual labor on mining claims; assignments of leases; assignments of mortgages; oil, gas, and mineral leases; releases of oil, gas, and mineral leases; assignments of overriding royalties; executions; lis pendens; attachments; and all liens), 50 cents per entry in excess of the first entry contained in a single document".

Chapter 220 deleted former (1)(d) that read: "for filing and indexing each certificate of fictitious name, $3".

1983 Amendment: At end of (1)(k), changed "50 cents per index" to "50 cents per entry" and "the first index" to "the first entry"; in (1)(o), inserted "certified" before "copy".

1981 Amendment: Deleted outdated provisions relating to recording charges for written instruments and real estate mortgages based on folios; deleted charge for recording notice of appropriating of water and increased charge for recording location of mining claims from $4 to $6 in (1)(a); increased charge for recording annual labor affidavit from $2 to $3 in (1)(b)(i); increased charge for filing writs or other instruments from $1 to $2 in (1)(c); deleted charge for filing certificate of incorporation and annual statements and inserted charge for filing certificate of fictitious name in (1)(d); inserted base fee of $5 for filing of subdivision and townsite plats, increased fee for lots in excess of 100 from 10 cents to 25 cents, and deleted fee for recording field notes in (1)(e); inserted (1)(f) relating to filing certificates of surveys; changed (1)(g)(i) from charge per folio to charge per page; increased charge for searching index from 30 cents to 50 cents in (1)(h); deleted charge for each entry of discharge of mortgage in (1)(j); deleted charge for recording instrument under 70-21-207 and instrument pertaining to land allotted to an Indian in former (1)(m); inserted (1)(k) relating to documents requiring multiple indexing; increased

charge for recording each stock subscription from 50 cents to $3 in (1)(m); deleted charging relating to television district; deleted "7-4-2633" from (1)(n); changed "may" to "must" in last sentence of (2).

Attorney General's Opinions

Appropriate Fee for Recording Blanket Document Listing Multiple Reconveyances of Trust Indentures: A flat fee of $6 is chargeable by the County Clerk and Recorder for each page of a blanket document listing multiple reconveyances of trust indentures. 48 A.G. Op. 23 (2000).

Disposition of Money Received by County Officers for Preparation of Abstracts: Preparation of abstracts by a Clerk of District Court, a County Clerk, or their respective deputies is an official service of the office. Therefore, compensation paid to them by title companies, credit bureaus, banks, realtors, and others for preparation on a regular basis of abstracts of instruments recorded in their respective offices may not be retained for their personal use, but rather must be paid to the county general fund, District Court fund, or state, as provided by law. 43 A.G. Op. 75 (1990).

Fee for Recording Documents for Mining Claims: Both 7-4-2631 and 7-4-2632 appear to apply to recording mining documents by mechanical means. Section 7-4-2632 was originally enacted as an amendatory addition to the present 7-4-2631. Both were originally parts of section 25-231, R.C.M. 1947, and were separated by the recodification of the R.C.M. into the MCA. The legislative intent indicates that the fee prescribed in 7-4-2632 was originally enacted as an alternative fee rather than an additional fee. When recording documents for mining claims by mechanical means, the Clerk and Recorder is to charge only the fee prescribed by 7-4-2632. 40 A.G. Op. 58 (1984).

Computation of Charges — Entries in Several Indexes: The charge to be computed for multiple entries in several indexes under 7-4-2631(1)(k) is 50 cents an index in excess of the first index contained in the document regardless of the number of entries made in the index. 39 A.G. Op. 64 (1982).

Liability for County Recording and Copying Fees: The Department of Natural Resources and Conservation must pay the fees set forth in 7-4-2631 for recording of water use permits, despite the language in 7-4-2516, but the County Clerk and Recorder may not collect a fee from the Department for the copying of documents on file with the county. 38 A.G. Op. 36 (1979), overruling 37 A.G. Op. 146 (1978).

County Clerk — Joint Tenancy Terminations: County Clerk and Recorders are not required to issue "transfers of title" to survivors of a joint tenancy interest. Rather, upon filing of the application and certificates (form INH-3), the Clerk should index the transfer in the grantor and grantee index, noting the time and place of filing. 37 A.G. Op. 134 (1978).

7-4-2632. Fee when recording done by mechanical means.

Compiler's Comments

1991 Amendment: Increased recording fee from $5 to $6. Amendment effective July 1, 1991.

1985 Amendment: Increased charge from $2.50 to $5.

1983 Amendment: Increased the per page charge from $2 to $2.50.

1981 Amendment: Changed "filing and indexing" to "recording" at the end of the section.

Attorney General's Opinions

Appropriate Fee for Recording Blanket Document Listing Multiple Reconveyances of Trust Indentures: A flat fee of $6 is chargeable by the County Clerk and Recorder for each page of a blanket document listing multiple reconveyances of trust indentures. 48 A.G. Op. 23 (2000).

Fee for Recording Documents for Mining Claims: Both 7-4-2631 and 7-4-2632 appear to apply to recording mining documents by mechanical means. Section 7-4-2632 was originally enacted as an amendatory addition to the present 7-4-2631. Both were originally parts of section 25-231, R.C.M. 1947, and were separated by the recodification of the R.C.M. into the MCA. The legislative intent indicates that the fee prescribed in 7-4-2632 was originally enacted as an alternative fee rather than an additional fee. When recording documents for mining claims by mechanical means, the Clerk and Recorder is to charge only the fee prescribed by 7-4-2632. 40 A.G. Op. 58 (1984).

County Clerk — Joint Tenancy Terminations: County Clerk and Recorders are not required to issue "transfers of title" to survivors of a joint tenancy interest. Rather, upon filing of the application and certificates (form INH-3), the Clerk should index the transfer in the grantor and grantee index, noting the time and place of filing. 37 A.G. Op. 134 (1978).

7-4-2634. Fees to be noted on recorded documents.

Compiler's Comments

1995 Amendment: Chapter 179 substituted "to document the charges entered" for "in order that the department of commerce may verify the charges and may see that they have been properly entered"; and made minor changes in style. Amendment effective July 1, 1995.

1983 Amendment: Substituted reference to department of commerce for reference to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs".

Transfer of Function: The function of the Department of Commerce in this section was transferred from the Department of Administration by sec. 1, Ch. 287, L. 1983. Those functions were transferred to the Department of Administration from the Department of Community Affairs by sec. 7, Ch. 274, L. 1981.

7-4-2635. Records preservation fund authorized.

Compiler's Comments

Effective Date: Section 3, Ch. 355, L. 1991, provided: "[This act] is effective July 1, 1991."

7-4-2636. Standards for recorded documents.

Compiler's Comments

Effective Date: Section 5, Ch. 571, L. 2003, provided: "[This act] is effective July 1, 2005."

7-4-2637. Fees for recording standard documents.

Compiler's Comments

Effective Date: Section 5, Ch. 571, L. 2003, provided: "[This act] is effective July 1, 2005."

Part 27
Office of County Attorney

Part Attorney General's Opinions

Restrictions on Authority of County Attorney Regarding Involuntary Commitment of Alcoholic: A County Attorney does not have authority to file a petition for the involuntary commitment of an alcoholic pursuant to 53-24-302, nor may a County Attorney represent a spouse, guardian, relative, certifying physician, or the chief of an approved public treatment facility in a proceeding for the involuntary commitment of an alcoholic. 43 A.G. Op. 40 (1989).

7-4-2701. Qualifications for county attorney in certain counties.

Compiler's Comments

1997 Amendment: Chapter 160 in (1), near beginning before "county attorney", inserted "full-time"; inserted (2) and (3) relating to qualifications for full-time and part-time County Attorneys; and made minor changes in style.

Case Notes

Student Attorney Considered to Be Practicing Law: Following the resignation of the acting County Attorney, Jefferson County Commissioners interviewed applicants and subsequently selected Valerie Wilson to fill the position effective August 18, 1995. To be qualified for the position, state law requires an attorney to be admitted to practice for at least 5 years prior to appointment or election. The District Court concluded that although Wilson had begun practicing law as a student attorney in 1990, she was not admitted to the Montana Bar until October 1991 and thus would not achieve the required 5 years until October 1996. On appeal, the Supreme Court reversed, ruling that state law does not require that one must be admitted to the State Bar in order to be "deemed practicing law" in Montana. Certification of student attorneys by Supreme Court order along with certification by the dean of the law school provide the guidelines for admission of a student attorney to the practice of law. Shapiro v. Jefferson County, 278 M 109, 923 P2d 543, 53 St. Rep. 848 (1996).

Attorney General's Opinions

Full-Time County Attorney — County Population Requirements: A county with a population of less than 30,000 may establish a full-time County Attorney position. The position need not be filled on July 1 but may be filled at some specified reasonable time after July 1. The salary for such a full-time County Attorney is the same as a full-time County Attorney in a county having more than 30,000 population. 38 A.G. Op. 22 (1979), followed in 42 A.G. Op. 125 (1988).

Full-Time County Attorney — Residency Requirements: A practicing attorney who has declared his intention to make a county his permanent home, is actively seeking a permanent residence in that county, and is in the process of terminating his personal business affairs at his former residence has become a resident of the county and is eligible for appointment as a full-time County Attorney once he has resided in the county for 30 days if he becomes a qualified registered elector and meets other qualifications for the office. 38 A.G. Op. 22 (1979), followed in 42 A.G. Op. 125 (1988).

7-4-2702. Procedure to fill vacancy in office of county attorney.

Compiler's Comments

1997 Amendment: Chapter 160 near beginning deleted prerequisite that there be no licensed attorney residing in county and at end inserted authorization for County Commissioners to appoint an attorney to fill vacancy; deleted former provisions regarding employment, duties, and compensation of acting County Attorney; deleted (2) containing requirement for County Commissioners to appoint a resident attorney to fill vacancy of County Attorney rather than special attorney (see 1997 Session Law for former text); and made minor changes in style.

Attorney General's Opinions

Appointment of County Attorney — Procedure — Eligibility: In a county with a population of less than 30,000, if no licensed attorney (see 1997 amendment) in the county wishes to be appointed County Attorney, the Board of County Commissioners should proceed to fill a vacancy under this section as if there were no licensed attorneys in the county. If one or more licensed attorneys are residents of the county and wish to be appointed but the County Commissioners do not want to appoint one of them, the County Commissioners may recruit and appoint an out-of-county attorney only if the attorney will be a county resident and meet other eligibility requirements by the time of appointment. 42 A.G. Op. 125 (1988).

7-4-2703. Limitation on number of deputies.

Case Notes

Appointment of Deputy County Attorneys: Although 7-4-2703 provides that a County Attorney of a first- or second-class county may appoint only one Chief Deputy and one Deputy County Attorney, 7-4-2401 provides for appointment of such additional Deputy County Attorneys as may be reasonably necessary to discharge the duties of the office. The prosecutors here were appointed properly and had the lawful authority to prosecute the matter. St. v. Poncelet, 187 M 528, 610 P2d 698, 37 St. Rep. 760 (1980).

7-4-2704. Limitations on activities of county attorneys and deputy county attorneys.

Compiler's Comments

1981 Amendment: Inserted "and except as provided in subsection (4)" at the end of (2) and (3); inserted (4) allowing up to 3 months in office to complete pending private matters.

Case Notes

Prosecutorial Discretion — Deputy's Prior Representation: The Lemmons were divorced after 20 years of marriage. Leroy was seeing Donna Myers, and Koralyn was seeing John Sweeting. Myers and Sweeting had just ended a personal and business relationship. Sweeting asked Koralyn to get a briefcase out of Leroy's truck. The briefcase actually belonged to Myers. Leroy and Myers returned to the truck and found the briefcase missing. They concluded Koralyn had taken it since the truck was not broken into. Leroy and Myers went to Koralyn's home. She heard them drive up and put a gun in the waistband of her pants. Leroy and Koralyn fought, and Leroy struck her in the head with the gun. Leroy and Myers put Koralyn on the floor of the truck and went to the Sheriff's department. The Sheriff was not immediately available, so Leroy and Myers left, with Koralyn still on the floor of the truck, to find Sweeting. A high speed chase ensued in which the cars rammed together and gunshots were exchanged. The chase ended when Leroy's transmission caught fire. The charges arising from the pursuit were dropped. Leroy was charged with aggravated assault and kidnapping. He was convicted of assault and unlawful restraint. Leroy contended the County Attorney abused his discretion in not acting on his complaints against Koralyn and for not disqualifying the office since a deputy had represented Koralyn in the divorce. On appeal, the Supreme Court held that the abuse of discretion issue had not been raised at trial and could not be raised on appeal. The court also stated that selectivity in enforcement is not a violation of the U. S. Constitution if the selection is not based on an unjustifiable or arbitrary classification. The court construed DR 5-105(D) to concern conflicts in representation, not prosecution. Also, the court stated that it was not established that the

County Attorney would have been disqualified from the prosecution for representing Koralyn, let alone a deputy. St. v. Lemmon, 214 M 121, 692 P2d 455, 41 St. Rep. 2359 (1984). See also Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140, 53 St. Rep. 687 (1996).

Attorney Fees Award — Disposition: Attorney fees awarded on appeal of Fair Labor Standards Act claim must be paid into the Cascade County general fund and not given to the County Attorney as private attorney fees because the population of Cascade County is in excess of 30,000 people, prohibiting profits by the County Attorney from private practice of law. St. v. Holman Aviation Co., 176 M 31, 575 P2d 925 (1978).

Attorney General's Opinions

County Attorney Serving as City Attorney — Acceptance of Fee From Private Company Prohibited: A full-time County Attorney serving as city attorney pursuant to an interlocal agreement may not personally receive a fee from a private company for work performed on a city-county bond issue. Attorney fees so paid should be remitted to the county general fund. 45 A.G. Op. 14 (1993).

Rural Improvement Districts — Representation by Part-Time County Attorney in Private Practice Permitted: After a rural improvement district has been created pursuant to 7-12-2113, a part-time County Attorney may represent a rural improvement district in his private practice and receive payment for such legal representation. 40 A.G. Op. 27 (1983).

State Conservation Districts — Legal Representation: The Attorney General is responsible for civil legal representation upon request from supervisors of a state conservation district, but private counsel may be employed as Special Assistant Attorneys General. The compensation may be set by the supervisors and becomes a district obligation. County Attorneys' duty to represent districts extends only to giving their opinion in writing to the officers of the district on matters pertaining to their offices. 37 A.G. Op. 76 (1977).

Successor to Part-Time County Attorney: The appointed or elected successor to a part-time County Attorney may complete that term on a part-time basis. 36 A.G. Op. 115 (1976).

7-4-2705. Employment of special counsel in certain counties.

Case Notes

Presumption of Regular Appointment: On appeal from a conviction for assault which was prosecuted by a special prosecutor where the record does not show whether any appointment was made under this section, the court will indulge the presumption that the appointment was regularly made in the absence of a showing to the contrary. St. v. Cockrell, 131 M 254, 309 P2d 316 (1957).

7-4-2706. County attorney to be full or part time — resolution — salary.

Compiler's Comments

2001 Amendment: Chapter 507 in (1) at end of second sentence substituted "the salary established pursuant to 7-4-2503" for "the salary provided by 7-4-2503 for the office of county attorney in a county with a population in excess of 30,000". Amendment effective May 1, 2001.

1981 Amendment: Inserted (2) relating to reducing the office from full- to part-time.

Attorney General's Opinions

County Attorney Serving as City Attorney — Acceptance of Fee From Private Company Prohibited: A full-time County Attorney serving as city attorney pursuant to an interlocal agreement may not personally receive a fee from a private company for work performed on a city-county bond issue. Attorney fees so paid should be remitted to the county general fund. 45 A.G. Op. 14 (1993).

7-4-2708. Contract for services of any other attorney.

Compiler's Comments

1989 Amendment: Following "commissioners may" deleted "upon consent of the county attorney" and after "employ any" deleted "other".

Case Notes

County Employment of Independent Contractor to Provide Legal Services: There is no express prohibition under Montana law precluding or preventing a county from entering into an independent contractor relationship for the provision of legal services. Hamner v. Butte-Silver Bow County, 233 M 271, 760 P2d 76, 45 St. Rep. 1481 (1988).

Attorney General's Opinions

Authority of County Commissioners to Employ Private Attorney: A County Attorney may not unreasonably withhold his consent to the employment of another attorney by the Board of County Commissioners to perform legal services in connection with the civil business of the county. The decision of a County Attorney to withhold his consent is subject to the supervisory authority of the Attorney General. 41 A.G. Op. 34 (1985). See 1989 amendment that does away with the requirement of obtaining the County Attorney's consent.

7-4-2711. County attorney to be legal adviser of county and other subdivisions.

Compiler's Comments

1991 Amendments: Chapter 7 inserted (2)(e) requiring County Attorney to act as counsel for a county hospital board; and made minor changes in style.

Chapter 88 in (2)(b), after "districts", inserted "and fire service areas".

1989 Amendment: Inserted (2)(d) requiring a County Attorney to act as weed district counsel upon request; and made minor changes in form.

Case Notes

No Opportunity for Parties to Address Issues — Award of Attorney Fees Premature: An award of attorney fees based on this section is premature unless and until an appropriate record is created and the parties have a full and fair opportunity to address the issues. Clark v. Dussault, 265 M 479, 878 P2d 239, 51 St. Rep. 642 (1994).

County Attorney — Conflict of Interests: The County Attorney should advise the school boards they should retain independent counsel to raise the privilege against self-incrimination as a defense to interrogatories propounded by the Human Rights Commission in the investigation of alleged violations of the antidiscrimination law since it is his duty to obtain the evidence and to prosecute if he determines there is a criminal violation. School District v. Human Rights Comm'n, 173 M 113, 566 P2d 799 (1977).

Legal Adviser of Justice of Peace: It is the duty of the County Attorney to advise the Justice of the Peace in preparation of a proper record for appeal to the District Court, and improper submission of such record may not bar defendant's right to appeal. Clark v. District Court, 142 M 56, 381 P2d 472 (1963); Reidelbach v. District Court, 142 M 52, 381 P2d 470 (1963).

Attorney General's Opinions

County Attorney Not Obligated to Serve Hospital District: A County Attorney has no obligation to act as legal counsel for a hospital district formed under 7-34-2101. 43 A.G. Op. 15 (1989).

Authority of County Commissioners to Employ Private Attorney: A County Attorney may not unreasonably withhold his consent to the employment of another attorney by the Board of County Commissioners to perform legal services in connection with the civil business of the county. The decision of a County Attorney to withhold his consent is subject to the supervisory authority of the Attorney General. 41 A.G. Op. 34 (1985). See 1989 amendment that does away with the requirement of obtaining the County Attorney's consent.

District Boards of Health — Formation and Insurance — County Attorney Not Legal Advisor: A District Board of Health formed pursuant to 50-2-107 stands in place of the County Board of Health in those counties that formed the District Board of Health. Once a county joins a District Board of Health, there is no need for the county to maintain a County Board of Health. The District Board of Health has the responsibility of providing its own legal advisor because there is no specific statutory mandate that the County Attorney act as legal advisor to the District Board of Health. The counties creating a District Board of Health are responsible for providing liability insurance for their District Board of Health. 41 A.G. Op. 22 (1985).

Rural Improvement Districts — County Attorney Not Legal Advisor: Except for legal work required by the Board of County Commissioners in connection with the creation of a rural improvement district, it is not the duty of a County Attorney to represent rural improvement districts formed under Title 7, ch. 12, part 21. 40 A.G. Op. 27 (1983).

Rural Improvement Districts — Representation by Part-Time County Attorney in Private Practice Permitted: After a rural improvement district has been created pursuant to 7-12-2113, a part-time County Attorney may represent a rural improvement district in his private practice and receive payment for such legal representation. 40 A.G. Op. 27 (1983).

County Attorney to Provide Legal Services — Conservation District: Sections 7-4-2711 and 76-15-319 require the County Attorney to provide upon request such legal services as the conservation district may require. 38 A.G. Op. 73 (1980).

Defense of County Officers: The County Attorney is not responsible for defending lawsuits brought against a county official in his individual capacity. 37 A.G. Op. 171 (1978).

State Conservation Districts — Legal Representation: The Attorney General is responsible for civil legal representation upon request from supervisors of a state conservation district, but private counsel may be employed as Special Assistant Attorneys General. The compensation may be set by the supervisors and becomes a district obligation. County Attorneys' duty to represent districts extends only to giving their opinion in writing to the officers of the district on matters pertaining to their offices. 37 A.G. Op. 76 (1977).

County Attorney — Fees in Addition to Salary: A County Attorney may not accept a fee from the County Commissioners, in addition to his salary as County Attorney, for prosecuting an appeal from a decision of the State Tax Appeal Board in which the county has intervened as party plaintiff. 37 A.G. Op. 63 (1977).

Joint Employment: A County Attorney, for purposes of administration, is jointly employed by both the county and the state. 36 A.G. Op. 32 (1975).

7-4-2712. Prosecutorial duties.

Case Notes

Failure of District Court to Grant Motions to Dismiss as Directed by Attorney General for Government Misconduct — Violation of Separation of Powers: The Attorney General directed the Lincoln County Attorney to file motions to dismiss charges against certain criminal defendants for the reason that outrageous government misconduct had occurred in the course of the prosecution. The Lincoln County Attorney filed the motions, but they were denied by the District Court. In a proceeding for supervisory control, the Supreme Court held that the Attorney General was within his authority to direct the County Attorney to move to dismiss the charges and held that the Attorney General's conclusion that there had been outrageous government misconduct in the cases served as a basis under 46-13-401(1) for the District Court to dismiss the charges. The refusal of the District Court to dismiss the charges was an abuse of discretion and a violation of the doctrine of separation of powers. By refusing to grant the motions to dismiss, the District Court intruded upon the lawful functions of the County Attorney and the Attorney General, who belong to the Executive Branch of government. State ex rel. Fletcher v. District Court, 260 M 410, 859 P2d 992, 50 St. Rep. 992 (1993). See also St. v. Schneiderhan, 261 M 161, 862 P2d 37, 50 St. Rep. 1242 (1993).

Authority of Prosecutor to Charge Under Alternate Statutes: Defendants Richard and David Fertterer were convicted of felony criminal mischief for illegally killing game. They contended on appeal that they should have been charged under the misdemeanor provisions of Title 87 and not under the felony provisions of Title 45. Citing St. v. Brady, 249 M 290, 816 P2d 413 (1991), the Supreme Court held that the state has the authority to charge under any statute if the conduct of the defendants meets the elements of the crime. St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

County Attorney's Discretion to Bring Action — Prosecutorial Authority Not Exceeded: In a suit against a county for liability of the County Attorney while carrying out county policy, the Supreme Court found no evidence or specific allegation that the County Attorney exceeded his authority or was derelict in his duty under the law. A determination by the County Attorney to bring an action is discretionary and is his duty under the law. Ronek v. Gallatin County, 227 M 514, 740 P2d 1115, 44 St. Rep. 1275 (1987).

Delegation of Powers Restricted: County Attorney cannot delegate to unofficial counsel his right to advise the grand jury, assist them in their investigations, and examine witnesses, and an order of the District Judge appointing such special prosecutor when the County Attorney was present and able to act could not give such authority. State ex rel. Porter v. District Court, 124 M 249, 220 P2d 1035 (1950).

Duty to Prosecute: Except when the County Attorney is himself the accused, the duty devolves upon him to prosecute public offenses. State ex rel. McGrade v. District Court, 52 M 371, 157 P 1157 (1916).

Duty Upon Appeal to Supreme Court — Expenses: After a criminal case has been appealed to the Supreme Court, the duties of the County Attorney therein and his power to contract expenses for the county cease. Independent Publishing Co. v. Lewis & Clark County, 30 M 83, 75 P 860 (1904).

Attorney General's Opinions

County Attorney as Employee for Purposes of Lawsuit Regarding Administrative Actions: A County Attorney is not liable for civil damages for conduct within the scope of his prosecutorial

duties; however, that immunity does not extend to the discretionary administrative business of running a County Attorney's office. Thus, a County Attorney is considered a county employee for purposes of the Montana Comprehensive State Insurance Plan and Tort Claims Act whenever the County Attorney is named in a civil lawsuit for actions regarding county administrative business, such as the hiring and firing of staff. 44 A.G. Op. 29 (1992).

County Responsible for Charges Incurred by City Police — Criminal Prosecutions: The county bears the financial responsibility for charges incurred at the request of the County Attorney, after an arrest by city police, for the preservation and preparation of evidence to be used in felony cases. 38 A.G. Op. 94 (1980).

Private Citizen Cannot Prosecute Complaint: Since the term "magistrate" includes Justices of the Peace in this section, the County Attorney is charged with the responsibility of prosecuting complaints in Justices' Courts and a Justice of the Peace cannot allow a private citizen to prosecute a complaint. However, a County Attorney is vested with normal discretion and need not file and prosecute every individual's complaint when there is insufficient evidence to warrant prosecution or when such a prosecution would not be in the interests of justice. 36 A.G. Op. 47 (1975).

Joint Employment: A County Attorney, for purposes of administration, is jointly employed by both the county and the state. 36 A.G. Op. 32 (1975).

Collateral References

Authority of attorney to dismiss or otherwise terminate action. 56 ALR 2d 1295.

7-4-2714. Recovery of illegally paid money.

Case Notes

Failure to Appeal County Commission Decision — Not a Bar Under Section: Failure of a taxpayer to appeal to the District Court from an order of the Board of County Commissioners allowing a claim against the county under the authority given him by 7-6-2424 does not limit the right of the County Attorney to sue in the name of the county to recover money illegally paid under this section. Carbon County v. Draper, 84 M 413, 276 P 667 (1929).

Failure to Bring Action: Where a County Attorney fails or refuses to bring an action to recover county funds illegally paid out, he may be compelled to act by mandamus or proceedings for his summary removal may be instituted. Gregg v. Bayers, 73 M 165, 235 P 337 (1925).

Taxpayer Not Real Party in Interest: Under this section an action to recover county funds unlawfully paid must be brought by the County Attorney in the name of the county, it being the real party in interest, and cannot therefore be maintained by a taxpayer. Gregg v. Bayers, 73 M 165, 235 P 337 (1925).

7-4-2716. Duties related to state matters.

Case Notes

Failure of State to Appeal — County Attorney Representation of State Position as Sufficient Opportunity for Hearing: Despite a District Court order in 1993, Sheppard was not admitted to phase II of the sexual offender program at the state prison. In 1995, Sheppard moved the District Court to order his enrollment in the program, serving the motion on the County Attorney who had prosecuted him for the underlying offense, but not on the state attorney for the Department of Corrections. The County Attorney appeared at the hearing on the motion and, pursuant to this section, advanced the state's position that Sheppard was not eligible for the treatment program because he failed to accept responsibility for the crime. The court affirmed its 1993 order and ordered that Sheppard be allowed into the program. The state did not timely appeal the decision and thus was bound by the 1993 order. The representation by the County Attorney of the state's position at the hearing, coupled with the state's opportunity to address the issue at prior hearings, was adequate consideration. St. v. Sheppard, 277 M 76, 919 P2d 1057, 53 St. Rep. 548 (1996).

County Responsibility for Medical Costs of Detained Person Unable to Pay — "Nature of the Crime" Approach: In determining whether a city or a county is responsible for medical costs incurred by a person ultimately charged with a violation of state law but who is unable to pay, the Supreme Court adopted the "nature of the crime" approach. This approach determines financial responsibility not on the basis of which agency first takes a person into custody, but rather on the basis of the crime charged. Because the county is vested with the primary responsibility for enforcing state law and maintaining facilities to accomplish that responsibility, performance of the task necessarily includes assumption of the associated

financial burden. Mont. Deaconess Medical Center v. Great Falls, 232 M 474, 758 P2d 756, 45 St. Rep. 1207 (1988).

County Attorney's Discretion to Bring Action — Prosecutorial Authority Not Exceeded: In a suit against a county for liability of the County Attorney while carrying out county policy, the Supreme Court found no evidence or specific allegation that the County Attorney exceeded his authority or was derelict in his duty under the law. A determination by the County Attorney to bring an action is discretionary and is his duty under the law. Ronek v. Gallatin County, 227 M 514, 740 P2d 1115, 44 St. Rep. 1275 (1987).

Power of Attorney General to Institute Actions in District Court:

Although County Attorney may be ordered by Attorney General to initiate a felony prosecution in a District Court, the Attorney General has no power to initiate the action independent of the County Attorney. State ex rel. Woodahl v. District Court, 159 M 112, 495 P2d 182 (1972).

The statutes of this state do not authorize the institution of an action in the District Courts by the Attorney General on behalf of the state, but rather they specifically state that such an action must be brought by the County Attorney of the county; however, under the common-law powers and duties of the Attorney General, he can institute such an action where the public interest is affected and the state is a party in interest. State ex rel. Olsen v. P.S.C., 129 M 106, 283 P2d 594 (1955); State ex rel. Ford v. Young, 54 M 401, 170 P 947 (1918); State ex rel. Nolan v. District Court, 22 M 25, 55 P 916 (1899).

Prosecution in Name of State: Criminal cases arising under the state laws must be prosecuted in the name of the state and by the County Attorney under this section and Art. VIII, sec. 27, 1889 Mont. Const. (No comparable provision in 1972 Mont. Const., however, the provision is codified at 46-11-401). State ex rel. Streit v. Justice Court, 45 M 375, 123 P 405 (1912).

Supervision by Attorney General: The County Attorney, in his every duty, is under the supervisory powers of the Attorney General. There are no official acts to be discharged by him in the performance of which he may not, where public interests require it, be assisted by that official. State ex rel. Nolan v. District Court, 22 M 25, 55 P 916 (1899).

Attorney General's Opinions

Child Abuse, Neglect, and Dependency Proceedings — Duty of County Attorney: It is the duty of the County Attorney to represent the Department of Family Services (now Department of Public Health and Human Services) in child abuse, neglect, and dependency proceedings brought under Title 41, ch. 3. 42 A.G. Op. 45 (1987).

County Responsible for Charges Incurred by City Police — Criminal Prosecutions: The county bears the financial responsibility for charges incurred at the request of the County Attorney, after an arrest by city police, for the preservation and preparation of evidence to be used in felony cases. 38 A.G. Op. 94 (1980).

Collateral References

Authority of attorney to dismiss or otherwise terminate action. 56 ALR 2d 1290.

Part 28
Office of County Surveyor

7-4-2801. Qualifications for county surveyor and deputies.

Compiler's Comments

1985 Amendments: Chapter 174, at beginning of (1) inserted "Except as provided in subsection (3)"; and inserted (3) relating to consolidation of office.

Chapter 622 in (1), substituted "registered professional engineer or registered professional land surveyor" for "professional engineer, not less than 22 years of age" and in second sentence, after "engineering", inserted "or land surveying"; and in (2) after "engineering", inserted "or land surveying".

Case Notes

Test of Statute's Constitutionality: The constitutionality of a statute is tested by the constitution in effect when the law was enacted. The recodification of a statute does not act as a reenactment of the law but is merely a ministerial and administrative function. Therefore, appellant could not be denied his right to hold the office of County Surveyor as the statute was unconstitutional at its inception and was not reenacted under the 1972 Constitution. Gallatin County v. McClue, 222 M 201, 721 P2d 338, 43 St. Rep. 1174 (1986).

7-4-2811. Function of county surveyor.

Case Notes

Purchase of Deepfreeze: County Surveyor could not bind the county in ordering, receiving, charging, and purchasing a deepfreeze. Although the written order described the item as a countershaft and pully and the county paid the claim, the payment of the claim by the county did not ratify the actions of the County Surveyor or make the transaction a legal sale of the freezer to the county. St. v. Bourdeau, 126 M 266, 246 P2d 1037 (1952).

Compensation for Equipment: The complaint of a County Surveyor in an action against the county to recover the reasonable value of the use of a transit employed by him in the performance of his duties during his term of office, with the knowledge and acquiescence of the County Commissioners and for the benefit of the county, stated a cause of action as upon an implied contract, in view of the provisions of this section making it the duty of the county to furnish plaintiff with the necessary equipment for the proper discharge of his duties in making surveys, establishing grades, etc. Builders Supply Co. v. Helena, 116 M 368, 154 P2d 270 (1944); Hicks v. Stillwater County, 84 M 38, 274 P 296 (1929).

7-4-2812. Duties related to roads and bridges.

Compiler's Comments

1995 Amendment: Chapter 336 in (1), at beginning of first sentence, substituted "The board of county commissioners may assign responsibility for the supervision" for "The county surveyor of all counties having a total registered vote of 20,000 or over at the last general election shall be responsible for supervision" and at end, after "county", inserted "to a county surveyor or to a county road superintendent" and inserted second sentence allowing Board to allocate duties between surveyor and superintendent; at beginning of (2) substituted "The duties are to" for "In the exercise of such control, supervision, and direction, he shall"; in (2)(b) substituted "grade, maintain, and repair all highways" for "cause highways to be graded, when needed, and maintain and repair the same"; in (2)(c) substituted "construct, maintain, and repair all bridges and causeways" for "cause all bridges and causeways to be made, when needed, and keep the same maintained and in good repair and renew the same when destroyed"; in (2)(i) substituted "employ and assign deputies and staff" for "employ deputies, men, and teams and discharge at his pleasure such deputies, men, and teams and determine how, when, and where such deputies, men, and teams shall work"; in (2)(m), after "duties", deleted "as are now or which may be hereafter"; at beginning of (3) substituted "The surveyor must" for "In the exercise of such control, supervision, and direction, he shall"; and made minor changes in style.

Collateral References

Measure and elements of damages for injury to bridge. 31 ALR 5th 171.

Liability in motor vehicle-related cases, of governmental entity for injury, death, or property damage resulting from defect or obstruction in shoulder of street or highway. 19 ALR 4th 532.

Part 29
Office of County Coroner

Part Collateral References

18 Am. Jur. 2d Coroners or Medical Examiners §§1 through 17.

7-4-2901. Appointment of deputy coroners.

Compiler's Comments

1987 Amendment: Inserted (2) relating to qualifications of a deputy coroner; and in (3), after "the coroner", inserted "or qualified deputy coroner".

7-4-2902. Vacancy in office of county coroner or disqualification of coroner.

Compiler's Comments

1987 Amendment: Substituted entire section (see 1987 Session Law for text) for former section that read: "(1) If the office of coroner is vacant or he is absent or unable to attend, the duties of his office may be discharged by any justice of the peace of the county with the like authority and subject to the same obligations and penalties as the coroner.

(2) A justice of the peace acting as coroner is allowed the same salary as the coroner for that portion of time he actually spends discharging the duties of coroner."

7-4-2905. Coroner education and continuing education.

Compiler's Comments

1995 Amendment: Chapter 24 in (1) inserted second sentence allowing adoption of rules regarding education standards and procedures; and in (2)(b), at beginning of second sentence, inserted "Unless there are exigent circumstances" and inserted third sentence allowing extension of the 2-year period due to exigent circumstances.

1995 Statement of Intent: The statement of intent attached to Ch. 24, L. 1995, provided: "A statement of intent is required for this bill because 7-4-2905 grants rulemaking authority to the board of crime control. The rules should provide for:

(1) essential training of coroners;

(2) a basic training course or its equivalent;

(3) continued training courses and education crucial to the professional standards of coroners and deputy coroners;

(4) board review of training schools other than those operated by the state to determine whether they meet board requirements for training; and

(5) board review of exigent circumstances that might allow a waiver of the 2-year time period for training."

1993 Amendment: Chapter 118 throughout section substituted references to Board of Crime Control for references to Attorney General; near middle of (1) substituted "department of justice" for "office of the attorney general"; and made minor changes in style.

Administrative Rules

ARM 23.14.901 Coroner education and continued education and extension of time limit for continued certification.

7-4-2911. Duties of county coroner.

Compiler's Comments

1991 Amendment: Inserted (2) requiring County Coroner to inquire into human deaths under 46-4-122; inserted (3) providing for decent disposal; inserted (4) requiring maintenance of records; inserted (5) providing for notification of next of kin; inserted (6) requiring preservation of evidence; inserted (7) requiring certification of judicially ordered deaths; inserted (8) requiring inquiry into deaths when no physician or surgeon will sign death certificate; inserted (9) requiring notification of County Attorney and law enforcement agency; and made minor changes in style.

7-4-2913. Payment of costs of inquest.

Compiler's Comments

1995 Amendment: Chapter 546 in second sentence substituted "department of corrections" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

7-4-2915. Custody and disposition of bodies held pending investigation.

Compiler's Comments

1991 Amendment: Inserted (1) allowing Coroner to take custody of a dead human body in the course of an inquiry; in (2), near beginning after "dead", inserted "human"; inserted (3) relating to Coroner custody of unknown or unclaimed bodies; inserted (4) allowing Coroner to release a dead human body in his custody; inserted (5) relating to release of dead human bodies to funeral homes on a rotating basis; and made minor changes in style.

Part 30
County Offices

7-4-3004. Office of public administrator.

Compiler's Comments

1985 Amendment: At end of section inserted "and 72-5-415(2)".

7-4-3007. Qualifications for office of county assessor — forfeiture of office.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (1)(b)(i), at end, substituted "15-7-106(4)" for "15-8-106(2)"; in (2) substituted "continuing education when conducted by the department of revenue" for "annual continuing education as provided in 15-8-106"; inserted (3) concerning county officers who are assessors because of consolidation of offices; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Effective Date: Section 7, Ch. 623, L. 1989, provided that this section is effective January 1, 1991.

Part 41
Municipal Officers in General

7-4-4101. Officers of city of first class.

Case Notes

Appointment of Chief of Police and Police Officers: Insofar as the method of appointment of members of the police force, including the Chief of Police, is concerned, this section is repealed by the Metropolitan Police Act (Ch. 136, L. 1907, codified primarily in Title 7, ch. 41). The method of appointment and removal by the later law is wholly inconsistent with the notion that the Mayor and Council are authorized to exercise the power of appointment as provided in the older law. State ex rel. Wynne v. Quinn, 40 M 472, 107 P 506 (1910).

Execution of Power Granted: The grant of power contained in this section, in the matter of prescribing the duties and fixing the compensation of city officers, is subject not only to the express and implied limitations found elsewhere in the title under which the section falls but contains in itself a limitation as to the mode in which the power granted may be executed. McGillic v. Corby, 37 M 249, 95 P 1063 (1908).

Attorney General's Opinions

Administrative Assistant — Mayoral Appointment: Although the City Council's contract and budget approval powers may affect the mayor's practical ability to provide a particular compensation amount to an administrative assistant or establish other employment conditions, they do not obviate his authority to fill that position without Council approval. Under 7-3-212, a mayor may appoint an administrative assistant without the approval of the City Council. 41 A.G. Op. 45 (1986).

Reapportionment — Holdover Aldermen: There is no provision in the Montana Constitution or statutes that authorizes the shortening of an alderman's term of office. The fact that ward boundaries may change as a result of reapportionment and that some voters may be represented for 2 years by an alderman for whom they had no opportunity to vote has not justified a deviation from state law, the shortening of terms, in other jurisdictions. Where state law provides for the length of term of an elected official and for the staggering of terms to insure continuity and stability, those requirements are paramount to the temporary disenfranchisement that necessarily follows a reapportionment. Montana state law regarding 4-year staggered terms for aldermen and the absence of any applicable statute authorizing the removal of incumbents from office after reapportionment determine that an alderman elected to a 4-year term in 1982 need not run for reelection in 1983 as a result of reapportionment and redistricting. 40 A.G. Op. 1 (1983).

Collateral References

62 C.J.S. Municipal Corporations §463.

7-4-4102. Officers of city of second or third class.

Compiler's Comments

1989 Amendment: Near end of (3), before "city court", substituted "appoint a justice of the peace or the city judge of another city as judge of the" for "designate a justice's court to act as".

1987 Amendment: In (3), at end, inserted "or may designate a justice's court to act as city court as provided in 3-11-205".

Case Notes

Commissioner of Public Works: Commissioner of Public Works, appointed by the Mayor, being a public officer of the city, was under a duty to account for all funds which might come into

his hands as such officer, including funds of public housing projects. Roundup v. Liebetrau, 134 M 114, 327 P2d 810 (1958).

Attorney General's Opinions

Appointment of City Judge by Third-Class City: Under this section, the governing body of a third-class city has the authority to determine by ordinance how a City Judge is selected. However, nothing in statute precludes the city from amending the ordinance in order to provide for the election of the judge. Therefore, when a city of the third class adopts a commission-manager form of government, the city is not bound by 7-3-4462, which requires election of a City Judge, but may continue to appoint its judge under an ordinance passed pursuant to this section. 45 A.G. Op. 15 (1993).

Collateral References

62 C.J.S. Municipal Corporations §463.

7-4-4103. Officers of towns.

Compiler's Comments

1989 Amendment: Near end of (3), before "city court", substituted "appoint a justice of the peace or the city judge of another city to be judge of the" for "designate a justice's court to act as".

1987 Amendment: Substituted (3) relating to appointment or election of a city judge or designation of a Justice's Court for former (3) that read: "The governing body of the town shall appoint a city judge or may designate a justice of the peace to act as city judge as provided in 3-11-205."

1981 Amendment: Inserted (1)(c) that reads: "one city judge"; inserted "except for the city judge" in (2); inserted (3) relating to decision on election or appointment of city judge.

Attorney General's Opinions

Residency for Justice of the Peace Serving as City Judge: A Justice of the Peace may not be appointed to serve as a City Judge in a town in which he does not reside without violating Art. VII, sec. 9, Mont. Const. 41 A.G. Op. 82 (1986). See 1989 amendment that provides for the appointment of a nonresident Justice of the Peace or City Judge to act as City Judge.

Collateral References

62 C.J.S. Municipal Corporations §463.

7-4-4104. General qualifications for municipal office.

Compiler's Comments

1981 Amendment: Deleted "except for city judges of third-class cities" after "who" in (2); substituted "met the qualifications prescribed by law or by ordinance adopted by the governing body of a city or town" for "resided in the town or city or an area which has been annexed by such town or city for at least 2 years immediately preceding his election or appointment and is not a qualified elector thereof" after "has not" in (2).

Case Notes

City Judge:

The office of the Police Judge (now City Judge) is the creation of the statute and not of the constitution. State ex rel. Shea v. Cocking, 66 M 169, 213 P 59 (1923).

Blindness does not disqualify one from holding the office of Police Judge (now City Judge). State ex rel. Shea v. Cocking, 66 M 169, 213 P 594 (1923).

Legislature Prescribing No Qualifications: Where the Legislature in creating an elective office prescribes no limitations or qualifications, the right to hold it is an implied attribute of citizenship and is presumed to be coextensive with that of voting at an election held for the purpose of choosing an incumbent for that office, those only who are competent to select the officer being deemed competent to hold it. State ex rel. Shea v. Cocking, 66 M 169, 213 P 594 (1923).

Application of Section: This section is of general application and controls aldermanic candidates who aspire to office at a first election after incorporation, as well as those who seek like honors at subsequent elections. Brown v. Foster, 48 M 114, 135 P 993 (1913).

Alderman: The official oath in writing of an Alderman, when taken and subscribed, is intended to become a record of the city. State ex rel. Wilson v. Willis, 47 M 548, 133 P 962 (1913).

Attorney General's Opinions

No Prohibition on City Employee Holding City Office: A municipality may not enact an ordinance prohibiting city employees from holding the office of councilman. 41 A.G. Op. 81 (1986).

Collateral References
62 C.J.S. Municipal Corporations §§476 through 488.

7-4-4105. Authority to abolish appointive municipal offices.

Case Notes
City Purchasing Agent: The City Council may, by a bare majority vote, abolish the office of city purchasing agent at any time and discharge the person appointed to fill it. State ex rel. Klick v. Wittmer, 50 M 22, 144 P 648 (1914).

Application of Section: This section has no application to a fireman, since 7-33-4113 declares that he is not to be deemed a municipal officer. State ex rel. Driffill v. Anaconda, 41 M 577, 111 P 345 (1910).

Offices Subject to Abolishment: The only officers of a city of the first class actually created by the Legislature are the Mayor, two Aldermen from each ward, a Police Judge (now City Judge), and a City Treasurer, none of whom can be in any way affected by any action of the Council, though other offices may be abolished. State ex rel. Quintin v. Edwards, 38 M 250, 99 P 940 (1908).

Collateral References
62 C.J.S. Municipal Corporations §467.

7-4-4107. Commencement of term of office.

Compiler's Comments
1981 Amendment: Substituted "January" for "May" in (1).

Collateral References
62 C.J.S. Municipal Corporations §495, et seq.

7-4-4109. Official bond.

Collateral References
62 C.J.S. Municipal Corporations §§489, 491.
Public officer's bond as subject to forfeiture for malfeasance in office. 4 ALR 2d 1348.

7-4-4111. Determination of vacancy in municipal office.

Compiler's Comments
1997 Amendment: Chapter 459 in (7), near beginning, substituted "a city council member" for "an alderman" and inserted second sentence concerning residence of appointed officer; and made minor changes in style.

1981 Amendment: Substantially rewritten based upon 2-16-501; deleted former subsection (1) relating to qualifying for office; inserted introductory clause regarding when an office becomes vacant; inserted (1) through (4) and (8) through (11); and amended (5) through (7) to conform to inserted material (see 1981 Session Law for text).

Attorney General's Opinions
Vacancy Not Created by Holdover Town Attorney: The general rule of law is that an officer must hold over until a successor is appointed and qualified, unless holding over is prohibited by express statutory language or by clear implication. The policy underlying the common-law rule is the strong public interest in continuing the work of important governmental offices when a qualified officer is holding over pending appointment and approval of a successor. With regard to the office of town attorney, absent statutory prohibition, a vacancy in the office of town attorney is not created when the attorney holds over following expiration of the term of office. Therefore, a qualified town attorney lawfully holding over in the office continues to hold office until a successor is nominated by the mayor and approved by the town council. 47 A.G. Op. 16 (1998).

Loss of Office Caused by Change of Residency — Urban Renewal Agency Commissioner: Under 2-16-501, a member of a board of commissioners of an urban renewal agency loses his seat on the board if he ceases to be a resident of the municipality that created the board. (See 1997 amendment.) 41 A.G. Op. 1 (1985).

7-4-4112. Filling of vacancy.

Compiler's Comments
1987 Amendment: Inserted (2) relating to all council position becoming vacant at one time.

1981 Amendment: In (1) substituted language relating to filling a vacancy of an elective office at the next general municipal election and appointing a successor within 30 days for "the council, by a majority vote of the members, may fill the same for the unexpired term and until the

qualification of the successor"; and deleted "but if the council shall fail to fill such vacancy before the time for the next election, the qualified electors of such city or ward may nominate and elect a successor to such office" after "vacancy exists" in (2).

Case Notes

Filling Vacancy — Right to Vote: Having been rightfully chosen by the City Council to fill a vacancy in its own body and after taking and subscribing the constitutional oath, an alderman had the right to have his vote on the question of filling another vacancy, caused by death, recorded, even though a certificate of election had not been issued to him and irrespective of the mayor's refusal to recognize him or of the fact that an action to determine his official status was then pending. State ex rel. Wilson v. Willis, 47 M 548, 133 P 962 (1913).

Majority Vote: The provision of this section, requiring "a majority vote of the members" of the City Council, that is, a majority of those constituting the actual membership of the body at the time, to fill a vacancy in an elective city office, and not 7-5-4121, making "a majority of the whole number of the members elected" requisite for such purpose, is applicable in case a vacancy in its own body caused by resignation or death is to be filled. State ex rel. Wilson v. Willis, 47 M 548, 133 P 962 (1913), distinguished in State ex rel. O'Hern v. Loud, 92 M 307, 14 P2d 432 (1932).

7-4-4113. Removal of appointed officer.

Case Notes

Misconduct — Intent Involved: To justify removal of an officer for misconduct, it is not necessary that the actions made the basis of the charge against him must have been willful; the official doing of an act may constitute misconduct, although there was no corrupt or malicious motive. Bailey v. Examining and Trial Bd., 45 M 197, 122 P 572 (1912); State ex rel. Ryan v. Bd. of Aldermen, 45 M 188, 122 P 569 (1912); State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103 (1911); State ex rel. Wynne v. Examining and Trial Bd., 43 M 389, 117 P 77 (1911); Leggatt v. Prideaux, 16 M 205, 40 P 377 (1895).

Misconduct of Alderman: An alderman was properly found guilty of misconduct in office and removed, on the grounds that in his capacity as an attorney at law he defended one charged with conducting business without paying a license tax and accepted a retainer to prosecute a suit against the town for damages and an injunction in regard to a sewer. (Decided prior to 1974 amendment inserting "nonelected" before "officer"—annotator.) State ex rel. Ryan v. Bd. of Aldermen, 45 M 188, 122 P 569 (1912).

City Judge:

The office of Police Judge (now City Judge) is a creature not of the constitution but of the statute, and the incumbent thereof is not liable to impeachment. He is, however, a city officer and may therefore, in a proper case, be removed by the City Council. State ex rel. Working v. Mayor, 43 M 61, 114 P 777 (1911).

Prohibition does not lie at the suit of a Police Judge (now City Judge) of a city to prohibit the City Council from proceeding to remove him from office, where written charges have not been filed against him as required by this section. State ex rel. Working v. Mayor, 43 M 61, 114 P 777 (1911).

Construction of Section: This section is in consonance with Art. V, sec. 18, 1889 Mont. Const. (similar to Art. V, sec. 13(1), 1972 Mont. Const.), subjecting officers not liable to impeachment to removal in the manner provided by law, and is a proper exercise of the legislative authority therein granted. State ex rel. Working v. Mayor, 43 M 61, 114 P 777 (1911).

Written Charges Required for Removal: Until written charges have been filed with a City Council, in conformity with the provision of this section, no proceeding looking to the removal of a city officer has been instituted. State ex rel. Working v. Mayor, 43 M 61, 114 P 777 (1911).

Collateral References

62 C.J.S. Municipal Corporations §§505 through 521.

Removal of public officers for misconduct during previous term. 42 ALR 3d 691.

7-4-4114. Municipal executive officers.

Collateral References

62 C.J.S. Municipal Corporations §§462, 463.

Part 42
Compensation of Municipal Officers and Employees

7-4-4201. Salary of officers.

Attorney General's Opinions

Increase of Officer's Salary During His Term: This section does not prohibit a City Council from increasing the salary of a municipal officer during the officer's term of office. It is clear from the title and substance of Ch. 221, L. 1979, that the Legislature intended to make a change in this section by deleting the prohibition against increasing or diminishing a municipal officer's salary during his term of office. 38 A.G. Op. 45 (1979).

Prohibition Against Salary Changes Not Revived by Contemporaneous Amendments: The enactment of Ch. 428 and Ch. 443, L. 1979, which amended former subsection (2) of 7-4-4201, did not revive the prohibition against changing the salary of a municipal officer during his term. The Legislature's express deletion of that prohibition in Ch. 221, L. 1979, was in effect a direct repeal of former subsection (2). Neither Ch. 428 nor Ch. 443, L. 1979, expressly or impliedly repeals Ch. 221, L. 1979, and it is not possible for the Legislature to put life into a dead statute by amendment of it. 38 A.G. Op. 45 (1979).

Collateral References

62 C.J.S. Municipal Corporations §§522 through 541.

7-4-4202. Minimum salary of chief of police.

Case Notes

Basis for Computing Longevity Pay: The language of 7-32-4116(3) applies to subsection (1) of this section and requires that additional salary be both calculated by and added to the base monthly salary established in subsection (1). Johnson v. Bozeman, 179 M 412, 587 P2d 359, 35 St. Rep. 1695 (1978).

7-4-4211. Designation of person to receive decedent's warrants or paychecks — reissuance.

Compiler's Comments

Source: Section 2, Ch. 113, L. 1983, was based on 2-18-412, state provisions for payment of a decedent's warrants.

Part 43
Office of Mayor

7-4-4301. Qualifications for mayor.

Collateral References

62 C.J.S. Municipal Corporations §§477 through 488.

7-4-4303. Powers of mayor related to municipal officers, personnel, and citizens.

Compiler's Comments

1997 Amendment: Chapter 485 deleted former (5) that authorized mayor to "call on every citizen of the city or town over the age of 18 years to aid in the enforcement of the laws and ordinances in case of riot"; at beginning of (5) inserted "request that the governor"; and made minor changes in style.

Case Notes

Nomination and Appointment of Nonelective Officers:

The nominee of a Mayor for a city office (City Engineer) who was not confirmed by a majority of the City Council as required by statute and ordinance does not assume the status of an officer. State ex rel. Sandquist v. Rogers, 93 M 355, 18 P2d 617 (1933).

The Town Clerk is an appointive officer, and the Mayor of a city or town has power "to nominate, and, with the consent of the council, to appoint all nonelective officers of the city or town, provided for by the council". The power to nominate to fill a nonelective office also includes like authority when a vacancy arises therein, but in either event the appointment is not effective until concurred in by a majority of the City or Town Council. State ex rel. Peterson v. Peck, 91 M 5, 4 P2d 1086 (1931).

Status of Mayor Generally: While the Mayor of a city is not, strictly speaking, a member of the Council in the sense that an Alderman is, yet he is such to the extent of the powers committed to

him under this section and 7-5-4102(2). State ex rel. O'Hern v. Loud, 92 M 307, 14 P2d 432 (1932).

Police Officers — Appointment and Suspension: Insofar as the method of appointment and suspension of members of the police force is concerned, this section is repealed by the Metropolitan Police Law (Ch. 136, L. 1907; codified in Title 7, ch. 32). State ex rel. Wynne v. Quinn, 40 M 472, 107 P 506 (1910).

Attorney General's Opinions

Administrative Assistant — Mayoral Appointment: Although the City Council's contract and budget approval powers may affect the mayor's practical ability to provide a particular compensation amount to an administrative assistant or establish other employment conditions, they do not obviate his authority to fill that position without Council approval. Under 7-3-212, a mayor may appoint an administrative assistant without the approval of the City Council. 41 A.G. Op. 45 (1986).

Collateral References

62 C.J.S. Municipal Corporations §543.

Removal of public officers for misconduct during previous term. 42 ALR 3d 691.

Institutional Powers and Mayoral Leadership, Svara, St. & Loc. Gov't Rev. (1995).

7-4-4306. Extraterritorial powers.

Compiler's Comments

1997 Amendment: Chapter 485 inserted second sentence requiring County Commissioners of county affected by ordinance to approve ordinance by majority vote.

Attorney General's Opinions

Ordinance Regulating Discharge of Firearms Not Health Ordinance: A city ordinance regulating the discharge of firearms outside the city limits may not be enacted as a health ordinance and enforced pursuant to the extraterritorial powers granted to a mayor under this section. 42 A.G. Op. 8 (1987).

Part 44
Office of Alderman

Part Case Notes

Arbitrary Denial of Building Permit by City Council — City, City Council, and Individual Council Members Liable: In an action under 43 U.S.C. 1983, the court of appeals upheld the District Court's holding that the Billings City Council's refusal to issue a building permit after the applicant had satisfied all the requirements for issuing the permit was an arbitrary and capricious action that deprived the applicant of his substantive due process rights. The city, City Council, and individual members of the City Council have no immunity from such action and are all liable for damages. Bateson v. Geisse, 857 F2d 1300 (9th Cir. 1988).

7-4-4401. Qualifications for alderman.

Case Notes

Constitutionality of Freeholder Requirement — Enactment Void: The freeholder requirement of this section (prior to 1979 amendment) was unconstitutional since it bore no relation to a person's qualifications and ability to serve as City Councilman, resulting in an invidious discrimination violative of equal protection. Thus, appellant's false swearing as to freeholder status in his filed declaration of nomination did not constitute a violation of the election laws. Sadler v. Connolly, 175 M 484, 575 P2d 51 (1978), distinguished in Johnson v. Killingsworth, 271 M 1, 894 P2d 272, 52 St. Rep. 274 (1995).

Residence: The provision of this section (prior to 1967 amendment) requiring that any person, to be eligible to the office of Alderman, must have been a resident of the ward where elected "for at least one year preceding the election", meant 1 year next preceding the election. Dowty v. Pittwood, 23 M 113, 57 P 727 (1899).

7-4-4402. Term of office.

Attorney General's Opinions

Reapportionment — Holdover Aldermen: There is no provision in the Montana Constitution or statutes that authorizes the shortening of an alderman's term of office. The fact that ward boundaries may change as a result of reapportionment and that some voters may be represented for 2 years by an alderman for whom they had no opportunity to vote has not justified a deviation

from state law, the shortening of terms, in other jurisdictions. Where state law provides for the length of term of an elected official and for the staggering of terms to insure continuity and stability, those requirements are paramount to the temporary disenfranchisement that necessarily follows a reapportionment. Montana state law regarding 4-year staggered terms for aldermen and the absence of any applicable statute authorizing the removal of incumbents from office after reapportionment determine that an alderman elected to a 4-year term in 1982 need not run for reelection in 1983 as a result of reapportionment and redistricting. 40 A.G. Op. 1 (1983).

7-4-4403. Officers of city or town council.

Case Notes

Reception of Reports: Where accountants are employed to audit the books of a city and their contract calls for a report to the city, but before it is made two copies thereof are handed to the Mayor, at his request, one of which he presents to the City Council and the other he receives as his own, the Mayor's duty is fully discharged. After seeing that the copy presented to the Council finds its way into the hands of the City Clerk and is by him filed among the records of his office, the Mayor has a right to retain the other copy among his private papers. Butte v. Nevin, 46 M 380, 128 P 600 (1912).

Compensation of President: The Council may or may not elect a president. When elected, he must be held to know whether provision has been made for his compensation; if none has been made in the mode prescribed by law, then he is entitled to none and has no legal claim against the city therefor. McGillic v. Corby, 37 M 249, 95 P 1063 (1908).

Part 45
Office of Municipal Clerk

7-4-4501. Duties of city clerk related to administration.

Case Notes

Recordation of Votes: It is the Clerk's duty to record a newly elected officer's vote on a question, and the performance of the Clerk's duty may be enforced by mandamus. State ex rel. Wilson v. Willis, 47 M 548, 133 P 962 (1913).

Collateral References

Liability of clerk of court, county clerk or prothonotary, or surety on bond, for negligent or wrongful acts of deputies or assistants. 71 ALR 2d 1140.

7-4-4502. Duties of city clerk related to city records and papers.

Case Notes

Possession of Books and Records: A Writ of Mandate is proper to compel the Mayor to nominate a person acceptable to the Council as Town Clerk, who then would be entitled to the custody of the books and records of the town, under this section. State ex rel. Peterson v. Peck, 91 M 5, 4 P2d 1086 (1931).

Record of Oath: If a person has been lawfully elected a member of the City Council and has taken the required oath, the intention of the law is that the oath, when taken and subscribed, shall become a record of the city, and it is the Clerk's duty to file and keep it as such. State ex rel. Wilson v. Willis, 47 M 548, 133 P 962 (1913).

Documents Kept by Mayor: If the Mayor chooses to keep a record including copies of documents that must be preserved in the files of the Clerk's office, they are his private property, and title to them does not vest in the city by virtue of the fact that he is acting as its chief executive at the time. Butte v. Nevin, 46 M 380, 128 P 600 (1912).

Protests Against Improvement Districts: The presentation of protests or objections against the creation of special improvement districts is not part of the duties of the City Clerk, and the leaving of such protests at the Clerk's office is of no avail. Hensley v. Butte, 36 M 32, 92 P 34 (1907). (Compare Tiggerman v. Butte, 44 M 138, 119 P 477 (1911).)

Part 46
Office of City Attorney

7-4-4601. Qualifications for city attorney.

Collateral References

62 C.J.S. Municipal Corporations §§477 through 488.

7-4-4603. Removal or suspension.

Collateral References

62 C.J.S. Municipal Corporations §505.

7-4-4604. Duties.

Case Notes

City Attorney's Authority to Try City Prosecution of Statutory DUI Violation Upheld: McCarvel was charged in Billings City Court with a violation of the state DUI statute. He was convicted by a jury and appealed to District Court in which, after the District Court refused to dismiss, he pleaded guilty. The Supreme Court held that the city attorney could lawfully prosecute a violation of a state statute in City Court because the City Court had concurrent jurisdiction with the Justice's Court and because it was the city attorney's duty to prosecute on behalf of the city offenses heard in that court. Billings v. McCarvel, 262 M 96, 863 P2d 441, 50 St. Rep. 1460 (1993).

Collateral References

62 C.J.S. Municipal Corporations §695.

Authority of attorney to dismiss or otherwise terminate action. 56 ALR 2d 1295.

CHAPTER 5
GENERAL OPERATION AND CONDUCT OF BUSINESS

Part 1
Local Government Ordinances, Resolutions, and Initiatives and Referendum

Part Law Review Articles

An Overview of the Impact of Major Environmental Law on Municipalities & Local Governments, Drake, Inst. on Plan. Zoning & Eminent Domain H4 (1996).

Helping States Cope With New Federal Mandates, Hill, 17 Nat'l L.J. D14 (1995).

7-5-102. Construction of certain sections.

Collateral References

62 C.J.S. Municipal Corporations §412.

7-5-103. Ordinance requirements.

Case Notes

Ordinance Not Invalid for Apparent Failure to Post Required Notice: An ordinance that was submitted in writing, contained one comprehensive subject, was read and passed at two readings, and was signed by the chairperson of the governing body is valid under this section. Because of numerous resolutions, ordinances, notices, and public hearings on this matter, an apparent failure to post notice of first adoption would not warrant a finding that the entire refuse disposal district project be invalidated. Clopton v. Madison County Comm'n, 216 M 335, 701 P2d 347, 42 St. Rep. 851 (1985).

Attorney General's Opinions

State Authority to Regulate Liquor — No Delegation to Municipalities: The authority granted to the state by the 21st amendment to the U.S. Constitution to regulate the sale of liquor has not been delegated to municipalities with general powers. Therefore, a municipality with general powers may not punish a violation of its obscenity ordinance by suspending or revoking the liquor license of the offender. 41 A.G. Op. 75 (1986).

Collateral References

62 C.J.S. Municipal Corporations §416, et seq.

Validity, construction, and application of loitering statutes and ordinances. 72 ALR 5th 1.

Validity and construction of statute or ordinance requiring installation of automatic sprinklers. 63 ALR 5th 517.

Validity and construction of zoning regulations relating to illuminated signs. 30 ALR 5th 549.

State and local government control of pollution from underground storage tanks. 11 ALR 5th 388.

Abstention from voting of member of municipal council present at session as affecting requisite voting majority. 63 ALR 3d 1072.

Supreme Court's application of vagueness doctrine to noncriminal statutes or ordinances. 40 L. Ed. 2d 823.

7-5-104. Emergency ordinance.

Collateral References

62 C.J.S. Municipal Corporations §419.

7-5-106. Ordinance veto procedure.

Collateral References

62 C.J.S. Municipal Corporations §§421 through 424.

Former jeopardy: right of municipal corporation to review of unfavorable decision in action or prosecution for violation of ordinance — modern status. 11 ALR 4th 399.

7-5-109. Penalty for violation of ordinance.

Compiler's Comments

1993 Amendment: Chapter 597 at beginning of (1) inserted exception clause; inserted (2) allowing a local government to fix certain penalties for violation of local ordinances; and made minor changes in style.

Case Notes

Five Days and $350 Fine for Disturbing the Peace: City's general penalty ordinance under which appellant was sentenced to 5 days in jail and a $350 fine for violating the disturbing the peace ordinance is within the limits of this section. Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021, 42 St. Rep. 928 (1985).

Escalating Fines for Parking Violations — Unconstitutional: An escalating fine schedule for parking violations where the amount to be paid depends on the length in the delay in paying after being cited is in violation of the basic principle of law that punishment must be for the violation and proportional to the gravity of the offense and hence is violative of Art. II, sec. 28, Mont. Const., which provides that laws for punishment of crime must be founded on principles of prevention and reformation. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

Attorney General's Opinions

Mandatory Seatbelt Ordinance: Under Montana law and the Montana Constitution, a municipality with self-governing powers may enact a mandatory seatbelt ordinance that provides for a fine or jail sentence for violation of the ordinance as long as the fine or penalty does not exceed $500 and the imprisonment does not exceed 6 months for any one offense, and as long as such an ordinance is not prohibited by the city charter. 41 A.G. Op. 47 (1986).

7-5-121. Resolution requirements.

Case Notes

Construction of Resolutions: The same rules of construction apply to official enactments by County Commissioners as apply to the construction of a statute. Mesa Communications Group, LLC v. Yellowstone County, 2002 MT 73, 309 M 233, 45 P3d 37 (2002).

Collateral References

62 C.J.S. Municipal Corporations §§416 through 420.

7-5-122. Resolution veto procedure.

Collateral References

62 C.J.S. Municipal Corporations §§421 through 424.

7-5-131. Right of initiative and referendum.

Case Notes

Guidelines for Distinguishing Between Legislative and Administrative Acts of Local Government — Initiative and Referendum Power Reserved for Legislative Acts Only: Beginning with Billings v. Nore, 148 M 96, 417 P2d 458 (1966), the Supreme Court recognized a distinction between legislative acts, which are subject to the powers of initiative and referendum, and administrative or quasi-judicial acts, which are not. Because local governments are empowered by Art. XI, sec. 4, Mont. Const., to exercise legislative, administrative, and other powers, the question arose as to whether this section unconstitutionally limits local government referendum power to resolutions and ordinances within the legislative jurisdiction. In order to clarify the

distinction between legislative and administrative acts of a local government, the Supreme Court adopted the following guidelines in Wichita v. Kans. Taxpayers Network, 874 P2d 667 (Kans. 1994): (1) An ordinance that makes new law is legislative, while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance. (2) Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative. (3) Decisions that require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy. (4) No act of a governing body is likely to be solely administrative or legislative, and the operation of the initiative and referendum statute is restricted to measures that are quite clearly and fully legislative and not principally executive or administrative. In the present case, an ordinance that implemented the use of water meters as part of a town's water system improvement plan was an administrative act that was not subject to referendum. The District Court properly declared a referendum challenging the ordinance invalid. The Supreme Court affirmed the constitutionality of this section. Whitehall v. Preece, 1998 MT 53, 288 M 55, 956 P2d 743, 55 St. Rep. 219 (1998), overruling Chouteau County v. Grossman, 172 M 373, 563 P2d 1125 (1977), and Dieruf v. Bozeman, 173 M 447, 568 P2d 127 (1977), to the extent that those decisions stand for the rule that a local government's act is administrative based solely on a statutory grant of authority.

Statute of Limitations Applicable to Suit to Determine Validity of Initiative or Referendum: A suit to determine the validity and constitutionality of a petition for initiative or referendum must be initiated within 14 days of the date on which the petition is approved as to form by the local government attorney, as set out in 7-5-135. Whitehall v. Preece, 1998 MT 53, 288 M 55, 956 P2d 743, 55 St. Rep. 219 (1998).

Rezoning Ordinance Subject to Referendum — No Distinction Between Zoning and Rezoning for Referendum Purposes: A community group filed a petition seeking a referendum to repeal a rezoning ordinance. Plaintiff, the owner of historic land that it wanted to develop, filed a declaratory judgment action against the city, seeking to have the referendum process refused. The community group was allowed to intervene. The motion for summary judgment was denied; the referendum was held; and the voters supported repeal of the ordinance. The Supreme Court held that the District Court correctly interpreted this section to mean that referendum by the people is appropriate for both zoning ordinances and rezoning ordinances. The Supreme Court overruled specific language in prior cases that distinguished between zoning and rezoning ordinances. The Greens at Fort Missoula, LLC v. Missoula, 271 M 398, 897 P2d 1078, 52 St. Rep. 501 (1995).

Resolution Creating Special Improvement District — Not Subject to Referendum: A resolution creating a municipal special improvement district that encompasses less area than the municipal limits is not subject to referendum because the resolution affects only the people within the improvement district rather than the people of the municipality as a whole. The Supreme Court further held that the resolution creating a special improvement district is part of an administrative procedure, not a legislative action subject to referendum. Shelby v. Sandholm, 208 M 77, 676 P2d 178, 41 St. Rep. 186 (1984), distinguished in The Greens at Fort Missoula, LLC v. Missoula, 271 M 398, 897 P2d 1078, 52 St. Rep. 501 (1995).

Attorney General's Opinions

Merger of Fire Services Between City and County With General Government Powers Not Allowed: A proposed city initiative would have merged a city fire department and a rural county fire district into a new fire protection district with an urban and a rural division. However, both the city and county were local government units with general government powers and had not been consolidated as allowed by law. Under the provisions of the initiative, neither fire department would maintain its own identity; therefore, the proposed merger would abrogate the city fire department as a separate entity and would be an invalid exercise of general government powers. This opinion does not preclude the provision of fire protection services in a cooperative fashion through an interlocal agreement that city voters may, by initiative, require the city governing body to pursue. 43 A.G. Op. 56 (1990).

Collateral References

62 C.J.S. Municipal Corporations §§449 through 461.

Adoption of zoning ordinance or amendment thereto as subject of referendum. 72 ALR 3d 1030.

Adoption of zoning ordinance or amendment thereto through initiative process. 72 ALR 3d 991.

7-5-132. Procedure to exercise right of initiative or referendum.

Compiler's Comments

2001 Amendment: Chapter 374 in (1) in second sentence near middle after first "effective date" inserted "or within 60 days after passage of the ordinance, whichever is later" and in third sentence near middle after "filed within" increased time for filing petition from 30 days to 60 days; and made minor changes in style. Amendment effective April 23, 2001.

1991 Amendment: In (1), near beginning of second sentence after "If", substituted "an approved petition containing sufficient signatures if filed" for "submitted"; inserted (3)(e) requiring that a petition or resolution contain transition provisions in certain cases; and made minor changes in style.

Attorney General's Opinions

Initiative Inappropriate Process for Alteration of Method of Establishment and Collection of County Solid Waste Management District Service Charges: The initiative process may not be used to amend the resolution creating a county solid waste management district when the district encompasses an area smaller than the entire county and the initiative petition seeks to alter the method of establishing and collecting service charges. Such a proposed action is administrative in character rather than a legislative act subject to initiative or referendum. 45 A.G. Op. 5 (1993).

Collateral References

62 C.J.S. Municipal Corporations §§453 through 458.

7-5-133. Processing of petition.

Compiler's Comments

1995 Amendment: Chapter 387 in (2) substituted "regular or primary election" for "school, primary, or general election or a special election called for that purpose"; and made minor changes in style.

Collateral References

62 C.J.S. Municipal Corporations §456.

7-5-134. Signatures — submission for approval — statement of purpose and implication.

Compiler's Comments

1991 Amendment: In (2) deleted second sentence requiring review of sample petition by election administrator; in (3), at end of first sentence, deleted "for preparation of the ballot statement" and in second sentence, after "shall", inserted "review the sample petition for form and compliance with 7-5-131 and 7-5-132 and"; in (5), after "notice", inserted "and a statement of the reasons for rejection" and increased time period for rejection notice from 10 days to 21 days; and made minor changes in style.

Case Notes

Statute of Limitations Applicable to Suit to Determine Validity of Initiative or Referendum: A suit to determine the validity and constitutionality of a petition for initiative or referendum must be initiated within 14 days of the date on which the petition is approved as to form by the local government attorney, as set out in 7-5-135. Whitehall v. Preece, 1998 MT 53, 288 M 55, 956 P2d 743, 55 St. Rep. 219 (1998).

Attorney General's Opinions

Initiative Inappropriate Process for Alteration of Method of Establishment and Collection of County Solid Waste Management District Service Charges: The initiative process may not be used to amend the resolution creating a county solid waste management district when the district encompasses an area smaller than the entire county and the initiative petition seeks to alter the method of establishing and collecting service charges. Such a proposed action is administrative in character rather than a legislative act subject to initiative or referendum. 45 A.G. Op. 5 (1993).

Power of County Election Administrator to Reject Initiative Petition if Subject Matter Outside Scope of Initiative Process: A county election administrator, upon the advice of the County Attorney, may reject a sample initiative petition when it does not involve a matter subject to the initiative or referendum process. 45 A.G. Op. 5 (1993).

Collateral References

62 C.J.S. Municipal Corporations §§457, 458.

7-5-135. Suit to determine validity and constitutionality of petition and proposed action.

Compiler's Comments

1985 Amendment: Substituted language of (1) relating to bringing suit on constitutionality within 14 days for former (1) and (2) that read: "(1) Before submitting the question to the electors, the governing body may direct that a suit be brought in district court by the local government to determine whether the petition is regular in form and has sufficient signatures and whether the proposed action would be valid and constitutional.

(2) The complaint shall name as defendants not less than 10 or more than 20 of the petitioners. In addition to the names of the defendants, to the caption of the complaint there shall be added the words: "And all petitioners whose names appear on the petition for an ordinance filed on the ... day of ....., in the year ...", stating the date of filing. The summons shall be similarly directed and shall be served on the defendants named therein and in addition shall be published"; inserted (2) providing that an action under this section takes precedence over other District Court matters; inserted (3) concerning defendant's costs and attorney fees; and inserted (4) regarding time period for collecting petition signatures.

Case Notes

Guidelines for Distinguishing Between Legislative and Administrative Acts of Local Government — Initiative and Referendum Power Reserved for Legislative Acts Only: Beginning with Billings v. Nore, 148 M 96, 417 P2d 458 (1966), the Supreme Court recognized a distinction between legislative acts, which are subject to the powers of initiative and referendum, and administrative or quasi-judicial acts, which are not. Because local governments are empowered by Art. XI, sec. 4, Mont. Const., to exercise legislative, administrative, and other powers, the question arose as to whether 7-5-131 unconstitutionally limits local government referendum power to resolutions and ordinances within the legislative jurisdiction. In order to clarify the distinction between legislative and administrative acts of a local government, the Supreme Court adopted the following guidelines in Wichita v. Kans. Taxpayers Network, 874 P2d 667 (Kans. 1994): (1) An ordinance that makes new law is legislative, while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance. (2) Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative. (3) Decisions that require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy. (4) No act of a governing body is likely to be solely administrative or legislative, and the operation of the initiative and referendum statute is restricted to measures that are quite clearly and fully legislative and not principally executive or administrative. In the present case, an ordinance that implemented the use of water meters as part of a town's water system improvement plan was an administrative act that was not subject to referendum. The District Court properly declared a referendum challenging the ordinance invalid. The Supreme Court affirmed the constitutionality of 7-5-131. Whitehall v. Preece, 1998 MT 53, 288 M 55, 956 P2d 743, 55 St. Rep. 219 (1998), overruling Chouteau County v. Grossman, 172 M 373, 563 P2d 1125 (1977), and Dieruf v. Bozeman, 173 M 447, 568 P2d 127 (1977), to the extent that those decisions stand for the rule that a local government's act is administrative based solely on a statutory grant of authority.

Statute of Limitations Applicable to Suit to Determine Validity of Initiative or Referendum: A suit to determine the validity and constitutionality of a petition for initiative or referendum must be initiated within 14 days of the date on which the petition is approved as to form by the local government attorney, as set out in this section. Whitehall v. Preece, 1998 MT 53, 288 M 55, 956 P2d 743, 55 St. Rep. 219 (1998).

Collateral References

62 C.J.S. Municipal Corporations §455.

7-5-136. Submission of question to electors.

Compiler's Comments

1995 Amendment: Chapter 387 in (1)(a) and (1)(b), at end, inserted "to be held in conjunction with a regular or primary election"; and made minor changes in style.

1985 Amendment: In (2) substituted "75 days" for "60 days"; and in (3) substituted "75 days" for "45 days".

Collateral References

62 C.J.S. Municipal Corporations §458.

7-5-137. Effect of repeal or enactment of ordinance by initiative or referendum.

Collateral References

62 C.J.S. Municipal Corporations §461.

7-5-140. Recordkeeping.

Compiler's Comments

Effective Date: Section 18(2), Ch. 459, L. 1997, provided: "[Sections 8 and 16 [enacting 7-5-140] and this section] are effective on passage and approval." Amendment effective April 30, 1997.

Part 2
Operation of Consolidated Units of Local Government

7-5-201. Operation of self-government consolidated units of local government.

Compiler's Comments

2003 Amendment: Chapter 466 in (1) at beginning of first sentence inserted exception clause; and made minor changes in style. Amendment effective April 23, 2003.

Saving Clause: Section 7, Ch. 466, L. 2003, was a saving clause.

Attorney General's Opinions

Self-Government Powers: Under a form of government with local self-government powers, the replacement of former county officers with department supervisors is a legitimate exercise of such local self-government powers. Section 7-4-2503 does not apply to self-government units since it may be superseded by ordinance or resolution of the Commission and is not prohibited by 7-1-114(g). 37 A.G. Op. 68 (1977).

Part 21
Conduct of County Government

7-5-2101. General authority of county commissioners.

Attorney General's Opinions

No Authority of Board of County Commissioners to Reduce County Auditor Office to Part-Time Position: Montana statutes contemplate a full-time County Auditor with a full-time salary in every county with a population of greater than 15,000. Although County Commissions do have the authority to consolidate certain county offices, including the County Auditor's office, no existing statute contemplates a reduction of the office of County Auditor to a part-time position. Had the Legislature intended to expressly authorize County Commissions to reduce the office, it would have adopted legislation similar to that for County Attorneys and County Superintendents. The authority in 7-6-2412 extends to the imposition of additional County Auditor duties, not to the reduction of hours worked. There is no express or implied authority for counties with general powers to reduce the office of County Auditor to a half-time position. 47 A.G. Op. 18 (1998).

County Commissioner and County Coordinator of Disaster and Emergency Services Incompatible — Positions Not to Be Held Simultaneously: The Board of County Commissioners has the power of supervision, revision, and removal over the position of county coordinator of disaster and emergency services. Therefore, under the common-law doctrine of incompatible public offices, the office of County Commissioner and the position of county coordinator of disaster and emergency services are incompatible and one person may not hold both jobs simultaneously. 46 A.G. Op. 26 (1996).

Provision of Office Space and Equipment by County for Part-Time County Attorney: A county governing body may satisfy its obligation to provide office space for a part-time County Attorney

by providing space in a county building or, if no suitable space is available, by renting office space. Use of the space for the County Attorney's private practice is allowed only through a written agreement between the county and the County Attorney leasing the use of the space for private business purposes. Alternatively, the governing body may allow a claim by the County Attorney for the rental of office space needed to conduct the county's business if suitable office space is not available in county buildings. A county governing body may satisfy its obligation to provide necessary equipment for a part-time County Attorney by providing the use of the equipment owned by the county or, if no suitable equipment is available, by renting equipment. Use of the equipment for the County Attorney's private practice is allowed only through a written agreement between the county and the County Attorney leasing the use of the equipment for private business purposes. 46 A.G. Op. 10 (1995), followed in 46 A.G. Op. 20 (1996).

Authority of County to Issue General Obligation Bonds for Demolition of Abandoned County Building: Under its general duty to care for and maintain its property, a county, through its Board of County Commissioners, may issue general obligation bonds to fund demolition of a county-owned building that has been abandoned and poses a threat to the public safety and welfare. 44 A.G. Op. 31 (1992).

Lack of County Authority to Implement Employee Safety Incentive Bonus Program: A county with general government powers has no inherent authority within its statutory system to implement an employee incentive award program whereby county employees are paid bonuses for maintaining accident-free periods in their departments. 42 A.G. Op. 111 (1988).

Act Allowing Private Parties to Contract for Jails Not in Conflict With Local Government Regulatory Statutes: The act allowing counties to contract with private parties for the building, maintenance, and operation of jails, enacted as Chapter 447, L. 1985, does not directly conflict with other Montana statutes regulating the indebtedness, contracts, jail facilities, or interlocal agreements of local governments. However, Chapter 447 is subject to the various applicable limitations contained in those statutes. 42 A.G. Op. 81 (1988).

County Buildings — Use of Rent for Costs: If no sale of the building is being attempted, a Board of County Commissioners may use money obtained from tenants of a county building to defray the operational and maintenance costs of the building. 40 A.G. Op. 33 (1984).

County Regulatory Power — District Courts: Montana's District Courts are clothed with inherent and statutory power to do all that is necessary to render their jurisdiction effective, including the power to hire necessary court personnel and control them; but it appears that requiring District Court personnel to also abide by county policies and regulations is not an undue interference with the judicial branch. The scope of the judicial authority in this matter in relation to county authority is not an appropriate matter for an Attorney General opinion and would be more appropriately disposed of by either an understanding between the court and the county or a judgment in a court of proper jurisdiction. 39 A.G. Op. 38 (1981).

County Regulatory Power — Personnel Policies: Personnel policies established by a Board of County Commissioners, including a requirement that employees submit timesheets, are within the statutory and implied powers of the Board as necessary for the administration of county business, and one receiving a county paycheck must abide by the personnel policies of the Board. 39 A.G. Op. 38 (1981).

Method of Exercising County Powers When None Specified: Where powers are conferred by statute on a Board of County Commissioners but the mode in which the authority is to be exercised is not indicated, the Board, in its discretion, may select any appropriate mode or course of procedure. 39 A.G. Op. 38 (1981).

Law Review Articles

Qualified Immunity: A User's Manual, Blum, 26 Ind. L. Rev. 187 (1993).

The Meaning of "Under Color of" Law, Winter, 91 Mich. L. Rev. 323 (1992).

Collateral References

Modern status of rule excusing governmental unit from tort liability on theory that only general, not particular, duty was owed under circumstances. 38 ALR 4th 1194.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 ALR 3d 90.

7-5-2103. Division of county into districts.

Attorney General's Opinions

Board of County Commissioners — No Power to Consolidate High School Districts: The sole and mandatory procedure for consolidating two high school districts in a county is in 20-6-315.

The Board of County Commissioners has no authority to consolidate districts. 41 A.G. Op. 5 (1985).

7-5-2104. Direction of lawsuits.

Case Notes

When Commissioners May Waive Privilege of Pleading Statute of Limitations: The Commissioners, under this section, may decline to plead the Statute of Limitations in an action on a claim against the county, whenever in their opinion the facts showing that bar of the statute could not be established. Therefore, they may stipulate in an agreed statement that the claim is not barred. The Statute of Limitations grants a personal privilege that may be waived; it must be pleaded to be available as a defense. Weir v. Silver Bow County, 113 M 237, 124 P2d 1003 (1942).

Attorney General's Opinions

Authority of County Commissioners to Employ Private Attorney: A County Attorney may not unreasonably withhold his consent to the employment of another attorney by the Board of County Commissioners to perform legal services in connection with the civil business of the county. The decision of a County Attorney to withhold his consent is subject to the supervisory authority of the Attorney General. 41 A.G. Op. 34 (1985).

7-5-2106. Control of conflict of interest.

Attorney General's Opinions

Definitions — Incorporation: Since the Legislature is presumed not to perform useless acts, the definitions of "be interested in" and "contract" contained in 2-2-201 are incorporated into and are applicable to 7-5-2106 and 7-5-4109, which relate to the same subject matter, conflicts of interest for local government officials. 40 A.G. Op. 28 (1983).

Disclosure — Abstinence From Voting — When Contract Voidable: Where a local government official has a conflict of interest, such as a substantial interest in a business bidding on a local government contract, the official must comply with the disclosure and abstinence from voting provisions of 2-2-125, now repealed and 2-2-131, even though the interest may be permissible under the exceptions contained in 2-2-201. If the interest is not permissible under the exceptions listed in 2-2-201, the contract is voidable and abstinence from voting will not exonerate the official. (See 1995 amendments to 2-2-125, now repealed and 2-2-131.) 40 A.G. Op. 28 (1983).

County Commissioners — Fiduciary Duty: A County Commissioner who is a voting member of the board of an organization that actually receives county contract funds does not have a prohibited conflict of interest under 7-5-2106 unless the Commissioner receives a personal pecuniary or proprietary benefit from the contract. He does, however, breach his fiduciary duty under 2-2-125(2)(b) (now repealed) by acting officially to award county contracts to the organization unless he complies with the voluntary disclosure requirements of 2-2-125(3) (now repealed). (See 1995 amendments to 2-2-125, now repealed and 2-2-131.) 38 A.G. Op. 55 (1979).

County Commissioners — Prohibited Interests: A County Commissioner who is a voting member of a board that channels county contract funds to other organizations but does not itself derive any economic benefit from the contract does not have a prohibited interest in the contract under 7-5-2106 and does not breach his fiduciary duty under 2-2-125(2)(b) (now repealed) by acting officially to allocate funds to that board for subsequent disbursement. (See 1995 amendments to 2-2-125, (now repealed) and 2-2-131.) 38 A.G. Op. 55 (1979).

7-5-2107. Employment of personnel by county commissioners.

Case Notes

Contract Providing Monthly Payments Not Establishment of Employment Relationship: A county contract for provision of certain legal services expressly provided independent contractor status because: (1) the county had no right to control the firm that was awarded the contract; (2) the firm was customarily engaged in independent practice; and (3) the contract was unnecessary for the firm to continue its business. Because an independent contract was indicated by these facts, the veterans' preference did not apply to hiring of the contractor, despite the contention that a contract provision for monthly payments established an employment relationship. Hamner v. Butte-Silver Bow County, 233 M 271, 760 P2d 76, 45 St. Rep. 1481 (1988).

Attorney General's Opinions

County Commissioner and County Coordinator of Disaster and Emergency Services Incompatible — Positions Not to Be Held Simultaneously: The Board of County Commissioners has the power of supervision, revision, and removal over the position of county coordinator of disaster and emergency services. Therefore, under the common-law doctrine of incompatible

public offices, the office of County Commissioner and the position of county coordinator of disaster and emergency services are incompatible and one person may not hold both jobs simultaneously. 46 A.G. Op. 26 (1996).

Record of Board Proceedings: The County Clerk and Recorder is not required to attend the meetings of the Board of County Commissioners and take the original notes of the proceedings, unless the Board so requests. The Clerk and Recorder's responsibilities, as they relate to the proceedings of the Board, are to record the minutes of the proceedings into the minute book and to make the book available for public examination upon request. The Board is responsible for the preparation, content, and publication of the minutes. The Board may employ its own personnel to take the original notes during the meetings pursuant to this section. 41 A.G. Op. 19 (1985).

District Court Employees as County Employees: District Court employees are paid by the county in which the court is located, receive the same county benefits as all other county employees, and are therefore county employees. 39 A.G. Op. 38 (1981).

Persons Considered County Employees: An employee who under state statutes receives a county payroll check and county fringe benefits, such as health insurance, unemployment insurance, workers' compensation, and state retirement benefits, is considered a county employee. 39 A.G. Op. 38 (1981).

Soil Conservation District Employees as County Employees: Although soil conservation districts are distinct governmental entities covering more than one county and the statutes governing the districts do not expressly designate district personnel as county employees to be included on the county payroll, if a county does include district personnel on its payroll, giving them the same benefits received by other county employees, to that extent district personnel must be considered county employees. 39 A.G. Op. 38 (1981).

No Salary Limitation as to Assistants to County Commissioners: The salaries of administrative assistants employed by a Board of County Commissioners are not limited by 7-4-2505, since County Commissioners are not included in the definitive list of county officers to which that section applies. Salaries of the administrative assistants may be set pursuant to 7-5-2107 which contains no limitation as to amount. 38 A.G. Op. 43 (1979).

Collateral References

Action under Title VII of 1964 Civil Rights Act (42 USCS §§2000e et seq.) as precluding action under 42 USCS §1983 for employment discrimination by state or local government. 78 ALR Fed. 492.

7-5-2108. County work week.

Case Notes

Full-Time District Court Reporters Subject to Statutory Workweek Requirement — Recordkeeping Required — Designation of Court Reporter's "Workstation": A District Court reporter who is treated as a full-time salaried county employee is subject to the statutory 40-hour workweek requirement in this section, and recordkeeping to document a court reporter's working hours, including overtime, annual leave, and sick leave, must be as determined by the District Court Judge who employs the court reporter. However, any method used to fulfill these requirements must comport with the District Court Judge's authority to control court assistants because allowing a Board of County Commissioners to enforce county personnel policies on court reporters would infringe on that authority. Any mandatory location of work for a court reporter that is set by anyone but the District Court Judge would interfere with the necessary flexibility of the judge. Thus, a court reporter's "workstation" is wherever that reporter is required to be to perform the duties for the judge for whom that court reporter works. Bd. of County Comm'rs v. District Court, 2000 MT 258, 301 M 496, 10 P3d 805, 57 St. Rep. 1061 (2000).

Attorney General's Opinions

Secretarial Services for Private Practice of County Attorney: A secretary employed by the county to assist a County Attorney may work on the County Attorney's private business during time when the secretary's services are not needed on county business. The County Attorney must account for the time that the secretary spends on private business and reimburse the county for any county-compensated time spent on the County Attorney's private business. A claim by a County Attorney for secretarial services reasonably required for the conduct of the County Attorney's official duties is a legitimate claim against the county. The reasonableness of the claim is a question of fact vested in the sound discretion of the county governing body. 46 A.G. Op. 10 (1995). See also 46 A.G. Op. 20 (1996), in which the Attorney General held that a County Attorney may not compel the County Commissioners to authorize the hiring as a county employee of a legal secretary for the County Attorney absent a showing that any other

arrangement would prevent the County Attorney from performing the minimum statutory duties.

District Court Employees' Workweek: District Court employees are paid by the county in which the court is situated and are considered county employees; therefore, they are salaried county employees under this section and must work a 40-hour week if required. 39 A.G. Op. 38 (1981).

Salary Computation for Portion of Month: The salary of a county employee employed on a 40-hour workweek is determined for a portion of a month by multiplying the monthly salary by 12 and dividing the annual salary thus determined by 52 weeks to determine the weekly rate of pay or by 2,080 hours to determine the hourly rate of pay. 34 A.G. Op. 37 (1972).

7-5-2109. County control of litter.

Compiler's Comments

1997 Amendment: Chapter 67 at beginning of (1)(a) and (2) inserted exception clause.

1993 Amendment: Chapter 406 inserted (1)(c) that read: "(c) The ordinance does not apply to a "notice of violation" card placed on a motor vehicle illegally parked in a disability parking space"; and made minor changes in style.

1991 Amendment: Inserted (1)(b) exempting deposits resulting from shooting activities at a shooting range. Amendment effective April 15, 1991.

Applicability: Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

Severability: Section 11, Ch. 415, L. 1991, was a severability clause.

Severability: Section 4, Ch. 508, L. 1983, was a severability clause.

7-5-2110. Community decay defined.

Compiler's Comments

1991 Amendment: In definition of community decay inserted (b) exempting normal activities at a shooting range; and made minor changes in style. Amendment effective April 15, 1991.

Applicability: Section 10, Ch. 415, L. 1991, provided: "[This act] applies to shooting ranges in operation on or after [the effective date of this act] [effective April 15, 1991]."

Severability: Section 11, Ch. 415, L. 1991, was a severability clause.

7-5-2122. Meetings of board of county commissioners.

Case Notes

Notice of Public Meeting Held Insufficient: Where two of three County Commissioners held a telephone meeting to discuss approval of a preliminary subdivision plat and were required to give notice of the meeting, the Board failed to comply in that county newspaper article did not supply sufficient facts concerning the time and place of the meeting to permit further public comment, nor was 2 days' posted public notice ever given. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069, 37 St. Rep. 175 (1980).

Telephone Conversation as Constituting a "Meeting" — Notice Required to Be Given: Where two of three County Commissioners discussed by telephone the approval of a preliminary plat of a subdivision, a "meeting" as defined in 2-3-202 took place, and the Commissioners were subject to the requirement that notice of the meeting be given in accordance with statute. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069, 37 St. Rep. 175 (1980).

Attorney General's Opinions

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings — Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

County Commission Meeting as "Meeting" Under Open Meetings Law: A regularly scheduled meeting between a Board of County Commissioners and its staff is a "meeting" within the terms of the open meetings law, Title 2, ch. 3, part 2. 41 A.G. Op. 38 (1985).

7-5-2123. Publication of board proceedings and annual financial statement.

Compiler's Comments

1995 Amendment: Chapter 299 in (1)(b), at beginning of first sentence, deleted "annually" and inserted second sentence requiring notice of availability if financial statement is not published annually; in (2), in second sentence after first "statement", inserted "or notice of the availability of the financial statement"; and made minor changes in style. Amendment effective July 1, 1995.

1989 Amendment: At end of (1)(b) inserted "in full and complete detail or in summary form".

1985 Amendment: In (1)(a) inserted "in full and complete detail or in summary form or by reference, with the full and complete text made available on request"; and at beginning of (2) inserted "in full, in summary, or by reference".

Attorney General's Opinions

Annual Statement of Financial Condition to Be Published in Full: The Board of County Commissioners is obligated to publish the County Clerk's annual statement of financial condition "annually in a newspaper in full" (see 1995 amendment). The statement may not be published in summary form. 42 A.G. Op. 54 (1988). See 1989 amendment that allows statement to be published in summary form.

Publication Mandatory: This section requires a Board of County Commissioners, at the adjournment of each session of the Board, to publish in a newspaper a complete list of all claims ordered paid (prior to 1985 amendment—Annotator) and a fair summary of its proceedings. (See 1995 amendment.) 39 A.G. Op. 77 (1982).

7-5-2125. Open meetings.

Attorney General's Opinions

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings — Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

7-5-2129. Certain records to be kept by board.

Case Notes

Method of Acceptance of Bid by County Commissioners — Vote Recorded in Minutes Held Sufficient: Where the Commissioners of the defendant county voted to accept the plaintiff's bid for a rock crusher but did not issue a written notice of bid award, as was usually done, informing the successful bidder of the acceptance of his bid, the Supreme Court held that the acceptance motion approved by the Commission and recorded in the Commission minutes constituted an acceptance of the bid and that there was no statutory provision for the procedure argued by the county. Modern Mach. v. Flathead County, 202 M 140, 656 P2d 206, 39 St. Rep. 2383 (1982).

Evidentiary Effect of Minute Book: This section providing that a Board of County Commissioners must cause a minute book to be kept in which must be recorded all its orders, decisions, and proceedings does not make such record the only evidence admissible to prove the action of the Board or prohibit oral testimony as to what was actually done. Proof of action has the same effect as though shown by a minute entry. State ex rel. Rankin v. Madison St. Bank, 77 M 498, 251 P 548 (1926).

Attorney General's Opinions

County Power to Grant Franchises — Interlocal Agreements Not Precluded: Article XI, sec. 4, Mont. Const.; 7-3-144; 7-4-2611; and 7-5-2129, as well as applicable case law, imply that a county vested with general government powers may exercise the power to grant franchises. Under 7-11-104, a city-county interlocal franchise agreement is possible. 42 A.G. Op. 87 (1988).

7-5-2130. Records to be signed.

Compiler's Comments

Clause Not Codified: A part of section 16-907, R.C.M. 1947, stating that the County Clerk is the Clerk for the Board of Commissioners, was not codified because it is redundant with 7-4-2611(1). This clause was not repealed and is still valid law. It may be referred to as sec. 4217, Pol. C. 1895. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

7-5-2131. Records to be available to public.

Compiler's Comments

1993 Amendment: Chapter 420 near end, after "open", deleted "at all times"; and made minor changes in style. Amendment effective April 20, 1993.

7-5-2132. Destruction of county records.

Compiler's Comments

1993 Amendment: Chapter 420 near beginning, before "approval", inserted "written", after "approval of the" substituted reference to local government records destruction subcommittee for "department of commerce", after "may destroy" deleted "old worthless reports, papers, or records in his office that have served their purpose and that are substantiated by permanent", and at end inserted reference to records meeting the local government records retention schedules that are no longer needed; and deleted (2) authorizing County Commissioners to adopt retention schedules and destroy documents (see 1993 Session Law for text). Amendment effective April 20, 1993.

1985 Amendment: In (2) substituted (a) and (b) relating to retention schedules for "Any claim, warrant, voucher, bond, or treasurer's general receipt may be destroyed by any county officer after a period of 25 years."

1983 Amendment: Substituted reference to department of commerce for reference to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs" in (1).

Transfer of Function: The function of the Department of Commerce in this section was transferred from the Department of Administration by sec. 1, Ch. 287, L. 1983. Those functions were transferred to the Department of Administration from the Department of Community Affairs by sec. 7, Ch. 274, L. 1981.

7-5-2133. Convenience fee for electronic county government services.

Compiler's Comments

Effective Date: Section 4, Ch. 264, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 9, 2003.

7-5-2142. Membership in associations of clerk and recorders.

Compiler's Comments

1997 Amendment: Chapter 215 in (2), after "within the state", deleted "not more often than once a year"; and made minor changes in style. Amendment effective July 1, 1997.

7-5-2143. Membership in associations of clerks of district courts.

Compiler's Comments

1997 Amendment: Chapter 215 in (2), after "within the state", deleted "not more often than once a year"; and made minor changes in style. Amendment effective July 1, 1997.

7-5-2144. Membership in associations of county treasurers.

Compiler's Comments

1997 Amendment: Chapter 215 in (2), after "within the state", deleted "not more often than once a year"; and made minor changes in style. Amendment effective July 1, 1997.

1993 Amendment: Chapter 216 in (1) deleted last sentence that read: "Payment for membership in such associations or organizations shall be made from county funds in such amount as shall be approved by the board of county commissioners"; and made minor changes in style.

7-5-2145. Attendance at meetings and conventions by county officers and employees.

Compiler's Comments

1997 Amendment: Chapter 215 in (2), at beginning, substituted "Any member" for "Three members" and after "within the state" deleted "not more often than once a year"; in (3), after "traveling expenses", deleted "not more often than once a year"; and made minor changes in style. Amendment effective July 1, 1997.

1983 Amendment: In (3), inserted "assessors".

1981 Amendment: Inserted (4) relating to payment of per-day paid officers.

Attorney General's Opinions

Exception to County Travel Policy — Certain County Officers Entitled to Actual Travel Expenses: In attending the annual state convention for the office held, a County Attorney, Sheriff, Assessor, or Justice of the Peace is entitled to reimbursement for actual travel expenses. These expenses may exceed the levels established in a county travel policy. 42 A.G. Op. 124 (1988).

Part 23
County Contracts

Part Case Notes

Method of Acceptance of Bid by County Commissioners — Vote Recorded in Minutes Held Sufficient: Where the Commissioners of the defendant county voted to accept the plaintiff's bid for a rock crusher but did not issue a written notice of bid award, as was usually done, informing the successful bidder of the acceptance of his bid, the Supreme Court held that the acceptance motion approved by the Commission and recorded in the Commission minutes constituted an acceptance of the bid and that there was no statutory provision for the procedure argued by the county. Modern Mach. v. Flathead County, 202 M 140, 656 P2d 206, 39 St. Rep. 2383 (1982).

Part Attorney General's Opinions

Restrictions on Purchasing Contracts: County purchasing contracts were affected by several amendments of existing statutes during the 1981 legislative session. The effect is that after October 1, 1981:

(1) purchases for amounts of $10,000 or less (threshold amount increased by 1991 amendment) may be accomplished without competitive bidding;

(2) purchases for amounts between $10,000 and $25,000 (threshold amount increased by 1991 amendment) may, at the discretion of the county governing body, be accomplished through competitive advertised bidding, competitive nonadvertised bidding, or public auction;

(3) purchases for amounts exceeding $25,000 (threshold amount increased by 1991 amendment) must be accomplished through competitive advertised bidding only. 39 A.G. Op. 27 (1981).

Part Law Review Articles

The Role of Incentive in Government and Private Behavior, Friedman, 29 San Diego L. Rev. 1 (1992).

Part Collateral References

Authority of state, municipality, or other governmental entity to accept late bids for public works contracts. 49 ALR 5th 747.

Public contracts: low bidder's monetary relief against state or local agency for nonaward of contract. 65 ALR 4th 93.

Construction and effect of "changed conditions" clause in public works or construction contract with state or its subdivision. 56 ALR 4th 1042.

Equipment leasing expense as element of construction contractor's damages. 52 ALR 4th 712.

Public contracts: authority of state or its subdivision to reject all bids. 52 ALR 4th 186.

Mistake: right of bidder for state or municipal contract to rescind bid on ground that bid was based upon his own mistake or that of his employee. 2 ALR 4th 991.

7-5-2301. Competitive, advertised bidding required for certain large purchases or construction contracts.

Compiler's Comments

2003 Amendment: Chapter 523 in (1) after "contract" deleted "must be entered into by a county" and after "maintenance" deleted "of any building, road, or bridge"; in (3) after "lowest" deleted "and best"; and made minor changes in style. Amendment effective April 25, 2003.

Effective Date: Section 2, Ch. 523, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 25, 2003, the date that the house and senate overrode the governor's veto.

1999 Amendments — Composite Section: Chapter 239 in (1) after "contract" inserted "must be entered into by a county", near middle after "supplies" deleted "in excess of $20,000", and after "$50,000" inserted "and". Amendment effective April 5, 1999.

Chapter 252 at beginning of (3) inserted "Subject to 7-5-2309". Amendment effective October 1, 1999.

Saving Clause: Section 5, Ch. 252, L. 1999, was a saving clause.

1997 Amendment: Chapter 203 in (1), after "construction", inserted "repair or maintenance" and substituted "$50,000" for "$25,000 or for the repair or maintenance of any building or road in excess of $45,000"; and made minor changes in style.

1991 Amendment: In (1) increased contract limit for purchase of materials or supplies to $20,000 from $10,000, increased contract limit for construction or repair of any building, road, or bridge to $25,000 from $10,000, and increased contract limit for repair or maintenance of building, road, or bridge to $45,000 from $25,000; and made minor changes in style.

1985 Amendment: In (2) substituted "as provided in 7-1-2121" for "in the official newspaper of the county at least once a week for 3 consecutive weeks before the date fixed therein for receiving bids".

1981 Amendment: Inserted "or for the repair or maintenance of any building, road, or bridge for which must be paid a sum in excess of $25,000" before "shall be entered into by a county governing body" near the end of (1).

Case Notes

Official Misconduct by Individual Commissioner: An individual Commissioner may be criminally liable for official misconduct for entering into a contract for purchase of equipment in excess of $10,000 [threshold amount was increased by 1981, 1991, and 1997 amendments—annotator] without publishing notice calling for bids. St. v. Cole, 174 M 380, 571 P2d 87, 34 St. Rep. 1169 (1977).

County Commissioners Convicted: There was sufficient substantial evidence to sustain guilty verdicts and judgment against three County Commissioners for official misconduct committed by failing to perform a mandatory duty of advertising a county road contract of over $10,000 [threshold amount was increased by 1981, 1991, and 1997 amendments—annotator] for bid and by knowingly performing the forbidden act of dividing a single road contract into parts to circumvent bidding requirements. St. v. DeGeorge, 173 M 35, 566 P2d 59 (1977).

Special Purpose Construction: Industrial development projects law (Title 90, ch. 5, part 1) is designed for special purpose and is thereby not limited by provision in this section that a county not contract for construction except on public bidding. Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

Attorney General's Opinions

County Lease or Lease With Purchase Option — Bidding Requirements: A county lease contract with no purchase option is not subject to the bidding requirements of 7-5-2301. A lease contract with a purchase option is subject to such requirements if the total amount of the lease payments, together with the purchase option price, exceeds $10,000 (threshold amount was increased by 1981, 1991, and 1997 amendments, and see 1999 amendment). 38 A.G. Op. 101 (1980).

Waiver of Competitive Bidding Requirements — Emergency Situations: Counties may contract for the repair of bridges and roads damaged by disasters and calamities without competitive bidding under 7-5-2304, provided there is an express determination that the repairs are urgently and immediately needed. 37 A.G. Op. 162 (1978).

Collateral References

Public contracts: low bidder's monetary relief against state or local agency for nonaward of contract. 65 ALR 4th 93.

Public contracts: authority of state or its subdivision to reject all bids. 52 ALR 4th 186.

7-5-2303. Use of public auction to make purchase.

Compiler's Comments

1991 Amendment: In (1), after "any vehicle", inserted "road machinery or other", after "appliances" deleted "building" and inserted "equipment", before "supplies for" substituted "or"

for "and", and increased purchase limit from $25,000 to $60,000; and made minor changes in style.

1981 Amendment: Increased auction limit in (1) from $10,000 to $25,000.

7-5-2304. Exemptions from competitive bidding requirements.

Compiler's Comments

1999 Amendment: Chapter 239 in introductory clause after "7-5-2301" deleted "and 7-5-2302"; and made minor changes in style. Amendment effective April 5, 1999.

Attorney General's Opinions

Waiver of Competitive Bidding Requirements — Emergency Situations: Counties may contract for the repair of bridges and roads damaged by disasters and calamities without competitive bidding, provided there is an express determination that the repairs are urgently and immediately needed. 37 A.G. Op. 162 (1978).

Collateral References

Waiver of competitive bidding requirements for state and local public building and construction contracts. 40 ALR 4th 968.

7-5-2305. Prohibition on division of contracts to circumvent bidding requirements.

Case Notes

County Commissioners Convicted: There was sufficient substantial evidence to sustain guilty verdicts and judgment against three County Commissioners for official misconduct committed by failing to perform a mandatory duty of advertising a county road contract of over $10,000 [threshold amount was increased by 1981, 1991, and 1997 amendments—annotator] for bid and by knowingly performing the forbidden act of dividing a single road contract into parts to circumvent bidding requirements. St. v. DeGeorge, 173 M 35, 566 P2d 59 (1977).

7-5-2306. Use of installment purchase contracts.

Compiler's Comments

1991 Amendment: Near middle increased number of years allowed for payment of installments on a purchase contract from 5 years to 10 years; and made minor changes in style.

Coordination Instruction — Amendment Void: Section 31, Ch. 770, L. 1991, provided: "If House Bill No. 296 is passed and approved and if it includes a section that amends 7-5-2306, then [section 1 of this act], amending 7-5-2306, is void." House Bill No. 296 was approved March 29, 1991, and included an amendment to 7-5-2306. Therefore, the amendment to 7-5-2306 contained in sec. 1, Ch. 770, L. 1991, is void.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

Attorney General's Opinions

Act Allowing Private Parties to Contract for Jails Not in Conflict With Local Government Regulatory Statutes: The act allowing counties to contract with private parties for the building, maintenance, and operation of jails, enacted as Chapter 447, L. 1985, does not directly conflict with other Montana statutes regulating the indebtedness, contracts, jail facilities, or interlocal agreements of local governments. However, Chapter 447 is subject to the various applicable limitations contained in those statutes. 42 A.G. Op. 81 (1988).

Capacity to Purchase Equipment Without Election: Under the provisions of 7-7-2101(2) prior to amendment by Ch. 134, L. 1981, the Attorney General held that a county may contract for machinery and equipment for a single purpose without a vote of the county residents when the entire expenditure will exceed $40,000, but the remaining indebtedness after applying cash on hand and revenue-sharing funds budgeted for that purpose must not exceed $40,000. An exception is not allowed for installment contracts in which each annual installment is less than $40,000 if the remaining indebtedness exceeds $40,000. 37 A.G. Op. 152 (1978).

7-5-2307. Treatment of rental-purchase contracts.

Attorney General's Opinions

Act Allowing Private Parties to Contract for Jails Not in Conflict With Local Government Regulatory Statutes: The act allowing counties to contract with private parties for the building, maintenance, and operation of jails, enacted as Chapter 447, L. 1985, does not directly conflict with other Montana statutes regulating the indebtedness, contracts, jail facilities, or interlocal agreements of local governments. However, Chapter 447 is subject to the various applicable limitations contained in those statutes. 42 A.G. Op. 81 (1988).

7-5-2309. Optional bidding preference for county resident.

Compiler's Comments

2001 Amendment: Chapter 181 in (2) near middle after "contract" inserted "for construction, repair, or maintenance of a building, road, or bridge that is in excess of $50,000 and that is" and near end substituted "18-1-102(1)(a)" for "18-1-102". Amendment effective October 1, 2001.

Applicability: Section 28, Ch. 181, L. 2001, provided: "[This act] applies to contracts for which the contracting government entity begins the contracting process after October 1, 2001."

Saving Clause: Section 5, Ch. 252, L. 1999, was a saving clause.

Effective Date: This section is effective October 1, 1999.

Part 24
County Printing

7-5-2401. Purpose of part.

Compiler's Comments

1995 Amendment: Chapter 507 in (1), before "legal", deleted "printing and"; inserted (2) concerning the purchase of county printed forms and materials; and made minor changes in style.

Administrative Rules

Title 2, chapter 67, ARM Board of County Printing.

7-5-2402. Definition.

Compiler's Comments

1981 Amendment: Changed internal reference to the board.

7-5-2403. Meetings of board of county printing.

Compiler's Comments

1995 Amendment: Chapter 507 after "meet" substituted "when ordered by the governor or requested by a majority of the board members" for "annually".

7-5-2404. Establishment of maximum prices.

Compiler's Comments

1995 Amendment: Chapter 507 in (1), after "county", deleted "printing and" and deleted second sentence that read: "The prices shall be the full prices to be charged and shall include the paper stock specified, completion of all printing and other work, and delivery to the county courthouse"; in (2), at end of first sentence, substituted "legal advertising" for "printing" and in second sentence substituted "Notice of the hearing must be mailed to the Montana association of counties and the Montana newspaper association" for "Notice of intention to hold a hearing shall be published at least 30 days before the date set for the hearing in a newspaper published in Helena, and a copy shall be mailed to each board of county commissioners"; inserted (4) concerning county requirements for establishments printing county legal advertising; and inserted (5) concerning the Board not setting maximum prices for county printed forms.

Administrative Rules

Title 2, chapter 67, ARM Board of County Printing.
Title 2, chapter 67, subchapter 1, ARM Organizational rule.
Title 2, chapter 67, subchapter 2, ARM Rules of practice.
ARM 2.67.201 Incorporation of model rules.
Title 2, chapter 67, subchapter 3, ARM Substantive rules.
ARM 2.67.301 Powers and duties of Board.
ARM 2.67.303 Official publications and legal advertising.

Case Notes

Former Law — Contract Incorporates Law: The maximum rate by law automatically became part of any printing contract under sections 16-1201 through 16-1224, R.C.M. 1947 (since repealed). Shelley v. Normile, 109 M 117, 94 P2d 206 (1939).

7-5-2405. Adoption of printing standards.

Compiler's Comments

1995 Amendment: Chapter 507 substituted "The board shall adopt necessary standards for typeface, type size, type style, and type leading for county legal advertising" for "The board shall adopt necessary standards for sizes, weights, and grades of paper stock, which shall conform to

the uniform scale of sizes, weights, and grades used by paper manufacturers, and for sizes and types of printing, ruling, and binding, which shall conform as nearly as possible to the ordinary standards in use in the printing industry. For this purpose, reference may be made to established standards or publications used in this state, and the board may provide for the adoption of a standard list for those items not covered by the prices, regulations, or standards published by the board."

Administrative Rules

ARM 2.67.302 County Commissioners to contract for county legal advertising.

7-5-2411. County printing contract.

Compiler's Comments

1995 Amendment: Chapter 507 in first sentence of (1), after "all", deleted "the printing for the county, including" and after "county" deleted "at a rate not exceeding that set by the board"; in (2) substituted "Contracts for printed forms and materials may be awarded on an annual basis or may be awarded for a specific printing job" for "(a) The county commissioners may separate the printing contract into two parts, one of which shall provide for the publication of legal advertising only. The legal advertising contract shall be let to a legally qualified newspaper. The other contract shall provide for all printed forms, materials, and supplies required by the county.

(b) The contract for printed forms, materials, and supplies referred to in subsection (2)(a) or subsection (2)(c) shall be let:

(i) to a commercial printing establishment or establishments, as the case may be, which has been in business in the county for at least 1 year and whose competitive bid is not more than 5% higher than that of the lowest responsible commercial printing establishment bidder doing business outside the county; or

(ii) if no establishment qualifies under subsection (2)(b)(i), to the lowest responsible commercial printing establishment bidder.

(c) Contracts for printed forms, materials, and supplies may be awarded on an annual basis or may be awarded for a specific printing job"; in (3) substituted current language concerning the maintenance of a list of bidders for county printing for "A contract may not call for payment by the county of any prices in excess of the maximum fixed by the board of county printing"; deleted (4) that read: "(4) Nothing in this part shall limit or restrict the power of a board of county commissioners to call for competitive bids from persons or firms qualified to bid on county printing under the terms of this part or to let contracts at prices less than the maximum fixed by the board of county printing"; and made minor changes in style.

1989 Amendment: At beginning of (1) deleted "Except as provided in subsection (2)", after "contract" substituted "for" for "with one newspaper to do", and at beginning of second sentence inserted "advertising required by law shall be awarded to a"; at beginning of (2) deleted "In any county in which no newspaper owns or operates a commercial printing establishment, the county commissioners shall and in counties of the first class"; in (2)(b), after "(2)(a) or", deleted "one separated under"; at beginning of (2)(c) deleted "The board of county commissioners for counties of the first class may award separate" and after "supplies" deleted "required by the counties. The separate contracts"; and made minor changes in phraseology and punctuation.

1985 Amendment: In (2)(b) in lead-in, inserted the reference to printed forms, materials, and supplies and changed a reference to (2)(b) to (2)(c); and in (2)(b)(i) after "1 year", inserted remainder of (2)(b)(i) and (2)(b)(ii) relating to 5% in-county bidding preference.

1981 Amendments: Chapter 70 inserted "or one separated under subsection (2)(b)" at the beginning of the last sentence in (2)(a); inserted (2)(b) relating to printed forms, materials, and supplies; and made minor changes in phraseology.

Chapter 393 substituted the second sentence in (1) that reads: "The newspaper shall be one that is published in the county and of general bona fide and paid circulation with the second-class mailing privilege and has been published as such at least once a week in the county for the 12 months preceding the awarding of the contract." for "The newspaper shall be: (a) of general circulation; (b) published at least once a week; (c) published in the county; (d) published continuously in the county for the 12 months preceding the awarding of the contract."

Administrative Rules

ARM 2.67.101 Organization of Board.

ARM 2.67.302 County Commissioners to contract for county legal advertising.

ARM 2.67.303 Official publications and legal advertising.

Case Notes

Standing: The plaintiff had the requisite standing to bring an action under Montana's Uniform Declaratory Judgments Act requesting interpretation of 7-5-2411, et seq. W. Litho v. Bd. of County Comm'rs, 174 M 245, 570 P2d 891 (1977).

Attorney General's Opinions

Applicable to County Attorney: The office of County Attorney is covered by the county printing contract. 36 A.G. Op. 37 (1975).

7-5-2412. Details relating to printing contract.

Compiler's Comments

1995 Amendment: Chapter 507 in (1), in second sentence, substituted "The county commissioners shall require a contractor to perform the county printing contract subject to the requirements of Title 18, chapter 1, part 2" for "The county commissioners shall require of any contractor to do such county printing a good and sufficient deposit in such sum as said commissioners may deem advisable, signed by at least two sufficient sureties and conditioned to the effect that said contractor will faithfully perform all of the conditions of said contract in accordance with this part and the terms of such contract"; in (3) substituted "county printing or county legal advertising" for "printing" and deleted second sentence that read: "Any printing establishments doing business in the county which may receive any contract for printing under this part and which may not be able to execute any part of such contract shall be required to sublet such contract or portion of contract to some printing establishment within the county if such is available and, if not, within the state, which shall do the work under the contract so sublet entirely within the state with Montana labor"; and made minor changes in style.

1985 Amendment: In (3) changed "All printing establishments" to "any printing establishments doing business in the county".

7-5-2413. Competitive bids required.

Compiler's Comments

1995 Amendment: Chapter 507 after "printing" inserted "or for county legal advertising if there is more than one legally qualified newspaper in the county".

Part 25
Vacation of Plats

Part Compiler's Comments

Section Not Codified: Section 11-2804, R.C.M. 1947, a validation section on vacated plats, was not codified. This section has not been repealed and is still valid law. It may be referred to as sec. 1, Ch. 13, L. 1943.

7-5-2502. Vacation of portion of village or townsite.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) at end substituted "The citation must be published as provided in 7-1-2121" for "The citation shall be published in a newspaper of regular circulation in the county or, if no such newspaper is in said county, then in such a newspaper located in an adjoining county of the state. The citation shall be published once a week for 2 successive weeks before the date of said hearing"; and made minor changes in style. Amendment effective October 1, 2001.

Part 41
Conduct of Municipal Government

7-5-4101. General powers of municipal council.

Case Notes

"General Welfare" Clause. 760
General Powers 761
Interpretation of Powers 762

"GENERAL WELFARE" CLAUSE

Roominghouses — Regulation: The business of conducting a roominghouse, though a legitimate one, is so far concerned with the health, morals, and welfare of the public that it is within the police power of a city to regulate it under the authority conferred by this section,

denominated the "general welfare clause". State ex rel. Altop v. Billings, 79 M 25, 255 P 11 (1927).

Delegation of Authority — Scope of Discretion — Licenses: A city ordinance which vests in its officials a discretion to grant or refuse to grant a license to carry on a lawful business, to be valid, need not, where the ordinance relates to the administration of a police regulation necessary to protect the general welfare, morals, and safety of the public, prescribe all the conditions upon which such license shall be granted or refused. The fact that in instances it may be exercised arbitrarily, in the absence of specific directions, is not an argument against its validity, since in such a case the person discriminated against may apply to the courts for relief. State ex rel. Altop v. Billings, 79 M 25, 255 P 11 (1927), distinguished in Bennett v. Stow, 144 M 599, 399 P2d 221 (1965).

GENERAL POWERS

Municipality's Authority to Adopt Ordinance Limiting University Students' Rights to Park on City Streets: A university student association challenged the legality of a city ordinance limiting parking in residential areas near the university to residents of those areas. The Supreme Court held that municipalities have the power to regulate parking and that regulating parking to relieve congestion in certain residential neighborhoods was a reasonable exercise of governmental authority. Assoc. Students v. Missoula, 261 M 231, 862 P2d 380, 50 St. Rep. 1301 (1993).

Parking Ordinance — Vicarious Criminal Responsibility: A city may, in the exercise of its police power, enact a parking ordinance that provides that the registered owner of a motor vehicle is vicariously criminally responsible for illegal parking by another unless it is shown that the vehicle was being used without the owner's consent. Such an ordinance does not violate due process restrictions (overruling a contrary holding in St. v. Jetty, 176 M 519, 579 P2d 1228 (1978)), but the ordinance must conform to the absolute liability requirements of 45-2-104. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

Unconstitutional Parking Ordinance — Presumption That Owner Parked Vehicle — Escalating Fines for Parking Violations:

In striking down a parking ordinance, the Supreme Court held that to make the owner of a vehicle prima facie liable upon proof that his vehicle has been parked illegally is equivalent to a presumption that the owner parked the vehicle. The effect of the presumption is to violate constitutional due process requirements by shifting the burden of persuasion to defendant and contradicting the presumption of innocence. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

An escalating fine schedule for parking violations where the amount to be paid depends on the length in the delay in paying after being cited is in violation of the basic principle of law that punishment must be for the violation and proportional to the gravity of the offense and hence is violative of Art. II, sec. 28, Mont. Const., which provides that laws for punishment of crime shall be founded on principles of prevention and reformation. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

Estoppel to Repudiate Acts of Officers: Although a municipal corporation is not bound by acts or statements of its officers made in excess of their authority, where an innocent party has been induced into a course of action by the conduct of municipal officers and because of such reliance would suffer a substantial loss, the municipality will not be permitted to deny the validity of its officers' actions. State ex rel. Barker v. Stevensville, 164 M 378, 523 P2d 1388 (1974).

Flat Rate Fees — City Employees' Services: Under its power to provide for the general welfare of its inhabitants, a city may provide for a flat rate charge to property owners for services of its employees in tapping into the water main. Leischner v. Knight, 135 M 109, 337 P2d 359 (1959).

Regulation of Alcoholic Beverages: Notwithstanding repeal of the state prohibition laws a city has the power to prohibit, by ordinance, traffic in intoxicating liquors under its general powers granted it by this section and the specific provision of 7-32-4302, under which it may pass ordinances to prevent acts or conduct calculated to disturb the public peace or which are offensive to public morals. State ex rel. Moreland v. Police Court, 87 M 17, 285 P 178 (1930).

Taxation: A city has no inherent power to levy taxes on property within its corporate limits, its power in that respect being limited to that conferred by statute, which must be strictly construed. First Nat'l Bank of Glendive v. Sorenson, 65 M 1, 210 P 900 (1922).

Proprietary Capacity — Municipal Power Plant: When a city is engaged in operating a municipal power plant, under an authority granted by general law, it acts in a proprietary or business capacity and stands upon the same footing as a private individual or business corporation similarly situated. Milligan v. Miles City, 51 M 374, 153 P 276 (1915).

Reduction in Force — Police:
Under its general legislative power the Council of a city or town may provide for the appointment of as many policemen, including a Chief of Police in case of a city and a Marshal in case of a town, as may be necessary to preserve the peace and enforce the ordinances. Grush v. Bishop, 46 M 97, 126 P 619 (1912).

As a City Council has, under this section and 7-6-4302, the sole power to determine the amount that shall be expended in carrying on the city government, it and not the Mayor has the power to reduce the police force for economical reasons or when it becomes unnecessarily large. State ex rel. Rowling v. Butte, 43 M 331, 117 P 604 (1911), distinguished in State ex rel. Gebhardt v. City Council, 102 M 27, 55 P2d 671 (1936).

INTERPRETATION OF POWERS

Arbitrary Denial of Building Permit by City Council — City, City Council, and Individual Council Members Liable: In an action under 43 U.S.C. 1983, the court of appeals upheld the District Court's holding that the Billings City Council's refusal to issue a building permit after the applicant had satisfied all the requirements for issuing the permit was an arbitrary and capricious action that deprived the applicant of his substantive due process rights. The city, City Council, and individual members of the City Council have no immunity from such action and are all liable for damages. Bateson v. Geisse, 857 F2d 1300 (9th Cir. 1988).

Rules of Construction: Within the scope of its powers delegated to it by the Legislature, a City Council has the same right to enact binding ordinances as has the Legislature to enact statutes, and practically the same rules of construction apply when the validity of an ordinance or a statute is under consideration by the courts. Missoula v. Swanberg, 116 M 232, 149 P2d 248 (1944).

Arbitrary Class — Equal Protection: A city ordinance that prohibits the installation of plumbing called "Durham work", made of certain material, in one- or two-story buildings and permits its installation in all others over two stories high is arbitrary and unreasonable class legislation and therefore invalid as in conflict with this section in the absence of evidence showing that the prohibited kind of material is detrimental to the health and safety of the people of the municipality. Missoula v. Swanberg, 116 M 232, 149 P2d 248 (1944).

Subject to State and Federal Constitutions: Laws enacted in the exercise of the police power, whether by municipal corporations acting in pursuance of the laws of the state or by the state itself, must be reasonable and are always subject to the provisions of both the federal and state constitutions and judicial scrutiny. Bettey v. Sidney, 79 M 314, 257 P 1007 (1927).

Reasonableness of Ordinance: The question of the reasonableness of an ordinance is, in the first instance, for the determination of a City or Town Council, and in the absence of a clear showing to the contrary its reasonableness will be presumed. Bettey v. Sidney, 79 M 314, 257 P 1007 (1927).

Authorized Act Resulting in Nuisance — Liability: In grants of authority to municipal corporations, authority to commit a nuisance will not be implied but must be expressed, since in the use of their private property cities are subject to the same rules as private individuals. When the use and enjoyment of a legislative grant does not necessarily and naturally create a nuisance but the nuisance results from the method of the use and enjoyment, the grant constitutes no defense. Lennon v. Butte, 67 M 101, 214 P 1101 (1923).

Express or Implied Authority: The statute creating a municipality or under which its exists is the charter of its powers, and it has only such authority as is conferred expressly and such as is necessarily implied or is indispensable in order properly to accomplish the purpose of its organization. State ex rel. Butte v. Police Court, 65 M 94, 210 P 1059 (1922).

Attorney General's Opinions

Doctrine of Incompatible Positions Precluding Public Works Director From Holding Office on City Council: An individual serving in the dual roles of public works director and City Council member would be in the position as City Council member of controlling actions and decisions of that individual's supervisor, the public works director, which could directly affect that individual's job duties and compensation. Therefore, under the common-law doctrine of incompatible public offices, the office of City Council member and the office or position of public works director are incompatible and one person may not hold both jobs simultaneously. 47 A.G. Op. 19 (1998). See also 41 A.G. Op. 81 (1986), and 46 A.G. Op. 26 (1996).

Firefighters — Receipt of Compensatory Time Off: A firefighter may receive compensatory time off for bonus hours worked in excess of 40 in 1 week, and under 7-5-4101 the governing body of a city has the authority to manage the affairs of the city, including entering into a contract

providing compensatory time off for firefighters. 39 A.G. Op. 35 (1981), followed in 45 A.G. Op. 21 (1994).

Local Governments — Borrowing From Financial Institutions Permitted: A county, city, or town with general government or self-government powers can incur indebtedness by borrowing money directly from a financial institution. This authority to borrow does not change the debt limitations on the local government. 38 A.G. Op. 14 (1979).

Police Dispatch Services: A county may contract with a city or town to provide the municipal police department with police dispatch services operated through the County Sheriff's office. 37 A.G. Op. 10 (1977).

Collateral References

62 C.J.S. Municipal Corporations §§412, 413.

7-5-4102. Powers and duties of mayor related to administration and executive function.

Case Notes

Tie Vote — Mayor to Cast Deciding Vote:

In quo warranto proceedings, under this section providing that the Mayor of a city shall be the presiding officer of the Council and decide by his vote all ties, it was held that where the Council was evenly divided on the question of confirmation of the Mayor's appointee to the office of City Attorney, he had the right to cast the decisive vote. State ex rel. O'Hern v. Loud, 92 M 307, 14 P2d 432 (1932), explained in State ex rel. Easbey v. Highway Patrol Bd., 140 M 383, 372 P2d 930 (1962).

Under the law as it existed in 1895, the Mayor was deemed to be a constituent part of the Council, and where there was a tie vote of the Aldermen on the confirmation of an officer, he had the right to vote for confirmation. State ex rel. Young v. Yates, 19 M 239, 47 P 1004 (1897).

Attorney General's Opinions

Administrative Assistant — Mayoral Appointment: Although the City Council's contract and budget approval powers may affect the mayor's practical ability to provide a particular compensation amount to an administrative assistant or establish other employment conditions, they do not obviate his authority to fill that position without Council approval. Under 7-3-212, a mayor may appoint an administrative assistant without the approval of the City Council. 41 A.G. Op. 45 (1986).

7-5-4103. Council rules and discipline.

Collateral References

62 C.J.S. Municipal Corporations §389.

7-5-4104. Control of nuisances — exception.

Compiler's Comments

1997 Amendment: Chapter 67 inserted (1)(c) allowing city or town councils to enforce the penalty and to post copies of 7-5-4113; and made minor changes in style.

1993 Amendment: Chapter 406 inserted (2) that read: "(2) The city or town council may not prohibit the placing of a "notice of violation" card on a motor vehicle illegally parked in a disability parking space."

Case Notes

Imposition of Fine: Under the rule of statutory construction that a specific provision is paramount to a general one, held, in a prosecution for maintaining a nuisance, that the specific provision of this section, empowering a city to impose a fine upon persons maintaining a nuisance, is controlling, as against the power conferred by 7-5-4207 to impose fines and jail penalties for the violation of city ordinances generally. Bozeman v. Merrell, 81 M 19, 261 P 876 (1927). See also Billings v. Trenka, 155 M 27, 465 P 838 (1970).

Law Review Articles

Eminent Domain—Loss of All Economically Beneficial Use of Real Property Constitutes a "Taking" Within Meaning of Fifth Amendment Unless Principles of State Property and Nuisance Law Give Rise to Restrictions on Land's Use—Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), Horn, 43 Drake L. Rev. 227 (1994).

Negligence, Nuisance and Affirmative Duties of Action, Markesinis, 105 Law. Q. Rev. 104 (1989).

No Nuisance Claim Permitted in Federal Court for Air or Water Pollution, 19 Golden Gate U.L. Rev. 121 (1989).

Public Nuisance—A Critical Examination, Spencer, 48 Cambridge L.J. 55 (1989).

Reflected Sunlight is a Nuisance, Alterman, 18 Envtl. L. 321 (1988).

Collateral References

62 C.J.S. Municipal Corporations §§279 through 281.

Public swimming pool as nuisance. 49 ALR 3d 652.

7-5-4106. Power of condemnation.

Compiler's Comments

2001 Amendment: Chapter 125 substituted "property for any public use listed in 70-30-102" for "property for opening, establishing, widening, or altering any street, alley, park, sewer, or waterway in the city or town and for establishing, constructing, and maintaining any sewer, waterway, or drain ditch outside of the corporate limits of the municipality or for any other municipal and public use"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

City Ordinance Not Conclusive Presumption of Necessity — Standard of Proof: A city ordinance adopted pursuant to this section did not establish a conclusive presumption that the taking of private property for a water system was necessary. The controlling statutes are in Title 7, chapter 13, part 44, and absent an agreement to purchase, 7-13-4404 requires that the standard of proof outlined in 70-30-111 be met before private property may be taken for a public use. Since the District Court has the power to determine whether a condemnation is necessary, the votes of the people and the city council cannot be considered as dispositive of the issue of necessity; however, the public interest as expressed in these votes must be considered and weighed with the other factors in determining whether acquisition is necessary. Missoula v. Mtn. Water Co., 228 M 404, 743 P2d 590, 44 St. Rep. 1633 (1987).

Areawide Condemnation: City's only authority to condemn on an "area" basis is 7-15-4259. Passage of city ordinance declaring condemnation for urban renewal of blighted areas did not create conclusive presumption of public use and necessity. Helena v. DeWolf, 162 M 57, 508 P2d 122 (1973).

Control of Floodwaters: Under this section a city may condemn lands for constructing a sewer, waterway, or drain ditch outside the corporate limits of the municipality "or for any other municipal and public use". Thus the city has the power of eminent domain for a project to divert floodwaters into a channel away from the city in order to protect it from overflows. Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

Right to Condemn Property:

Authority to condemn property for a public use must be clearly expressed in the law before such right will be allowed. State ex rel. McLeod v. District Court, 67 M 164, 215 P 240 (1923).

In the absence of legislative authority empowering it so to do, a city has no right to condemn land outside of its corporate limits for a public highway leading to a park owned by it. State ex rel. McLeod v. District Court, 67 M 164, 215 P 240 (1923).

Vesting of Fee to Land: Under section 11-606, R.C.M. 1947 (since repealed), the fee to the land covered by a street once established is vested in the public. The form of dedication required of the owner, when the plat of a city or town or an addition thereto is recorded, is equivalent to a deed, but as the respective rights of the abutting owners and of the public are dependent upon the fact of dedication, it is not important to inquire where the fee is vested. Kipp v. Davis-Daly Copper Co., 41 M 509, 110 P 237 (1910).

Water Supply — Prior Attempt at Consent Required: In condemnation proceedings to acquire title to property for a water supply, it is not necessary to allege or prove that the city had endeavored to obtain the consent of the owners of the property to the taking thereof. Helena v. Rogan, 27 M 135, 69 P 709 (1902).

Law Review Articles

Reengineering Regulation to Avoid Takings, Merriam, 33 Urb. Law. 1 (2001).

Efficient Compensation for Regulatory Takings: Some Thoughts Following the Lucas Ruling, Trefzger, 23 Real Est. L.J. 191 (1995).

Eminent Domain—Loss of All Economically Beneficial Use of Real Property Constitutes a "Taking" Within Meaning of Fifth Amendment Unless Principles of State Property and Nuisance Law Give Rise to Restrictions on Land's Use—Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), Horn, 43 Drake L. Rev. 227 (1994).

Property Rights and Democracy: Philosophical and Economic Considerations, Riedinger, 22 Cap. U.L. Rev. 893 (1993).

Collateral References

Measure of damages or compensation in eminent domain as affected by premises being restricted to particular educational, religious, charitable, or noncommercial use. 29 ALR 5th 36.

Eminent domain: validity of "freezing" ordinances or statutes preventing prospective condemnee from improving, or otherwise changing, the condition of his property. 36 ALR 3d 751.

Current Condemnation Law; Takings, Compensation & Benefits, Ackerman, A.B.A. (1994).

7-5-4109. Control of conflict of interest.

Compiler's Comments

1993 Amendment: Chapter 322 inserted (2) establishing a process whereby a local government governing body can waive the conflict of interest provision for certain officers and employees or their relatives; and made minor changes in style.

Case Notes

Where Franchised Utility in No Position to Complain: A utility operating under a nonexclusive city franchise sought to enjoin a city from selling bonds for the purpose of securing its own gas distributing system, on ground of unlawful competition. The utility could not question the legality of any other contract entered into by the city in connection with the enterprise and hence was in no position to complain that the city's contract with a contracting firm relating to a supply of natural gas was illegal because a city employee, not served with summons, was interested in the contract contrary to this section. Montana-Dakota Util. Co. v. Havre, 109 M 164, 94 P2d 660 (1939).

Subsequent Interest: This section is not applicable to a Mayor who was not interested in a contract made with the city but who agreed, after the contract was accepted and filed with the proper official, to take stock in a corporation succeeding to the rights of the original contractor. State ex rel. Great Falls Water Works v. Great Falls, 19 M 518, 49 P 15 (1897).

Attorney General's Opinions

City Employee as Councilman — No Conflict of Interest: There is no inherent conflict of interest when a city employee is also an elected city councilman in a council-mayor form of municipal government. The opportunity to commit the breach of a fiduciary duty does not constitute a conflict of interest. 41 A.G. Op. 81 (1986).

Definitions — Incorporation: Since the Legislature is presumed not to perform useless acts, the definitions of "be interested in" and "contract" contained in 2-2-201 are incorporated into and are applicable to 7-5-2106 and 7-5-4109, which relate to the same subject matter, conflicts of interest for local government officials. 40 A.G. Op. 28 (1983).

Disclosure — Abstinence From Voting — When Contract Voidable: Where a local government official has a conflict of interest, such as a substantial interest in a business bidding on a local government contract, the official must comply with the disclosure and abstinence from voting provisions of 2-2-125 (now repealed) and 2-2-131, even though the interest may be permissible under the exceptions contained in 2-2-201. If the interest is not permissible under the exceptions listed in 2-2-201, the contract is voidable and abstinence from voting will not exonerate the official. 40 A.G. Op. 28 (1983).

Control of Conflict of Interest — Elected City Official Prohibited From Selling Supplies to City: A business operated by an elected city official or owned by a corporation in which the official is a major stockholder may not sell supplies to the city. The crucial factor in determining whether a conflict of interest lies and applying conflict of interest statutes is the presence of a pecuniary or proprietary interest. A formal contract is not required to find a conflict of interest. 38 A.G. Op. 79 (1980).

Law Review Articles

A Model Ethical Code for Appointed Municipal Officials, Larson, 9 Hamline J. Pub. L. & Pol'y 395 (1989).

Conflicts of Interest in Government, Dahl, 18 Colo. Law. 595 (1989).

Collateral References

Validity and construction of orders and enactments requiring public officers and employees, or candidates for office, to disclose financial condition, interests, or relationships. 22 ALR 4th 237.

7-5-4121. Conduct of council business.

Compiler's Comments

"Viva Voce" Defined: "Viva voce" means voting by speech or outcry as distinguished from voting by written or printed ballot. Black's Law Dictionary, Fifth Edition (1979).

Case Notes

City Authority to Plant Trees: Plaintiff filed suit against the city to prevent the planting of trees in the boulevard area of the sidewalk in front on his property. The District Court dismissed plaintiff's complaint for failure to state a cause of action because the City Council has broad discretion under 7-14-4101 to alter and maintain city streets and avenues, including the planting of trees. A statement by the City Council Public Works Committee that no trees would be planted if plaintiff objected did not create a contract binding on the city. The elements of a contract are missing here, and there was no action by the City Council as required by this section to create a contract. Duncan v. Missoula, 239 M 201, 779 P2d 519, 46 St. Rep. 1619 (1989).

Failure to Record: Town could not deny the validity of a sewage project contract due to an alleged technical defect in failing to record in minutes of Town Council the aye and no vote on the approval of the contract as required by this section where the town in all of its affirmative acts recognized the contract. St. Eng'r. Serv., Inc. v. Kevin, 148 M 312, 420 P2d 433 (1966).

Filling Vacancy: Subsection (2) of this section does not apply to an election by a City Council to fill a vacancy in its own body, caused by resignation or death. The provisions governing such election are found in 7-4-4112. State ex rel. Wilson v. Willis, 47 M 548, 133 P 962 (1913), distinguished in State ex rel. O'Hern v. Loud, 92 M 307, 14 P2d 432 (1932).

Attorney General's Opinions

Number of Town Council Members Necessary to Constitute Quorum When Mayor Resigns: Regarding the question of what constitutes a quorum of municipal council members when the mayor resigns and the mayoral duties are assumed by one of the municipal council members, at common law, the general rule is that the total number of all of the duly elected and qualified members of the municipal council is taken as the basis. Although the mayor or chief executive may be included in the count under some statutes, the mayor is not made a member of the council and is not included in the number on which a quorum is reckoned. However, even though the mayor is not counted in the determination of a quorum, a member of the municipal council who acts as mayor or presiding officer pro tempore in absence of the mayor is counted in determining whether a quorum is present and retains the right to vote as a member of the council. Thus, the president of the council, when serving as acting mayor in the absence of the mayor, may vote on a measure with the other members of the council and then, as acting mayor, cast the deciding vote in case of a tie. 47 A.G. Op. 20 (1998).

Town With Weak-Mayor Government Not Authorized to Adopt Statutory Quorum Provisions: A town with a weak-mayor form of municipal government does not have authority to adopt by ordinance the quorum provisions of 7-3-4221. Those provisions would conflict with this section, which states that a majority of the members of the town council constitute a quorum and does not include the mayor as a member of the town council for the determination. 47 A.G. Op. 20 (1998).

Collateral References

62 C.J.S. Municipal Corporations §385, et seq.

7-5-4122. Special meetings of council.

Case Notes

Lack of Notice — Burden of Proving Special Meeting: In an injunction suit to restrain the payment of municipal funds for work done in repairing sidewalks, in which one ground of the complaint was that though the meeting of the Council at which the walk was ordered replaced was a special one, it was held without notice, proclamation, or message of the Mayor, as required by this section, the plaintiff had the burden of proving that the meeting was a special one. O'Brien v. Drinkenberg, 41 M 538, 111 P 137 (1910).

Collateral References

62 C.J.S. Municipal Corporations §397.

7-5-4123. Journal of council proceedings.

Collateral References

62 C.J.S. Municipal Corporations §409.

7-5-4124. Destruction of municipal records.

Compiler's Comments

1993 Amendment: Chapter 420 at beginning deleted "Except as provided in subsection (2)", before "approval" inserted "written", after "approval of the" substituted reference to local government records destruction subcommittee for "department of commerce", after "may destroy" deleted "old worthless reports, papers, or records in his office that have served their purpose and that are substantiated by permanent", and at end inserted reference to records meeting the local government records retention schedules that are no longer needed; deleted (2) authorizing destruction of public utility records (see 1993 Session Law for text); deleted (3) authorizing cities and towns to adopt retention schedules and destroy documents (see 1993 Session Law for text); and made minor changes in style. Amendment effective April 20, 1993.

1985 Amendment: In (3) substituted (a) and (b) relating to retention schedules for "Any claim, warrant, voucher, bond, or treasurer's general receipt may be destroyed by any city or town officer after a period of 5 years."

1983 Amendment: Substituted references to department of commerce for references to department of administration.

1981 Amendments: Chapter 217 reduced the time period for keeping records from 25 to 5 years.

Chapter 274 substituted "department of administration" for "department of community affairs" in (1) and (2).

Transfer of Function: The function of the Department of Commerce in this section was transferred from the Department of Administration by sec. 1, Ch. 287, L. 1983. Those functions were transferred to the Department of Administration from the Department of Community Affairs by sec. 7, Ch. 274, L. 1981.

7-5-4125. Convenience fee for electronic municipal government services.

Compiler's Comments

Effective Date: Section 4, Ch. 264, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 9, 2003.

Part 42
Municipal Ordinances and Resolutions

Part Collateral References

Former jeopardy: right of municipal corporation to review of unfavorable decision in action or prosecution for violation of ordinance—modern status. 11 ALR 4th 399.

7-5-4201. Municipal ordinances.

Compiler's Comments

Section Not Codified: Section 11-1103, R.C.M. 1947, validating ordinances made prior to 1895, was not codified. That section has not been repealed and is valid law. It may be referred to as sec. 5043, Pol. C. 1895.

Case Notes

Interpretation of Uniform Building Code Ordinance Matter of Law — Violation May Constitute Negligence Per Se: Chambers was injured after falling into a pit at the Helena garbage transfer station. A Uniform Building Code (UBC) ordinance required guardrails on most landings and ramps, except on the loading side of loading docks. The District Court held that the pit did not fit the loading dock exception and that the city's failure to install guardrails was negligence per se. The city argued that interpretation of the UBC ordinance was a finding of fact that the trial court improperly removed from the province of the jury because the court made credibility determinations and weighed the evidence. Chambers maintained that, like statutes, interpretation of a UBC ordinance is a question of law. The Supreme Court agreed with Chambers. Violation of a UBC ordinance is a matter of law, violation of which may constitute negligence per se, and in this case, it was undisputed that the city was subject to the ordinance and that there were no guardrails installed along the transfer station pit. Chambers was a member of the class of persons that the ordinance was designed to protect and met the elements of negligence per se. Further, pursuant to Montana pattern jury instructions, it is up to the jury

to decide whether a statute has been violated. Once the trial court determined that the city was negligent per se, the jury instruction should not have been given because there were no more undisputed issues regarding violation of the statute. The only remaining determination was whether the loading dock exception applied to the pit, and that was a statutory interpretation for the court to decide. The plain language of the UBC ordinance and its exception did not include a pit design such as that used at the transfer station, so the trial court correctly interpreted the ordinance and held the city negligent per se. Chambers v. Helena, 2002 MT 142, 310 M 241, 49 P3d 587 (2002).

One Subject — Wholesale Adoption of State Misdemeanors: A town ordinance that, in effect, adopted all state laws defining misdemeanors and made them town ordinances was invalid as violating the prohibition against passage of an ordinance containing more than one subject. White Sulphur Springs v. Voise, 136 M 1, 334 P2d 855 (1959).

One Subject — Establishing Police Department: An ordinance establishing a police department, repealing a series of ordinances dealing therewith and those relating to the location and conduct of the city jail, held not open to the objection that it was void as in contravention of the provisions of this section. State ex rel. Dwyer v. Mayor, 69 M 232, 221 P 524 (1923).

One Subject — Liberal Construction: The restriction placed by this section upon the City Council in enacting ordinances to the effect that none shall be passed containing more than one subject which shall be clearly expressed in its title, like that imposed upon the Legislature in enacting a statute, must be liberally construed. The ordinance will be sustained unless it appears beyond a reasonable doubt that it does not meet the requirement. State ex rel. Dwyer v. Mayor, 69 M 232, 221 P 524 (1923).

Resolution of Intention — Approval by Mayor: A resolution of intention is not valid unless approved by the Mayor. All proceedings taken under an unapproved resolution of intention are void. Hinzeman v. Deer Lodge, 58 M 369, 193 P 395 (1920).

One Subject — Special Election on Bonds: An ordinance calling for a special election for the authorization or rejection of an increase of the city's indebtedness by the issuance of water and sewer bonds was not obnoxious to the prohibition contained in this section that no ordinance shall be passed containing more than one subject. The general subject of the ordinance was the incurring of the indebtedness, and the different purposes named in it as making the indebtedness necessary were matters of detail for the information of the voters. Carlson v. Helena, 39 M 82, 102 P 39 (1909).

One Subject — General Rule: The observance of the limitation imposed by this section relative to ordinances containing more than one subject, which must be clearly expressed in its title, is mandatory and renders void any ordinance which violates it. But whatever is germane, incidental, or necessary to the main or general subject of an ordinance may be included in it and is not a separate subject. Carlson v. Helena, 39 M 82, 102 P 39 (1909). See also State ex rel. Moreland v. Police Court, 87 M 17, 285 P 178 (1930); St. v. McKinney, 29 M 375, 74 P 1095 (1904).

Collateral References

62 C.J.S. Municipal Corporations §§416 through 420.

Validity and construction of statute or ordinance requiring installation of automatic sprinklers. 63 ALR 5th 517.

Validity, construction, and application of regulations regarding outside employment of governmental employees or officers. 62 ALR 5th 671.

Validity and construction of regulations of governing body of condominium or cooperative apartment pertaining to parking. 60 ALR 5th 647.

Validity of statutes, ordinances, and regulations requiring the installation or maintenance of various bathroom facilities in dwelling units. 79 ALR 3d 716.

Supreme Court's application of vagueness doctrine to noncriminal statutes or ordinances. 40 L. Ed. 2d 823.

7-5-4202. Incorporation of technical codes by reference.

Compiler's Comments

2001 Amendment: Chapter 354 in (2) at beginning of first sentence substituted "The notice" for "At least 15 days prior to final action be a governing body of the city or town, notice" and at end substituted "as provided in 7-1-4127" for "in a newspaper of general circulation in the city or town"; and made minor changes in style. Amendment effective October 1, 2001.

1987 Amendment: In (2), in second sentence, reduced copies on file from three to one.

7-5-4203. Effective date of ordinances and resolutions.

Compiler's Comments

1993 Amendment: Chapter 309 at beginning of (1), after "ordinance", deleted "or resolution"; inserted (2) providing that resolutions are effective immediately unless otherwise specified; and made minor changes in style.

Case Notes

Resolution Creating Special Improvement District — Not Subject to Referendum:

A resolution creating a municipal special improvement district that encompasses less area than the municipal limits is not subject to referendum because the resolution affects only the people within the improvement district rather than the people of the municipality as a whole. The Supreme Court further held that the resolution creating a special improvement district is part of an administrative procedure, not a legislative action subject to referendum. Shelby v. Sandholm, 208 M 77, 676 P2d 178, 41 St. Rep. 186 (1984), distinguished in The Greens at Fort Missoula, LLC v. Missoula, 271 M 398, 897 P2d 1078, 52 St. Rep. 501 (1995).

Sections 7-5-4203(1) and 7-5-4204 are not applicable to special improvement districts but only to matters of general legislation on which all electors may vote. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

Interpretation of City Ordinance: If the language of an ordinance is plain and unambiguous, it is not subject to interpretation or open to construction but must be accepted and enforced as written. Schanz v. Billings, 182 M 328, 597 P2d 67, 36 St. Rep. 1163 (1979), following Sheridan County Elec. Co-op, Inc., v. Montana-Dakota Util. Co., 128 M 84, 270 P2d 742 (1954), and followed in The Greens at Fort Missoula, LLC v. Missoula, 271 M 398, 897 P2d 1078, 52 St. Rep. 501 (1995).

Emergency Measure Excepted From Referendum: It was contended that to compel a city to pass an ordinance or resolution for the rezoning of the city and vacation of streets by mandamus at the instance of the city housing authority would destroy the exercise of right of referendum by the city inhabitants because the ordinance or resolution would be effective immediately. The Supreme Court held that the housing authorities being an emergency measure, this section as originally enacted specifically provides that an emergency measure is excepted from the provisions of the Referendum Act (Ch. 167, L. 1907). State ex rel. Great Falls Housing Authority v. Great Falls, 110 M 318, 100 P2d 915 (1940).

Bond Issues: This statute, being a general statute, held not controlling where a city seeks to sell bonds for the acquisition of a self-supporting gas distribution system under authority of Ch. 141, L. 1935. Section 15 specifically provides that if any of the provisions of the chapter are inconsistent with any other statute, the provisions of the chapter are controlling. Montana-Dakota Util. Co. v. Havre, 109 M 164, 94 P2d 660 (1939).

Increase in Salary — Date: The provision of section 11-732, R.C.M. 1947 (since completely rewritten), that the salary of a city officer shall not be increased or diminished during his term of office, means the terms the officer is then serving. Where the salary of a Mayor was increased by ordinance near the close of his first term, the increase could not, under this section, become effective until after his second term had commenced. The increase was made during his prior term and not during the term he was then serving. Broadwater v. Kendig, 80 M 515, 261 P 264 (1927).

Bond Ordinance Approved by Voters: This section has no application to an ordinance providing for the issuance of water and sewer bonds after sanction of the taxpayers affected thereby has been obtained. The law has to do with matters of general legislation on which all electors, whether taxpayers or not, may vote, while the question whether bonds shall be issued can be submitted to taxpayers only. Carlson v. Helena, 39 M 82, 102 P 39 (1909).

7-5-4204. Details relating to emergency measures.

Case Notes

Applicability: Sections 7-5-4203(1) and 7-5-4204 are not applicable to special improvement districts but only to matters of general legislation on which all electors may vote. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

Collateral References

62 C.J.S. Municipal Corporations §419.

Conclusiveness of declaration of emergency in ordinance. 35 ALR 2d 586.

7-5-4205. Powers of mayor related to ordinances and resolutions.

Collateral References

62 C.J.S. Municipal Corporations §§421 through 424.

7-5-4206. Procedure to veto ordinance or resolution.

Collateral References

62 C.J.S. Municipal Corporations §423.

7-5-4207. Penalties for violation of municipal ordinances.

Compiler's Comments

1993 Amendment: Chapter 597 at beginning of (1) inserted exception clause; inserted (2) allowing a local government to fix certain penalties for violation of municipal ordinances; and made minor changes in style.

Case Notes

Invalid Ordinance: A town ordinance which in effect adopted all state laws defining misdemeanors and made them town ordinances, with penalties limited as provided by this section, was invalid as containing more than one subject in violation of the prohibition set forth in 7-5-4201. White Sulphur Springs v. Voise, 136 M 1, 343 P2d 855 (1959).

Nuisance — Section Not Applicable: Under the rule of statutory construction that a specific provision is paramount to a general one, held, in a prosecution for maintaining a nuisance, that the specific provision of 7-5-4104, empowering a city to impose a fine upon persons maintaining a nuisance, is controlling, as against the power conferred by this section to impose fines and jail penalties for the violation of a city ordinance generally. Bozeman v. Merrell, 81 M 19, 261 P 876 (1927). See also Billings v. Trenka, 155 M 27, 465 P2d 838 (1970).

Commission-Manager Cities: The powers of a city operating under the commission-manager plan granted by 7-3-4313, with respect to punishments of violations of its ordinances, are the same as and no greater than those granted by this section to cities generally. Bozeman v. Merrell, 81 M 19, 261 P 876 (1927).

Attorney General's Opinions

Mandatory Seatbelt Ordinance: Under Montana law and the Montana Constitution, a municipality with self-governing powers may enact a mandatory seatbelt ordinance that provides for a fine or jail sentence for violation of the ordinance as long as the fine or penalty does not exceed $500 and the imprisonment does not exceed 6 months for any one offense, and as long as such an ordinance is not prohibited by the city charter. 41 A.G. Op. 47 (1986).

Validity of Ordinance Allowing Escalating Penalty for Failure to Obtain Business License: A Lewistown city ordinance that allows an escalating monthly penalty for failure to obtain a local business license is valid despite Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983). The Shea case determined that escalating penalties for parking violations were criminal penalties and violative of Art. II, sec. 28, Mont. Const. In analyzing the Lewistown ordinance, the Attorney General observed that the crucial issue is whether the penalty imposed is civil or criminal in nature. Applying the five factors outlined in Brown v. Multnomah County District Court, 570 P2d 52 (Ore. 1977), he concluded that the instant ordinance imposed civil penalties and that the ordinance was valid. 40 A.G. Op. 75 (1984).

Motor Vehicle Parking Offenses — Civil Penalty: A city with general government powers may not establish a civil penalty and collection system for motor vehicle parking offenses. 40 A.G. Op. 31 (1984).

Collateral References

Supreme Court's application of vagueness doctrine to noncriminal statutes or ordinances. 40 L. Ed. 2d 823.

7-5-4208. Applicability of part.

Compiler's Comments

1985 Amendment: At end of (1) after "resolutions", deleted "and initiatives and referenda"; in lead-in of (2) after "resolutions", deleted "and initiatives and referenda"; in (2)(a) after "parts 1 and 42" inserted remainder of sentence concerning which provisions of law govern the adoption of an ordinance or resolution relating to specific situations; in (2)(b) after "provisions of this part", substituted present language in remainder of subsection regarding sections of Title 7, ch. 5, part 1, that are in conflict with or that address procedures or effects not addressed by or in conflict with this part for "which a municipality by ordinance adopts for governing its procedures

or effects"; at end of (2)(c) inserted "apply to municipal ordinances and resolutions"; and made minor changes in phraseology.

Part 43
Municipal Contracts and Franchises

7-5-4301. Power to enter and execute contracts.

Compiler's Comments

2003 Amendment: Chapter 526 in (1) near end substituted "chapter" for "code"; in (2)(b)(i) at beginning inserted exception clause; inserted (2)(b)(ii) allowing a city or town to extend, renew, or amend an agreement for the supervision or operation of a physical plant that provides water, sewer, or power services to the municipality without proceeding under public bidding procedures in certain instances; and made minor changes in style. Amendment effective October 1, 2003.

1987 Amendment: Inserted (2)(b) relating to supervision over water, sewer, or power services.

1983 Amendment: In (2), inserted last sentence relating to professional, technical, engineering, and legal services.

Case Notes

Green Waste Compost Program Contract Exempt From Bidding Process — Not Reviewable in Absence of Bad Faith, Fraud, or Corruption: Heritage argued that the city of Helena awarded a contract without soliciting bids. The Supreme Court held that the contract was for construction, repair, or maintenance in an amount less than $25,000 and involved technical skills and therefore was exempt from the bidding process. The Supreme Court also stated that in following Baker v. St., 218 M 235, 707 P2d 20 (1985), an agency's decision in awarding a contract is not reviewable in the absence of a showing of bad faith, fraud, or corruption. Heritage Commercial Contractors, Inc. v. Helena, 272 M 90, 899 P2d 1076, 52 St. Rep. 676 (1995).

Professional Services: Senate Bill 288 (Ch. 371, L. 1971), which amended this section, the title of which was "An act amending section 11-1202, R.C.M. 1947, to increase the monetary limitation on purchasers", and eliminated last paragraph of this section excepting from bid requirements contracts for professional, technical, engineering, and legal services, without reference thereto in title of bill, was in violation of Art. V, sec. 23, 1889 Mont. Const. (similar to Art. V, sec. 11(3), 1972 Mont. Const.). Morrison-Maierle, Inc. v. Forsyth, 160 M 69, 500 P2d 395 (1972).

Public Utility Rates: Under 7-13-4101 and this section, a city may contract for rates with a public utility, subject, however, to the paramount authority of the state to exercise its power in the premises whenever it chooses to do so. State ex rel. Billings v. Billings Gas Co., 55 M 102, 173 P 799 (1918), distinguished in Baker v. Mont. Petroleum Co., 99 M 465, 44 P2d 735 (1935).

Award to Lowest Responsible Bidder: The mode of exercising the power granted by this section is subject to the limitation prescribed in that section of the code in reference to the awarding by municipalities of contracts exceeding a certain amount to the lowest responsible bidder. This limitation is, furthermore, exclusive and applies to all municipal bodies. Missoula Street Ry. v. Missoula, 47 M 85, 130 P 771 (1913).

Attorney General's Opinions

Provision of Fire Protection Services Outside City Limits: A city may contract with entities to provide fire protection services outside the city limits. 42 A.G. Op. 80 (1988).

Contract for Employment of Construction Manager: A contract for the employment of a construction manager that calls only for the application of the contractor's technical expertise and experience in a supervisory capacity and does not involve the procurement of supplies or actual construction is exempt from the bidding requirements of 7-5-4302, as a contract for professional and technical services. 37 A.G. Op. 175 (1978).

Purchase by City of Real Property With Existing Buildings: Under applicable Montana statutes, a municipality is not required to submit a proposed purchase of real estate and existing buildings to voters for approval and may purchase them to house its fire department using current appropriations and without incurring indebtedness or issuing bonds to finance such purchase. 37 A.G. Op. 31 (1977).

Police Dispatch Services: A county may contract with a city or town to provide the municipal police department with police dispatch services operated through the County Sheriff's office. 37 A.G. Op. 10 (1977).

Collateral References

63 C.J.S. Municipal Corporations §§976 through 978.

Amount of appropriation as limitation on damages for breach of contract recoverable by one contracting with government agency. 40 ALR 4th 998.

Liability of municipality on quasi contract for value of property or work furnished without compliance with bidding requirements. 33 ALR 3d 1164.

Revocation, prior to execution of formal written contract, of vote or decision of public body awarding contract to bidder. 3 ALR 3d 864.

7-5-4302. Competitive, advertised bidding required for certain purchase and construction contracts.

Compiler's Comments

2001 Amendment: Chapter 354 in (2) at beginning substituted "The advertisement must be published as provided in 7-1-4127" for "The advertisement must be made in the official newspaper of the city or town if there is an official newspaper, and if not, it must be made in a daily newspaper of general circulation published in the city or town if there is a newspaper. If there is no newspaper, the advertisement must be made by posting in three of the most public places in the city or town. The advertisement, if by publication in a newspaper, must be made once each week for 2 consecutive weeks". Amendment effective October 1, 2001.

1997 Amendment: Chapter 459 in (1), after "equipment", substituted "or" for "for any"; and made minor changes in style.

1993 Amendment: Chapter 475 in (1), after "supplies of any kind", inserted "in excess of $20,000" and after "maintenance" substituted "in excess of $25,000" for "for which must be paid a sum exceeding $10,000"; and made minor changes in style.

1987 Amendment: In (1), near beginning, inserted reference to 7-5-4310.

1981 Amendment: Extended the coverage of the types of contracts to include repair and maintenance; increased the minimum contract amount requiring bids from $4,000 to $10,000 in (1).

Case Notes

When Claim for Relief Accrues for Failure of Construction Contract to Be Awarded to Lowest Bidder — No Negligence by Engineering Firm in Handling of Bidding Process on Public Works Contract: The city of Glasgow hired an engineering firm to prepare plans, specifications, and bid documents for a municipal sewer improvement project, including review of bid results and bid award recommendations. Debcon, Inc. (Debcon), submitted the lowest bid, but the engineering firm's review showed significant mathematical errors in Debcon's bid and some question as to the ability of Debcon to perform. The engineering firm recommended that the contract be awarded to a different bidder, and Debcon sued both the city and the engineering firm, alleging negligence in the award of the construction contract. The District Court concluded that Debcon lacked standing to assert a duty of care owed to it by the city and that the negligence claim against the engineering firm must also fail as a matter of law because the firm owed no duty of care to Debcon, an essential element for asserting negligence as a claim for relief. Debcon did not appeal the judgment in favor of the city, but did appeal the judgment in favor of the firm. The Supreme Court cited a long line of cases back to 1910 for the proposition that, absent a duty, no breach of duty can be established and no negligence action can be maintained. An unsuccessful bidder has no standing in mandamus or otherwise to control the discretion in the award of a contract to the lowest responsible bidder, which may not be the lowest pecuniary bidder. A claim for relief from the award of a public contract accrues under the following conditions: (1) plaintiff must timely assert its claim as an aggrieved taxpayer; (2) the claim must seek a remedy, such as an injunction, writ of mandamus, or declaratory judgment, that will protect the rights of the aggrieved taxpayer from the potential harm that will occur; and (3) plaintiff must then show that the process by which the public works contract was awarded resulted from an abuse of discretion, i.e., that discretion was tainted by an act of bad faith, fraud, corruption, or arbitrariness. The Supreme Court in this case declined to follow Debcon's contention that a new duty of care should be constructed from whole cloth that would allow Debcon, as the aggrieved low bidder, to recover lost profits or other expectancy damages under a negligence theory. The District Court properly concluded that the engineering firm, serving as project engineer for the city of Glasgow, did not owe Debcon, as a failed bidder, a duty of care in its handling of the public works contract bidding process under a negligence theory. Debcon's claim for relief was a claim for which relief could not be granted as a matter of law. Further, Debcon did not enjoy contractual privity with the engineering firm, so absent a statutory provision that would sustain a bad faith claim, a claim of bad faith did not lie. Summary judgment in favor of the engineering firm was proper. Debcon, Inc. v. Glasgow, 2001 MT 124, 305 M 391, 28 P3d 478 (2001), following O'Brien v. Drinkenberg,

41 M 538, 111 P 137 (1910), and its progeny, Koich v. Cvar, 111 M 463, 110 P2d 964 (1941), and State ex rel. Sletten Constr. Co. v. Great Falls, 163 M 307, 516 P2d 1149 (1973), and followed, with regard to standing to challenge the letting of a contract to provide public school transportation, in Hickey v. Baker School District No. 12, 2002 MT 322, 313 M 162, 60 P3d 966 (2002).

Green Waste Compost Program Contract Exempt From Bidding Process — Not Reviewable in Absence of Bad Faith, Fraud, or Corruption: Heritage argued that the city of Helena awarded a contract without soliciting bids. The Supreme Court held that the contract was for construction, repair, or maintenance in an amount less than $25,000 and involved technical skills and therefore was exempt from the bidding process. The Supreme Court also stated that in following Baker v. St., 218 M 235, 707 P2d 20 (1985), an agency's decision in awarding a contract is not reviewable in the absence of a showing of bad faith, fraud, or corruption. Heritage Commercial Contractors, Inc. v. Helena, 272 M 90, 899 P2d 1076, 52 St. Rep. 676 (1995).

No Recovery Under Void Public Contracts: Contracts not let on competitive bidding when required under this section are not only void but in actions to recover the reasonable value of property where restoration cannot be made excepting at cost exceeding the price (buried water pipe in the instant case), the courts will refuse to enforce the claim, leaving the parties where they placed themselves unlawfully. Quasi or constructive contracts based on unjust enrichment and enforced by action ex contractu rest on equitable principles. This section was enacted for economy and protection of the public. Builders Supply Co. v. Helena, 116 M 368, 154 P2d 270 (1944), reversing the dictum in Missoula Street Ry. v. Missoula, 47 M 85, 130 P 771 (1913).

Letting Contract to Higher Bidder Held Warranted: A City Council received two bids for firefighting equipment, one for $3,155.55 and the other for $3,500, both bidders substantially meeting the specifications stated in the advertisement for bids. After conducting a fair investigation into the relative merits of both and witnessing a demonstration of the equipment offered by the successful bidder, who also offered continuous servicing not offered by the unsuccessful one, there were substantial and plausible reasons justifying the letting of the contract to the higher bidder. Koich v. Cvar, 111 M 463, 110 P2d 964 (1941).

Lowest Responsible Bidder:

The "lowest responsible bidder", within the meaning of this statute, does not mean merely the one whose pecuniary ability to perform the contract is deemed the best; it also means the one who is most likely in regard of skill, ability, and integrity to do faithful and conscientious work and promptly to fulfill the contract according to its letter and spirit. The City Council has a broad discretion in determining what bid answers that requirement, the members thereof not being purely ministerial officers but in that connection exercising quasi-judicial functions. Koich v. Cvar, 111 M 463, 110 P2d 964 (1941).

Under the exclusive rather than directory nature of the limitation upon the power of cities to let contracts prescribed by this section, a contract entered into by a city with a street railway company, according to the terms of which the latter was to be paid the cost of removing and replacing its tracks on certain streets to enable the former to lay sewers, was void, it not having been let to the lowest responsible bidder as required by the statute. Commonwealth Pub. Serv. Co. v. Deer Lodge, 96 M 48, 29 P2d 667 (1934); Missoula Street Ry. v. Missoula, 47 M 85, 130 P 771 (1913), reversed in part in Builders Supply Co. v. Helena, 116 M 368, 154 P2d 270 (1944).

To successfully attack the letting of a contract for a municipal improvement, it must be shown that the contract was not let to the lowest responsible bidder, that there was not any opportunity afforded for competitive bidding, or that there was collusion or bad faith on the part of the Council or such gross mistake as to preclude the exercise of sound judgment. O'Brien v. Drinkenberg, 41 M 538, 111 P 137 (1910).

Waterworks Construction Contract: A contract with a city for the construction of a system of waterworks is governed by the provisions of this section, 7-5-4308, and 7-5-4309 (now repealed). Forsyth v. Crellin, 210 F 835 (9th Cir. 1914).

Specific Processes — Use in Construction: Where a City Council incorporated in a resolution ordering the paving of a street, as well as in the call for bids, the requirement that in the construction of the pavement certain patented processes and compounds should be used, and the company controlling the patent agreed that the cost of such material, which constituted only a part of the gross cost of the improvement, should be the same to all bidders, while in other respects, such as the cost of labor, other materials, etc., the principle of competition was retained, the proceedings were not void as being violative of this section. Ford v. Great Falls, 46 M 292, 127 P 1004 (1912).

Purpose of Section — Public Protection: This section is designed to prevent favoritism and to secure to the public the best possible return for the expenditure of the funds which the property

owners are required to furnish through the payment of taxes and assessments. Ford v. Great Falls, 46 M 292, 127 P 1004 (1912).

Construction of Section — Source of Funds: The requirement of this section extends to and includes expenditures made from the general revenues of the municipality, as well as from funds derived from special assessments. Ford v. Great Falls, 46 M 292, 127 P 1004 (1912).

Attorney General's Opinions

Lease-Purchase Must Be Bid: A lease of equipment with an option to purchase at the end of 5 years is within the purpose of 7-5-4302 and is subject to the requirement that it be competitively bid. 41 A.G. Op. 78 (1986).

Subcontracts: This section clearly applies only to contracts that the City Council directly enters into and does not apply to subcontracts that the prime contractor with the city may subsequently enter into. 40 A.G. Op. 32 (1984).

Contract for Employment of Construction Manager: A contract for the employment of a construction manager that calls only for the application of the contractor's technical expertise and experience in a supervisory capacity and does not involve the procurement of supplies or actual construction is exempt by 7-5-4301(2) from the bidding requirements of this section, as a contract for professional and technical services. 37 A.G. Op. 175 (1978).

Competitive Bidding Requirements Mandatory: A local government unit with self-government powers cannot supersede by the passage of a resolution or ordinance the competitive bidding requirements set forth in 7-5-4302. 37 A.G. Op. 175 (1978).

Purchase by City of Real Property With Existing Buildings: Under applicable Montana statutes, a municipality is not required to submit a proposed purchase of real estate and existing buildings to voters for approval and may purchase them to house its fire department using current appropriations and without incurring indebtedness or issuing bonds to finance such purchase. 37 A.G. Op. 31 (1977).

Collateral References

63 C.J.S. Municipal Corporations §§995 through 1005.

Authority of state, municipality, or other governmental agency to accept late bids for public works contracts. 49 ALR 5th 747.

Public contracts: low bidder's monetary relief against state or local agency for nonaward of contract. 65 ALR 4th 93.

Public contracts: authority of state or its subdivision to reject all bids. 52 ALR 4th 186.

Mistake: right of bidder for state or municipal contract to rescind bid on ground that bid was based upon his own mistake or that of his employee. 2 ALR 4th 991.

Validity of municipality's ban on construction until public facilities comply with specific standards. 92 ALR 3d 1073.

Right of municipal corporation to recover back from contractor payments made under contract violating competitive bidding statute. 33 ALR 3d 397.

7-5-4303. Exemptions from bidding or advertising requirements for certain contracts.

Attorney General's Opinions

Purchase by City of Real Property With Existing Buildings: Under applicable Montana statutes, a municipality is not required to submit a proposed purchase of real estate and existing buildings to voters for approval and may purchase them to house its fire department using current appropriations and without incurring indebtedness or issuing bonds to finance such purchase. 37 A.G. Op. 31 (1977).

Collateral References

Waiver of competitive bidding requirements for state and local public building and construction contracts. 40 ALR 4th 968.

7-5-4304. Certain contracts to be submitted to voters.

Compiler's Comments

1999 Amendment: Chapter 139 near end inserted "or obligations issued pursuant to 7-7-4104"; and made minor changes in style. Amendment effective March 23, 1999.

1991 Amendment: Near middle inserted exception clause. Amendment effective July 1, 1991.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

1985 Amendment: After "may be let", substituted "pursuant to 7-5-4302 that extends" for "extending".

Attorney General's Opinions

Purchase by City of Real Property With Existing Buildings: Under applicable Montana statutes, a municipality is not required to submit a proposed purchase of real estate and existing buildings to voters for approval and may purchase them to house its fire department using current appropriations and without incurring indebtedness or issuing bonds to finance such purchase. 37 A.G. Op. 31 (1977).

7-5-4305. Prohibition on division of contracts to circumvent bidding requirements.

Collateral References

63 C.J.S. Municipal Corporations §1008.

7-5-4306. Use of installment purchase contract.

Compiler's Comments

1999 Amendment: Chapter 139 inserted last sentence exempting limitations in section from contracts under 7-7-4104. Amendment effective March 23, 1999.

1997 Amendment: Chapter 459 at beginning of first sentence deleted "Subject to the requirements of subsection (2)" and near middle extended period to 10 years from 5 years; deleted (2) that read: "(2) When the purchase price is extended over a term of 2 years, at least 40% of the amount must be paid the first year and the remainder the second year. When the amount is extended over a term of 3 years, at least one-third of the amount must be paid each year. If the amount is extended over a term of 4 years, at least one-fourth is to be paid each year. If the amount is extended over a term of 5 years, at least one-fifth is to be paid each year"; and made minor changes in style.

1993 Amendment: Chapter 475 in (1) substituted "an installment purchase contract exceeds $4,000" for "any such contract shall exceed the amount set forth in 7-5-4302(1)"; and made minor changes in style.

1981 Amendment: Substituted a reference to 7-5-4302(1) for a $4,000 amount at which contract payments may be made in installments.

Case Notes

Installment Contracts: This section expressly authorizes an alternate method of financing construction of municipal buildings to that of borrowing or a bond issue, namely by installment contract. (See 1999 amendment.) Greener v. Great Falls, 157 M 376, 485 P2d 932 (1971).

7-5-4308. Procedure to modify contract.

Collateral References

63 C.J.S. Municipal Corporations §1016, et seq.

Power of municipal corporation to submit to arbitration. 20 ALR 3d 569.

7-5-4321. Grant of exclusive franchise — election required.

Compiler's Comments

1995 Amendment: Chapter 387 in (2), at end, inserted "at a regular or primary election"; and made minor changes in style.

1991 Amendment: Near beginning of (2) inserted exception clause. Amendment effective July 1, 1991.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

1981 Amendment: Inserted "exclusive" before "franchise" in (1) and (2).

Case Notes

Development and Use Agreement Not Precluding City From Entering Agreement for Construction Project on Public Property — Franchise Agreement Outside Scope of Citizen Group's Agreement With City: A citizen's group entered a franchise agreement with a professional baseball organization to bring a team to Missoula. After two potential sites were rejected, the city of Missoula accepted a gift of property upon which to construct a baseball facility and granted the citizen group the right to finance and construct the stadium on the property and to convey the completed facility to the city. The citizen group moved to enjoin the city from development of the proposed civic baseball stadium because of the city's failure to comply with statutory requirements for planning, funding, and managing the facility. All claims were dismissed on summary judgment, and the citizen group appealed, but the Supreme Court affirmed. The development and use agreements in this case did not preclude the city from executing an agreement with another entity for the construction of a similar facility on public property or from

leasing a city-owned facility for baseball games or any other purpose. Any franchise agreement between the baseball organization and the citizen group was outside the scope of the group's agreement with the city, so the voter-approval provisions of this section did not apply. The citizen group's argument that the city was required to comply with urban renewal laws also failed. The decision whether to proceed with development under the urban renewal statutes was up to the city, and the fact that the city designated the capital improvements associated with the stadium construction as an urban renewal project did not require that the citizen group's building project come under the same purview. Rather, under 7-16-4106, the city is permitted to obtain an athletic field and civic stadium through purchase, donation, or condemnation and to regulate its use, but nothing in the statute prohibits the city from designating a stadium project as an urban renewal project or mandates that the project be designated as an urban renewal project. The District Court properly found that the city appropriately exercised its administrative authority in accepting the gift property and then leasing the site to the citizen group for purposes of constructing a stadium using private financial resources. The citizen group failed to raise a genuine issue of material fact that would preclude summary judgment. Fair Play Missoula, Inc. v. Missoula, 2002 MT 179, 311 M 22, 52 P3d 926 (2002).

Construction of Section: The word "franchise" in this section is used in the same sense as it is in Art. XII, sec. 16 and 17, 1889 Mont. Const. [no comparable provision in 1972 Mont. Const.], where it is classed as property and subject to taxation as such. Glodt v. Missoula, 121 M 178, 190 P2d 545 (1948).

Parking Meters — Conditional Sale Paid With Percentage of Revenue: The purchase of parking meters under a conditional sales contract whereby the city determines the location, controls the use and operation, and collects the revenues, the vendor to be paid from a percentage of the revenues, and after the total price is paid the meters to become the property of the city, did not constitute the granting of a franchise. Glodt v. Missoula, 121 M 178, 190 P2d 545 (1948).

Approval by Qualified Electors: A city is prohibited from granting a franchise to a gas company to lay its mains in city streets until the application for it has first been submitted to and approved by the qualified electors. State ex rel. Billings v. Billings Gas Co., 55 M 102, 173 P 799 (1918).

Collateral References

Power of municipality to sell, lease, or mortgage public utility plant or interest therein. 61 ALR 2d 595.

CHAPTER 6
FINANCIAL ADMINISTRATION AND TAXATION

Part 2
Deposit and Investment of Public Money

Part Attorney General's Opinions

Permissible Alternatives for Deposit — County General Fund: The permissible alternatives for deposit or investment of county general fund money are governed by 7-6-202 through 7-6-213. 42 A.G. Op. 25 (1987).

Use by County Treasurer of Investment or Brokerage Firms — Limitations: There is no express or implied limitation on a County Treasurer's ability to use the services of an investment or brokerage firm to purchase approved securities; however, an investment company may not be used in making demand or time deposits because that form of transaction is restricted to banks, savings and loan associations, and credit unions. 42 A.G. Op. 25 (1987).

Part Collateral References

Factors Influencing the Politics and Process of County Government Budgeting, Duncombe, Duncombe, & Kinney, St. & Loc. Gov't Rev. (1992).

7-6-201. Deposit of public funds in financial institutions.

Compiler's Comments

1989 Amendment: At beginning of (1) deleted reference to subsection (3) of 7-6-206.

1985 Amendment: Throughout section inserted "or credit union(s)" in list of financial institutions; near beginning of (1) after "7-6-206(3)", inserted "or"; and made minor changes in phraseology.

1981 Amendment: Added "or in a repurchase agreement as authorized in 7-6-213" at the end of (2).

Case Notes

Deposit of "Public Funds" — Other Entities:

A county is liable to an irrigation district for the loss of funds deposited by the latter with the Treasurer of the former as required by this section and redeposited by the Treasurer in county depositories which failed. State ex rel. Cartersville Irrigation District v. McGraw, 74 M 164, 240 P 817 (1925).

Under Ch. 137, L. 1925, amendatory of this section, title to money deposited by a school district with the County Treasurer passes to the county. The money becomes county funds. The county becomes the debtor of the school district, and upon redeposit thereof in county depositories, the county is liable to the district for their loss occasioned by such depositories becoming insolvent, such loss being the loss of county and not school district funds. State ex rel. School District v. McGraw, 74 M 152, 240 P 812 (1925).

Attorney General's Opinions

Distribution of Interest on Protested Tax Payments: Interest accrued on amounts held in a protest fund established under 15-1-402 is not "public money" under 7-6-201 through 7-6-206 and therefore must be distributed to the affected taxing units in the same proportion as the tax amounts in the fund are paid to those units. 41 A.G. Op. 60 (1986).

7-6-202. Investment of public money in direct obligations of United States.

Compiler's Comments

1997 Amendment: Chapter 131 at beginning of (4) inserted exception clause; inserted (5) limiting maturity dates to 10 years, with an average of 6 years; and made minor changes in style.

1995 Amendment: Chapter 406 substituted current text concerning eligible federal investments for former text that read: "(1) A local governing body may invest public money not necessary for immediate use by the county, city, or town in:

(a) direct obligations of the United States government;

(b) securities issued by agencies of the United States;

(c) securities guaranteed by the United States or by an agency of the United States but not issued by agencies of the United States; or

(d) mutual funds that invest only in:

(i) government obligations;

(ii) securities issued by agencies of the United States; or

(iii) securities guaranteed by the United States or by an agency of the United States but not issued by agencies of the United States.

(2) The local governing body may invest in these obligations either directly or in the form of securities of or other interests in an open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 through 80a-64), as amended, if:

(a) the portfolio of the investment company or investment trust is limited to United States government obligations and repurchase agreements fully collateralized by United States government obligations; and

(b) the investment company or investment trust takes delivery of the collateral for any repurchase agreement, either directly or through an authorized custodian." Amendment effective April 13, 1995.

Saving Clause: Section 4, Ch. 406, L. 1995, was a saving clause.

Applicability: Section 5, Ch. 406, L. 1995, provided: "This act does not apply to and does not require the sale of securities that were legal investments before [the effective date of this act] [effective April 13, 1995]. Upon the liquidation of an investment authorized prior to [the effective date of this act] [effective April 13, 1995], the proceeds must be invested pursuant to [this act]."

1993 Amendment: Chapter 271 inserted (1)(c) relating to securities guaranteed but not issued by the United States; and inserted (1)(d) relating to mutual funds that invest only in government obligations and in securities issued or guaranteed by the United States.

1989 Amendment: Inserted (2) relating to investments in a qualifying investment company or investment trust; and made minor changes in phraseology and style.

1985 Amendment: At end deleted "payable within not to exceed 180 days from the time of such investment" and inserted "and securities issued by agencies of the United States".

Attorney General's Opinions

Local Government Investment in Securities Not Issued by Agencies of the United States Prohibited: Consistent with the prior holding in 42 A.G. Op. 25 (1987) and with subsequent amendment to this section, a local government may invest public money in a mutual fund that

invests, or obtains through repurchase agreements fully collateralized by the United States government, direct obligations of the United States and securities issued by agencies of the United States. However, a local government may not invest public money in a mutual fund that invests in government obligations or securities that are guaranteed but not issued by agencies of the United States. (See 1993 and 1995 amendments.) 44 A.G. Op. 22 (1991).

Allowable Securities Investments: The following are considered "agencies of the United States" and are permissible entities for securities investments under this section: (1) Government National Mortgage Association; (2) Federal Home Loan Mortgage Corporation; (3) Federal Home Loan Bank Board; (4) Federal National Mortgage Association; and (5) Farm Credit System banks. Also, treasury investment growth receipts represent investments in direct obligations of the U.S. government permissible under this section. However, mortgage-backed certificates issued by a private entity but guaranteed by the Government National Mortgage Association are not permissible investments. 42 A.G. Op. 25 (1987). See 1989 amendment that allows the local government body to invest in certain investment companies.

Limitation of Investment in Mutual Funds: A County Treasurer may not invest in private mutual funds even though the funds may be limited to investments in which the Treasurer could directly invest under this section because the actual security being purchased is an interest in an investment company. 42 A.G. Op. 25 (1987). See 1989 amendment that allows the local government body to invest in certain investment companies.

7-6-203. Interest rates on deposits of public money.

Compiler's Comments

1985 Amendment: In two places, after "savings and loan association" inserted "or credit union".

7-6-204. Crediting of interest — exceptions.

Compiler's Comments

2003 Amendment: Chapter 214 inserted (1)(c) requiring credit for interest paid unless otherwise provided by subsections (2) and (3); in (2) at beginning inserted "Subject to subsection (1)"; in (3) at beginning inserted "Subject to subsection (1)", after "investments of" substituted "any fund separately created and accounted for by a county, city, or town" for "the county road fund or county bridge fund", after "credited to the" substituted "separately created" for "county road fund or county bridge", and at end after "fund" inserted "proportionately to each fund's participation in the deposit or investment"; and made minor changes in style. Amendment effective July 1, 2003.

2001 Amendment: Chapter 278 in (1) near beginning after "Unless otherwise provided" inserted "by law or by the terms of a gift, grant, or donation". Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1993 Amendment: Chapter 130 inserted (3) allowing interest earned on county road or bridge fund money to be credited to the road or bridge fund; and made minor changes in style. Amendment effective July 1, 1993.

1981 Amendment: In (2), substituted "Title 7, chapter 33, part 21 or 23" for "[Title 19, chapter 12]".

Attorney General's Opinions

Distribution of Interest on Protested Tax Payments: Interest accrued on amounts held in a protest fund established under 15-1-402 is not "public money" under 7-6-201 through 7-6-206 and therefore must be distributed to the affected taxing units in the same proportion as the tax amounts in the fund are paid to those units. 41 A.G. Op. 60 (1986).

7-6-205. Demand deposits.

Compiler's Comments

1997 Amendment: Chapter 229 substituted "may" for "shall"; deleted (2) that required a local government to distribute demand deposits ratably among all banks within the boundary of the local government (see 1997 Session Law for text); and made minor changes in style.

7-6-206. Time deposits — repurchase agreement.

Compiler's Comments

1995 Amendment: Chapter 406 in first sentence of (1), after "that is not invested", deleted "in direct obligations of the United States government or in mutual funds"; and made minor changes in style. Amendment effective April 13, 1995.

Saving Clause: Section 4, Ch. 406, L. 1995, was a saving clause.

Applicability: Section 5, Ch. 406, L. 1995, provided: "This act does not apply to and does not require the sale of securities that were legal investments before [the effective date of this act] [effective April 13, 1995]. Upon the liquidation of an investment authorized prior to [the effective date of this act] [effective April 13, 1995], the proceeds must be invested pursuant to [this act]."

1993 Amendment: Chapter 271 in (1), after "United States government", inserted "or in mutual funds"; and made minor changes in style.

1989 Amendment: Near end of first sentence of (1) substituted "state" for "county, city, or town" and at end of second sentence deleted reference to subsection (3); deleted former (2) that read: "(2) When more than one bank, savings and loan association, or credit union is available in any county for the time or savings deposit of such county funds or in any city or town for the time or savings deposit of such banks, savings and loan associations, and credit unions qualifying therefor and substantially in proportion to the total property taxes paid during the preceding year in such county or the county in which such city or town is located and the corporation license taxes paid by each ban, savings and loan association, or credit union willing to receive such time or savings deposits under the terms of this part"; substituted language in (2) relating to bids for time or savings deposits for former (3) that read: "(3) In lieu of a ratable distribution among banks, savings and loan associations, and credit unions within the county, city, or town, the local governing body may solicit bids without advertising from any bank, savings and loan association, or credit union in a county having at least two such financial institutions. Such institutions may request in writing that they be listed for solicitation on bids for public money not necessary for immediate use by the unit of local government. In counties having less than two such institutions, the local governing body may solicit bids from and deposit public money in such institutions in neighboring counties unless the local financial institution agrees to pay the same rate of interest bid by the neighboring financial institutions. The governing body may solicit bids by notice sent by mail to the investment institutions whose names are listed as provided herein. The provisions of this subsection shall be considered as meeting the requirements of subsection (2)"; and made minor changes in phraseology.

1985 Amendment: Throughout section inserted references to credit union(s) and made minor changes in phraseology.

1981 Amendment: Added "or placed in repurchase agreements as authorized in 7-6-213, and money placed in repurchase agreements is subject to subsections (2) and (3)" at the end of (1); inserted "time or savings" before "deposit of such county funds" and before "deposit of such city or town funds" in (2).

7-6-207. Deposit security.

Compiler's Comments

1985 Amendment: In (1)(a) inserted "if the institution in which the deposit is made has a net worth to total assets ratio of 6% or more"; and inserted first sentence of (1)(b) relating to such ratio of less than 6%.

1983 Amendments — Composite Section: Chapter 217, in (2), deleted last part of second sentence, which read: ", and the state of Montana and the form of receipt and the trustee have been approved by the department of administration"; and made minor phraseology changes.

Chapter 287 substituted reference to Department of Commerce for reference to Department of Administration, which was deleted by Ch. 217.

1981 Amendment: Substituted "department of administration" for "department of community affairs" in (2).

Transfer of Function: The function of the Department of Commerce in this section was transferred from the Department of Administration by sec. 1, Ch. 287, L. 1983. Those functions were transferred to the Department of Administration from the Department of Community Affairs by sec. 7, Ch. 274, L. 1981.

7-6-208. Substitution of deposit security.

Compiler's Comments

1985 Amendment: Throughout section inserted references to credit union and made minor changes in phraseology.

7-6-211. Report by financial institution.

Compiler's Comments

1985 Amendment: Throughout section inserted references to credit union and made minor changes in phraseology.

7-6-212. Limitation on liability of treasurer or town clerk.

Case Notes

Treasurer Held Not Liable: When the City Treasurer had complied with the provisions of the law as then constituted but the city lost money upon the failure of its depository bank, the Treasurer was held not liable. Billings v. Mass. Bonding & Ins. Co., 88 M 91, 290 P 246 (1930); State ex rel. School District v. McGraw, 74 M 152, 240 P 812 (1925).

7-6-213. Repurchase agreements — bidding.

Compiler's Comments

1985 Amendment: In (1) substituted "one or more repurchase agreements, including daily repurchase agreements" for "a repurchase agreement"; in (4) near beginning changed "shall" to "may"; and in (5), near middle after "do business in", substituted "the state of Montana" for "its jurisdiction" and near end before "and range of funds", deleted "security pledge requirements".

Part 5
Local Government Levy for Juvenile Detention Programs

7-6-501. Definitions.

Compiler's Comments

1999 Amendment: Chapter 536 in definition of juvenile detention program inserted (c) concerning educational program; and made minor changes in style. Amendment effective April 29, 1999.

1997 Amendments: Chapter 286 in (2)(a) inserted reference to 41-5-1503, 41-5-1512, and 41-5-1513.

Chapter 550 in definition of youth substituted "youth in need of intervention" for "youth in need of supervision"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Section 79, Ch. 550, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Effective Date: Section 6, Ch. 745, L. 1991, provided that this section is effective July 1, 1991.

7-6-502. Levy for juvenile detention programs.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) at beginning substituted "Subject to 15-10-420" for "If approved by a majority of the qualified electors voting on the question". Amendment effective July 1, 2001.

Effective Date: Section 6, Ch. 745, L. 1991, provided that this section is effective July 1, 1991.

Attorney General's Opinions

Levy for Juvenile Detention Facility Not Subject to Voter Approval Unless Increase Sought in Previous Levy: House Bill No. 74, passed by the 1991 Legislature and approved as Ch. 745, L. 1991, does not require that a levy for juvenile detention facilities be approved by the voters subsequent to initial voter approval unless there is a proposal to increase the amount of the previously approved levy. If a governing body decides at any time that an increase in mills is necessary, it must follow the procedures outlined in 7-6-2531 (now repealed). 44 A.G. Op. 14 (1991).

Part 6
Local Government Accounting

Part Compiler's Comments

Effective Date: Section 69, Ch. 430, L. 1995, provided: "[This act] [Title 7, ch. 6, part 6] is effective on passage and approval." Approved April 13, 1995.

Part Attorney General's Opinions

Setting of Compensation for Mosquito Control Board Employees — Approval Required: A mosquito control board may not set the level of compensation of board employees without the approval of the Board of County Commissioners. 47 A.G. Op. 11 (1998). See also 38 A.G. Op. 35 (1979).

Setting of Compensation for Weed Control Board Employees — Approval Required: A weed control board may not set the level of compensation of board employees without the approval of the Board of County Commissioners. 47 A.G. Op. 11 (1998). See also 38 A.G. Op. 35 (1979).

7-6-609. Declaration of policy.

Compiler's Comments

Effective Date: Section 63, Ch. 278, L. 2001, provided: "[This act] is effective July 1, 2001."

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

7-6-610. Fiscal year for local governments.

Compiler's Comments

Effective Date: Section 63, Ch. 278, L. 2001, provided: "[This act] is effective July 1, 2001."

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

7-6-611. Role of department of administration.

Compiler's Comments

2003 Amendment: Chapter 114 in (3) substituted "department of administration" for "department of commerce". Amendment effective October 1, 2003.

Code Commissioner Instruction: Pursuant to sec. 221(1), Ch. 483, L. 2001, in (1), (2), (3), and (4) the code commissioner changed "department of commerce" to "department of administration".

Effective Date: Section 63, Ch. 278, L. 2001, provided: "[This act] is effective July 1, 2001."

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

7-6-612. Additional records and reports.

Compiler's Comments

2003 Amendment: Chapter 114 deleted former (5) that read: "(5) The provisions of subsections (3) and (4) apply to local governments that are not subject to an independent audit pursuant to 2-7-503 and are in addition to laws specifically applying to those local governments"; and made minor changes in style. Amendment effective October 1, 2003.

Effective Date: Section 63, Ch. 278, L. 2001, provided: "[This act] is effective July 1, 2001."

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

7-6-613. Procedure to transfer funds.

Compiler's Comments

Effective Date: Section 63, Ch. 278, L. 2001, provided: "[This act] is effective July 1, 2001."

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

7-6-614. Procedure to close inactive funds.

Compiler's Comments

Effective Date: Section 63, Ch. 278, L. 2001, provided: "[This act] is effective July 1, 2001."

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

7-6-615. Authorization to maintain petty cash fund.

Compiler's Comments

Effective Date: Section 63, Ch. 278, L. 2001, provided: "[This act] is effective July 1, 2001."

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

7-6-616. Capital improvement funds.

Compiler's Comments

2003 Amendment: Chapter 35 throughout section substituted "capital improvement fund" for "capital improvement program"; in (1) near beginning after "municipal" inserted "or special district" and after "body may" substituted "establish" for "provide for"; in (2) after "municipal" inserted "or special district"; in (3) near middle after "from" deleted "up to 10% of one or more property tax levies and may receive funds from" and after "source" inserted "including funds that

have been allocated in any year but have not been expended or encumbered by the end of the fiscal year"; inserted (4) regarding investment of money in the capital improvement fund; and made minor changes in style. Amendment effective July 1, 2003.

Effective Date: Section 63, Ch. 278, L. 2001, provided: "[This act] is effective July 1, 2001."

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

7-6-617. Payment of fees and taxes by credit card and other commercially acceptable means.

Compiler's Comments

Effective Date: Section 3, Ch. 268, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 9, 2003.

Part 11
Tax and Revenue Anticipation Notes

7-6-1102. Short-term obligations authorized.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§24, 27.

7-6-1103. Issuance and sale of short-term obligations — procedure.

Compiler's Comments

1995 Amendment: Chapter 423 at end of (2)(b) deleted reference to subsection (2) of 7-7-4434; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1987 Amendment: In (2)(a) changed "Montana economic development board" to "board of investments".

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §24.

7-6-1105. Refunding and renewal of short-term obligations.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §24.

7-6-1111. Short-term obligations — security.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§259, 439.

7-6-1112. Funds for payment of principal and interest.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§24, 259, 439.

Part 15
Resort Tax

Part Attorney General's Opinions

Municipal Tiered Resort Tax Allowed: Resort tax statutes neither prohibit nor explicitly permit a differential tax schedule. However, a differential tax structure is not inconsistent with concerns revealed in the legislative history and may arguably further the express statutory purposes by taxing at a higher rate those businesses drawing more of their customers from tourists than those businesses serving a greater proportion of local residents. Therefore, a municipality with self-governing powers may establish a tiered resort tax schedule providing different tax rates for similar goods or services according to the character of the business in which the goods or services are offered, as long as none of the tax rates exceed 3%. 48 A.G. Op. 25 (2000).

7-6-1501. Resort tax — definitions.

Compiler's Comments

1995 Amendment: Chapter 554 in (5)(b) substituted "5,500" for "2,500"; and in (5)(c) substituted "primary" for "major" and inserted "related to current employment". Amendment effective April 26, 1995.

1991 Amendment: In introductory clause extended reference to 7-6-4469 (renumbered 7-6-1509); in definition of luxuries, in second sentence, inserted "appliances, hardware supplies and tools"; and inserted definition of resort area. Amendment effective July 1, 1991.

Preamble: The preamble to Ch. 729, L. 1985, which enacted 7-6-4461 through 7-6-4467 (renumbered 7-6-1501 through 7-6-1507), provided: "WHEREAS, many municipalities in the State of Montana rely upon tourism for the bulk of their livelihood; and

WHEREAS, the tourist industry tends to be seasonally cyclical; and

WHEREAS, such cycles are reflected in demands for services and capital expenditures that do not occur for a community with a steady economy; and

WHEREAS, tourist income, tending to be spent for services and consumables originating in communities other than the resort community, is not translated into taxable real property; and

WHEREAS, the resort community must provide services not only for tourists but for its own residents, and those services are not commensurate with the taxable value of the resort community as compared with steady income municipalities of similar populations.

THEREFORE, it is the intent of this act to rectify this inequity by providing for a resort tax that may be locally enacted which would tax tourists to reimburse the resort community for the services provided to tourists."

Collateral References

68 Am. Jur. 2d Sales and Use Taxes §87, et seq.

7-6-1503. Limit on resort tax rate — goods and services subject to tax.

Compiler's Comments

1995 Amendment: Chapter 554 in (2)(a) inserted exception clause; and made minor changes in style. Amendment effective April 26, 1995.

1991 Amendment: In (2)(a), after "community", inserted "or area"; and inserted (2)(a)(iv) concerning destination ski resorts and destination recreational facilities. Amendment effective July 1, 1991.

1987 Amendment: Made (2)(b) freestanding in outline for style purposes.

Attorney General's Opinions

Municipal Tiered Resort Tax Allowed: Resort tax statutes neither prohibit nor explicitly permit a differential tax schedule. However, a differential tax structure is not inconsistent with concerns revealed in the legislative history and may arguably further the express statutory purposes by taxing at a higher rate those businesses drawing more of their customers from tourists than those businesses serving a greater proportion of local residents. Therefore, a municipality with self-governing powers may establish a tiered resort tax schedule providing different tax rates for similar goods or services according to the character of the business in which the goods or services are offered, as long as none of the tax rates exceed 3%. 48 A.G. Op. 25 (2000).

Collateral References

68 Am. Jur. 2d Sales and Use Taxes §65, et seq.

7-6-1504. Resort tax — election required — procedure — notice.

Compiler's Comments

1995 Amendment: Chapter 554 inserted (6) regarding publication of notice; and made minor changes in style. Amendment effective April 26, 1995.

1991 Amendment: In two places in (1), after "community", inserted "or area"; inserted (2)(b) concerning resort tax election for resort area; inserted (3) concerning resort area that is in more than one county; at beginning of (4)(d) deleted "may specify"; and made minor changes in style. Amendment effective July 1, 1991.

Attorney General's Opinions

Municipal Tiered Resort Tax Allowed: Resort tax statutes neither prohibit nor explicitly permit a differential tax schedule. However, a differential tax structure is not inconsistent with concerns revealed in the legislative history and may arguably further the express statutory purposes by taxing at a higher rate those businesses drawing more of their customers from tourists than those businesses serving a greater proportion of local residents. Therefore, a municipality with self-governing powers may establish a tiered resort tax schedule providing different tax rates for similar goods or services according to the character of the business in which the goods or services are offered, as long as none of the tax rates exceed 3%. 48 A.G. Op. 25 (2000).

7-6-1505. Resort tax administration.

Compiler's Comments

1997 Amendment: Chapter 327 inserted (1)(c) concerning resort area district board of directors; and made minor changes in style. Amendment effective April 21, 1997.

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

1991 Amendment: Inserted (1) defining governing body; in (2), after "governing body", deleted "of the resort community"; in (3)(a), (3)(d)(ii), and (4)(b)(ii) substituted "governing body" for "resort community"; in (3)(b) and (3)(c), before "office", deleted "local government" and after "employee" inserted "of the governing body"; in (3)(d)(iii) inserted reference to revocation of county business license; and made minor changes in style. Amendment effective July 1, 1991.

Collateral References

68 Am. Jur. 2d Sales and Use Taxes §246, et seq.

7-6-1506. Use of resort community tax revenues — bond issue — pledge.

Compiler's Comments

1987 Amendment: Inserted (2) authorizing issuance of bonds; and inserted (3) relating to pledge for repayment of bonds.

Retroactive Applicability: Section 3(2), Ch. 40, L. 1987, provided for retroactive application to taxable years beginning after December 31, 1986.

7-6-1508. Establishment of a resort area — taxing authority — approval by electorate.

Compiler's Comments

Effective Date: Section 8, Ch. 549, L. 1991, provided: "[This act] is effective July 1, 1991."

7-6-1509. Use of resort area tax.

Compiler's Comments

1997 Amendment: Chapter 327 at beginning of (1)(a) inserted exception clause; inserted (1)(b) concerning resort area district expenditures; in (2), at beginning, inserted "If the electors of a resort area have not established a resort area district"; and made minor changes in style. Amendment effective April 21, 1997.

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 8, Ch. 549, L. 1991, provided: "[This act] is effective July 1, 1991."

7-6-1531. Resort area district — definitions.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1532. Resort area district authorized.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1533. Petition to create resort area district.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1534. Resort area district — notice of petition — hearing required.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1535. Resort area district — hearing on petition.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1536. Resort area district — election required — notice.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1537. Conduct of election on question of creating resort area district.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1538. Qualifications to vote on question of creating resort area district.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1539. Resolution creating resort area district upon favorable vote.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1540. Resort area district — certificate of incorporation from secretary of state.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1541. General powers of resort area district.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1542. Resort area district board powers related to administration and expenditure of resort tax revenue.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1543. Resort area district to be governed by board — composition — qualifications — term of office.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1544. Resort area district board — election — term.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1545. Resort area district board election — canvass of vote.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1546. Resort area district board — vacancy.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1547. Resort area district board — meetings.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1548. Referendum to dissolve resort area district.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1549. Conduct of election on question of dissolving resort area district — qualification of electors.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

7-6-1550. Resolution dissolving resort area district upon favorable vote.

Compiler's Comments

Saving Clause: Section 24, Ch. 327, L. 1997, was a saving clause.

Effective Date: Section 25, Ch. 327, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 21, 1997.

Part 21
Office of County Treasurer

Part Case Notes

Property Tax Refund — County Treasurer Not Agent of Department of Revenue: The District Court properly refused a taxpayer's motion to compel a County Treasurer to sign and comply with the terms of a settlement agreement between the Department of Revenue and the taxpayer in a suit over property taxes. A tax refund was at stake, but the taxpayer had failed to comply with the provisions of 15-1-401. The Supreme Court held that rather than being a mere agent of the Department of Revenue, the Treasurer represents a significant part of the tax refund process and cannot be compelled to sign an agreement entitling a taxpayer to a refund without his compliance with 15-1-401. Eagle Communications, Inc. v. County Treasurer, 211 M 195, 685 P2d 912, 41 St. Rep. 1303 (1984).

7-6-2111. Duties of county treasurer.

Compiler's Comments

2001 Amendment: Chapter 278 deleted former (1)(d) that read: "(d) may not enter money received for the current year on the treasurer's account with the county for the past fiscal year until after the treasurer's annual settlement for the past year has been made with the county clerk"; deleted former (2) that read: "(2) This section does not apply to a county that has adopted the alternative accounting method provided for in Title 7, chapter 6, part 6"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1995 Amendment: Chapter 430 inserted (2) providing exception for county that has adopted alternative accounting method provided in Title 7, chapter 6, part 6; and made minor changes in style. Amendment effective April 13, 1995.

Case Notes

Bond Payment by Warrant: It was contended that holders of county bonds cannot be required to accept county warrants in payment of principal and interest due on the bonds. The Supreme Court held that such is the manner in which under this section counties discharge their obligations. If there are no funds to pay the warrants but no showing that the bondholders cannot cash them without a discount, it cannot be said that the obligation of the county to such holders is in any manner impaired. Great N. Ry. v. Phillips County, 112 M 542, 118 P2d 754 (1941).

Ministerial Officer: The County Treasurer is a ministerial officer, without authority other than that conferred on him by statute, and he is not required to perform any duties not imposed on him by law. Rosebud County v. Smith, 92 M 75, 9 P2d 1071 (1932).

Warrants:

Where the petition for Writ of Mandate to compel a County Treasurer to register warrants shows on its face that the warrants were not properly made out, signed, or executed, it does not state facts sufficient to justify the granting of the Writ, since such a warrant is no warrant at all, and upon its presentation the officer may entirely disregard it. State ex rel. Lockwood v. Tyler, 64 M 124, 208 P 1081 (1922).

The owner of a warrant which the Treasurer refuses to pay cannot obtain a money judgment against the county in an action on the warrant. Greeley v. Cascade County, 22 M 580, 57 P 274 (1899).

Accounting for Funds: The duty of a County Treasurer to account for and pay over the money paid directly to him by members of the public, as revenue due the county, or directed by a court or by statute to be deposited with him for safekeeping, is clearly statutory, and his liability for dereliction in this respect is a liability created by statute. Gallatin County v. USF&G Co., 50 M 55, 144 P 1085 (1914), distinguished in School District v. Pondera County, 89 M 342, 297 P 498 (1931).

Payment of Juror's Certificates: The phrase, "or as otherwise provided by law", in subsection (5) includes juror's certificates, and the restrictions as to the power of payment by the Treasurer applies as well to them as to other claims against the county. Silver Bow County v. Davies, 40 M 418, 107 P 81 (1910); In re Farrell, 36 M 254, 92 P 785 (1907).

Disbursement of County Funds: The provisions of this section are mandatory. The use of the word "only" in subsection (5) limits the power of the Treasurer to pay out the money of the county, both as to the amount and the precedent conditions of payment. Silver Bow County v. Davies, 40 M 418, 107 P 81 (1910); In re Farrell, 36 M 254, 92 P 785 (1907).

Attorney General's Opinions

Duty of County Treasurer to Break Out Amount Received as Payment for City Special Improvement District Assessments: A County Treasurer, when remitting taxes to a city, must break out the amount received from taxpayers as payment for the city's special improvement district assessments. 43 A.G. Op. 48 (1989).

Timeliness of Mailed Property Tax Payments — Postmark: Property tax payments deposited in the United States mail on or before payment deadlines enumerated in 15-16-102, as shown by the postmark on the envelope received by the Treasurer's office, are considered timely paid irrespective of the date upon which such payment is actually received by the County Treasurer. 40 A.G. Op. 12 (1983).

7-6-2113. Effect of failure to make treasurer's report.

Compiler's Comments

2001 Amendment: Chapter 278 in first sentence near middle after "report as required in" substituted "7-6-612" for "7-6-2112"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

7-6-2114. Inspection of treasurer's books and records.

Compiler's Comments

2001 Amendment: Chapter 483 in (2) after "department of" substituted "administration" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

1983 Amendment: Substituted reference to department of commerce for reference to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs" in (2).

Transfer of Function: The function of the Department of Commerce in this section was transferred from the Department of Administration by sec. 1, Ch. 287, L. 1983. Those functions were transferred to the Department of Administration from the Department of Community Affairs by sec. 7, Ch. 274, L. 1981.

Attorney General's Opinions

Manner in Which Duties Performed — No Control by Commissioners: The County Commissioners, in the exercise of their statutory supervisory control over county officers, may assure that the officers fulfill their statutory duties but may not assume control over the manner in which those duties are performed. 38 A.G. Op. 85 (1980).

Supervisory Power Over All Enumerated County Officers: The supervisory power of the County Commissioners under 7-4-2110 extends to all county executive officers enumerated in 7-4-2203. 38 A.G. Op. 85 (1980).

7-6-2116. Receipt for money paid to county treasurer.

Compiler's Comments

1987 Amendment: In (1), at beginning, inserted exception clause; and inserted (2) requiring County Treasurer to issue receipts for money paid through the mail or by electronic means.

7-6-2131. Fees of county treasurer.

Compiler's Comments

1989 Amendment: Increased fee from $3 to $25 plus actual costs incurred. Amendment effective July 1, 1989.

7-6-2141. Coordination of state revenue collected by counties — duties of department of administration.

Compiler's Comments

2001 Amendment: Chapter 483 in (1) in first sentence after "department of" substituted "administration" for "commerce". Amendment effective July 1, 2001.

Preamble: The preamble to Ch. 369, L. 1987, provided: "WHEREAS, by law counties are required to collect certain revenues on behalf of the state; and

WHEREAS, counties receive limited and conflicting instructions from the various departments of state government concerning the collection of revenue by the state; and

WHEREAS, a recent audit identified many of these problems and recommended that a single state agency be designated to coordinate the collection of state revenue by the counties."

Part 22
General Provisions Related to Counties

Part Attorney General's Opinions

Authority of Local Government to Levy Additional Mills to Make Up Difference Between Light Vehicle Tax Reimbursement and Amount Assessed for Fiscal Year 2001: In enacting 15-1-121, the Legislature provided for a reimbursement of an average of 88% of the amount lost by counties in light vehicle fee collections compared to the amount that the counties actually received in combined fees and property taxes in fiscal year 2001. The legislative intent was to simplify the collection and disbursement of county revenue while maintaining rough revenue neutrality for the counties. Under 15-10-420, the Legislature also provided an inflation adjustment to the mill levy cap and allowed for an increase in mill levy capacity for a decrease in reimbursements, in effect enabling local governments to maintain for fiscal year 2002 the amount of revenue collected in fiscal year 2001. Thus, a local government was authorized to levy additional mills sufficient to make up the difference between the amount reimbursed by the state for light vehicle fees and taxes under 15-1-121 and the amount of fees and taxes assessed by the local government for fiscal year 2001. 49 A.G. Op. 4 (2001).

Mill Levy Increase — Proration to Parts of Fiscal Year to Accommodate October Effective Date: Section 7-14-2501 was amended in 1981 to authorize the Board of County Commissioners to levy 15 mills rather than 12 mills for the county road fund. The increase, under the 1981 amendments to 1-2-201, becomes effective October 1, 1981. However the county budget year begins July 1, 1981. The reasonable way to give effect to both amendments is to construe them to allow the Board to apply a rate of 12 mills for the 3 months of the current county fiscal year which fall

before October 1, 1981, and a rate of 15 mills for the 9 months of the current county fiscal year which fall after October 1, 1981. (See 2001 amendment to 7-14-2501.) 39 A.G. Op. 29 (1981).

7-6-2202. Duties of county clerk related to finance.

Compiler's Comments

2001 Amendment: Chapter 278 in (3) at end after "annual statement" substituted "prescribed by the department of commerce" for "as prescribed in 7-6-2203"; deleted former (4) that read: "(4) This section does not apply to a county that has adopted the alternative accounting method provided for in Title 7, chapter 6, part 6"; and made minor changes in style. Amendment effective July 1, 2001.

Code Commissioner Instruction: Pursuant to sec. 221(1), Ch. 483, L. 2001, in (3) the code commissioner changed "department of commerce" to "department of administration".

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1995 Amendment: Chapter 430 inserted (4) providing exception for county that has adopted alternative accounting method provided in Title 7, chapter 6, part 6; and made minor changes in style. Amendment effective April 13, 1995.

Case Notes

Drainage District Assessments — Liquidated Claims: Assessments made by drainage district under section 89-2813, R.C.M. 1947 (since repealed), for such things as construction and maintenance, become judgments when confirmed by District Court, and when levied for benefits accruing to highways are liquidated claims which do not require audit by Board of Commissioners; however, general county budget law must be observed in payment. State ex rel. Valley Center Drain District v. Big Horn County, 100 M 581, 51 P2d 635 (1935).

7-6-2225. County hard-rock mine trust reserve account — expenditure restrictions.

Compiler's Comments

1999 Amendment: Chapter 144 in (1) substituted "15-37-117(1)(e)" for "15-37-117(1)(f)"; and made minor changes in style. Amendment effective July 1, 1999.

The amendment to this section made by sec. 1, Ch. 552, L. 1999, was rendered void by sec. 12(2), Ch. 552, L. 1999, a contingent voidness provision.

1995 Amendment: Chapter 577 in (1) substituted reference to 15-37-117(1)(f) for reference to 15-37-117(1)(d); and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 22, Ch. 672, L. 1989, was a saving clause.

Effective Date — Retroactive Applicability: Section 23, Ch. 672, L. 1989, provided: "[This act] is effective on passage and approval [approved May 16, 1989] and applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1988."

7-6-2226. Metal mines tax reserve account.

Compiler's Comments

1999 Amendment: Chapter 144 in first sentence in (1) substituted "15-37-117(1)(e)" for "15-37-117(1)(f)". Amendment effective July 1, 1999.

The amendment to this section made by sec. 2, Ch. 552, L. 1999, was rendered void by sec. 12(2), Ch. 552, L. 1999, a contingent voidness provision.

1995 Amendment: Chapter 577 in (1) substituted reference to 15-37-117(1)(f) for reference to 15-37-117(1)(d); and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 22, Ch. 672, L. 1989, was a saving clause.

Effective Date — Retroactive Applicability: Section 23, Ch. 672, L. 1989, provided: "[This act] is effective on passage and approval [approved May 16, 1989] and applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1988."

Part 24
County Auditor and Claims Against County

Part Case Notes

Failure of Commissioners to Provide Suitable Office Room: The acts of the County Commissioners in furnishing the Auditor, as an office, an 8- x 22-foot partitioned space, with no windows, insufficient ventilation, and artificial lighting, was an abuse of discretion and an arbitrary act. State ex rel. Taylor v. Bd. of County Comm'rs, 128 M 102, 270 P2d 994 (1954).

Woman May Be Auditor: Since the adoption of the suffrage amendment to the 1889 Montana Constitution, a woman, otherwise qualified, is entitled to hold the office of County Auditor. Rose v. Sullivan, 56 M 480, 185 P 562 (1919).

7-6-2401. Creation of office of county auditor.

Compiler's Comments

2003 Amendment: Chapter 145 in (1) at beginning deleted "Except as provided in subsection (2)" and at end after "fourth class" inserted "that have a population in excess of 15,000"; in (2) substituted text relating to the creation of a county auditor's position in combination with another position for former text that read: "(2) The provisions of 7-6-2401 through 7-6-2413 do not apply to counties having a population of less than 15,000 persons according to the most recent federal census"; inserted (3) providing that the provisions of 7-6-2403 through 7-6-2412 do not apply to counties without a county auditor; and made minor changes in style. Amendment effective October 1, 2003.

Part of Section Not Codified: A "grandfather clause" at the end of section 16-3201, R.C.M. 1947, relating to the continued holding of office of current officeholders in fifth-class counties was not codified because it was temporary. That clause was not repealed and is valid law. It may be referred to as sec. 1, Ch. 52, L. 1961.

Case Notes

County of Sixth Class — Accountant Hired to Audit Books — Void: Under this section a county of the sixth class is not entitled to an auditor, and when such county entered into a contract with a public accountant for an audit of its books at a monthly compensation of $150 for a period of several years, the contract was void for the reason that it nullified this section. Judith Basin County ex rel. Vralsted v. Livingston, 89 M 438, 298 P 356 (1931).

Attorney General's Opinions

No Authority of Board of County Commissioners to Reduce County Auditor Office to Part-Time Position: Montana statutes contemplate a full-time County Auditor with a full-time salary in every county with a population of greater than 15,000. Although County Commissions do have the authority to consolidate certain county offices, including the County Auditor's office, no existing statute contemplates a reduction of the office of County Auditor to a part-time position. Had the Legislature intended to expressly authorize County Commissions to reduce the office, it would have adopted legislation similar to that for County Attorneys and County Superintendents. The authority in 7-6-2412 extends to the imposition of additional County Auditor duties, not to the reduction of hours worked. There is no express or implied authority for counties with general powers to reduce the office of County Auditor to a half-time position. 47 A.G. Op. 18 (1998).

7-6-2407. Examination and investigation of claims.

Compiler's Comments

2003 Amendment: Chapter 371 at end of (1) substituted "who shall investigate and examine all claims presented" for "whose duty it shall be to audit the same. The county auditor shall also investigate and examine all claims presented to him and report the same with his finding to the board of county commissioners at their regular session after such investigation shall have been completed, with his approval or disapproval endorsed thereon, and he shall keep a complete record of all such claims and of his investigations and examinations of the same in a book kept for that purpose"; inserted (2) and (3) regarding duties of county auditor after receipt of claim; in (4)(b) at end of first sentence deleted "provided, however, that the judge of the district court of the county where any claim has been disapproved by the county auditor may order the payment of the same"; inserted (4)(b)(i) through (4)(b)(iii) outlining requirements for county auditor upon disapproval of claim payment; and made minor changes in style. Amendment effective April 16, 2003.

Case Notes

Disallowance of Claims: The Board may exercise its judgment in ordering paid those claims which have the approval of the Auditor, but the only power which the Board has in reference to claims disapproved by him is to disallow them. State ex rel. Dolin v. Major, 58 M 140, 192 P 618 (1920).

District Court Approval of Disallowed Claims: It would seem that the proviso empowering District Judges to order the payment of claims against the county after the approval by the Auditor is repugnant to Art. IV, sec. 1, 1889 Mont. Const. (similar to Art. III, sec. 1, 1972 Mont. Const.), for the reason that it undertakes to cast upon District Judges a power which pertains

exclusively to the executive branch of the government. State ex rel. Dolin v. Major, 58 M 140, 192 P 618 (1920).

Scope of "Audit": The word "audit" is not used in its narrow and restricted sense and does not limit the Auditor to merely ascertaining whether the claims are in proper form and mathematically correct. State ex rel. Dolin v. Major, 58 M 140, 192 P 618 (1920).

7-6-2408. Auditor's powers related to investigations.

Case Notes

Scope of County Auditor's Duties — Adequate Budget: A County Auditor brought an action seeking a Writ of Mandamus to compel the respondent Board of County Commissioners to include sufficient funds in the Auditor's budget to allow the Auditor to conduct audits to determine county compliance with applicable statutes. The Supreme Court overruled the issuance of the Writ by stating that while the Board has a legally enforceable duty to fund the Auditor's office at a level that allows her to perform her duties at the minimum level imposed by law, the language of the applicable statute and a comparison of the Auditor's duty under 7-6-2409 with the duties of the Legislative Auditor and the duties of the Department of Community Affairs (now Department of Administration) indicates that the County Auditor's functions under 7-6-2409 are limited to bookkeeping and account balancing. This conclusion is also indicated by the fact that the Legislature has required no professional qualifications of the County Auditors but has established minimum levels of education and experience for the Legislative Auditor. Reep v. Bd. of County Comm'rs, 191 M 162, 622 P2d 685, 38 St. Rep. 108 (1981).

7-6-2409. Examination of county books and accounts.

Case Notes

Scope of County Auditor's Duties — Budget: A County Auditor brought an action seeking a Writ of Mandamus to compel the respondent Board of County Commissioners to include sufficient funds in the Auditor's budget to allow the Auditor to conduct audits to determine county compliance with applicable statutes. The Supreme Court overruled the issuance of the Writ by stating that while the Board has a legally enforceable duty to fund the Auditor's office at a level that allows her to perform her duties at the minimum level imposed by law, the language of the applicable statute and a comparison of the Auditor's duty under 7-6-2409 with the duties of the Legislative Auditor and the duties of the Department of Community Affairs (now Department of Administration) indicates that the County Auditor's functions under 7-6-2409 are limited to bookkeeping and account balancing. This conclusion is also indicated by the fact that the Legislature has required no professional qualifications of the County Auditors but has established minimum levels of education and experience for the Legislative Auditor. Reep v. Bd. of County Comm'rs, 191 M 162, 622 P2d 685, 38 St. Rep. 108 (1981).

7-6-2412. Other duties of auditor.

Attorney General's Opinions

No Authority of Board of County Commissioners to Reduce County Auditor Office to Part-Time Position: Montana statutes contemplate a full-time County Auditor with a full-time salary in every county with a population of greater than 15,000. Although County Commissions do have the authority to consolidate certain county offices, including the County Auditor's office, no existing statute contemplates a reduction of the office of County Auditor to a part-time position. Had the Legislature intended to expressly authorize County Commissions to reduce the office, it would have adopted legislation similar to that for County Attorneys and County Superintendents. The authority in this section extends to the imposition of additional County Auditor duties, not to the reduction of hours worked. There is no express or implied authority for counties with general powers to reduce the office of County Auditor to a half-time position. 47 A.G. Op. 18 (1998).

7-6-2413. Limitation on number of deputy county auditors.

Case Notes

No Legal Duty to Fund Deputy Position: The Lewis and Clark County Auditor petitioned for a Writ of Mandamus to compel the Board of County Commissioners to fund a Deputy Auditor position eliminated by the Commissioners because of budget cuts. The District Court dismissed the petition on the ground that there was no legal duty of the Commissioners to fund the position. On appeal, the Supreme Court had to reconcile three statutes: 7-4-2401(1), under which county officers may appoint as many deputies or assistants as necessary to discharge the duties of the

office; 7-4-2402, which provides the County Commissioners with authority to fix and determine the number of county deputy officers; and 7-6-2413, which provides that the number of Deputy Auditors in first-, second-, and third-class counties must not exceed one. The court held that the specific statute, 7-6-2413, must control over the general statute, 7-4-2401(1). The specific statute does not mandate a Deputy Auditor but merely permits one deputy. Based on 7-4-2402, the court held that the authority to determine whether to appoint a deputy resides with the Commissioners and not the Auditor. Based on this statutory scheme, the court held that the Commissioners had no clear legal duty to fund the position of Deputy Auditor. Spotorno v. Bd. of Comm'rs, 212 M 253, 687 P2d 720, 41 St. Rep. 1722 (1984).

7-6-2421. Presentation of claims against county.

Compiler's Comments

2001 Amendment: Chapter 257 deleted former (4) that read: "(4) Money deposited in the county treasury pursuant to former section 16-2616, R.C.M. 1947, and not otherwise disposed of shall be transferred by the county treasurer to the state treasurer for deposit in the agency fund provided for in Title 72, chapter 14, part 2. The county treasurer may deduct the fees and expenses of the coroner and the county prior to transferring the money"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

Reference to R.C.M. Section: Section 16-2616, R.C.M. 1947, was repealed by Ch. 443, L. 1979. That section provided for the deposit of money found on a dead body.

Case Notes

General 792
Claims 793

GENERAL

Mandamus Proceeding Authorized: This section was not violated by Justice of the Peace seeking Writ of Mandamus to compel County Commissioners to pay for clerical services of a secretary because he was considered to be litigating his own right to incur actual and necessary expenses in the performance of his official duties. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184, 32 St. Rep. 1136 (1975).

Limitation — No Bar: Where, without first ascertaining the legal ownership thereof, a county appropriated a landowner's gravel, the landowner's action was not barred by the limitation of this section. Neil v. Lewis & Clark County, 133 M 323, 323 P2d 270 (1958).

Limitation — Not Applicable to Amended Claim: Where a Sheriff's claims during two terms in office had been approved by the Commissioners for mileage at the rate of 7 cents and 8 ½ cents per mile, and after retiring from office he presented additional claims for the difference between those rates and 10 cents per mile under 7-32-2144, he was not required to present the latter claims within 1 year after the last claim accrued, under this section, they having amounted to amendments of the original claims, the merits of which had been passed upon by the Board before approval. Weir v. Silver Bow County, 113 M 237, 124 P2d 1003 (1942), distinguished in Neil v. Lewis & Clark County, 133 M 323, 323 P2d 270 (1958).

Claim by Officer — Use of Own Equipment:

Mere benefits received will not ordinarily create an implied promise to pay, but if a county (or other municipal corporation) is required by law to furnish one of its officers with the necessary equipment for the performance of his duties, and it does not do so but knowingly permits him to use his own equipment, receiving benefits therefrom, it is liable for the reasonable value of its use as upon an implied contract. Hicks v. Stillwater County, 84 M 38, 274 P 296 (1929).

This section, providing that a county officer must not present any claim against the county, except for his own services, or aid another in procuring allowance of a demand against the county, does not bar an officer from presenting a valid claim against the county for use of his own equipment, the provision being merely intended to bar the officer from championing the claims of third persons. Hicks v. Stillwater County, 84 M 38, 274 P 296 (1929).

Pleading — Presentation of Claim — Condition Precedent: The presentation of a claim to the Board of County Commissioners is a condition precedent to the commencement of an action against the county for its recovery. Powder River Cattle Co. v. Comm'rs of Custer County, 9 M 145, 22 P 383 (1889); Greeley v. Cascade County, 22 M 580, 57 P 274 (1899). See also First Nat'l Bank of Billings v. Custer County, 7 M 464, 17 P 551 (1888).

Pleading — Allegations Required: A complaint in an action against a county to recover witness fees, which failed to allege that the claim had been presented under oath (deleted, Ch. 225, L. 1979) to the county, in separate items, with the nature of each item stated, was defective. First Nat'l Bank of Billings v. Custer County, 7 M 464, 17 P 551 (1888), distinguished in Neil v. Lewis & Clark County, 133 M 323, 323 P2d 270 (1958).

CLAIMS

School Money — Question of Law — No Discretion: A claim against the county within the meaning of this section, the presentation of which to the Board of County Commissioners is a condition precedent of an action for its recovery, does not comprehend a claim by a school district for its proportion of interest and penalties retained by the county on redemption of property from tax sale. This presents a question of the law dependent upon the meaning of statutes, thus leaving no room for the exercise of discretion lodged in the Board in passing upon the average claim presented for allowance. School District v. Pondera County, 89 M 342, 297 P 498 (1931).

Failed Consideration — Road Purchase: The subject matter of an action against a county by which it was sought to obtain compensation for land taken for road purposes under an agreement, the consideration for which failed, is not a "claim" against the county, within the meaning of this section, an action on which is barred if not brought within 1 year after its accrual. Flynn v. Beaverhead County, 54 M 309, 170 P 13 (1917), explained in Neil v. Lewis & Clark County, 133 M 323, 323 P2d 270 (1958).

Member of Sheriff's Posse: A person who serves as a member of a Sheriff's posse in obedience to a law requiring him to do so cannot recover from the county for expenses or services rendered, in the absence of an express or implied provision of law authorizing payment therefor. Sears v. Gallatin County, 20 M 462, 52 P 204 (1898). See State ex rel. McGrade v. District Court, 52 M 371, 157 P 1157 (1916).

Collateral References

Waiver of, or estoppel to rely upon, contractual limitation of fine for bringing action against municipality or other political subdivision. 81 ALR 2d 1039.

7-6-2423. Procedure for claims by county commissioners.

Case Notes

Does Not Authorize Claims: This section does not create any authority to compensate Commissioners. They may charge for services otherwise legal. This section is designed in connection with 7-6-2421 to enable the Board of County Commissioners to determine in the first instance whether it will even consider a claim. St. v. Story, 53 M 573, 165 P 748 (1917).

7-6-2424. Appeal of decision concerning claim.

Case Notes

Section Plain, Speedy, and Adequate Relief — Mandate as Remedy:

Where Justice of Peace incurred unbudgeted expenses and County Commissioners refused to pay, Writ of Mandate under 27-26-102, rather than appeal under this section or declaratory judgment, was proper remedy. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975).

District Court properly quashed Writ of Mandate to compel County Commissioners to allow claim of hospital for medical care of a floating sheepherder since there existed a plain, speedy, and adequate remedy at law by an appeal to the District Court from disallowance of claim by County Commissioners. State ex rel. Mont. Hosp. Ass'n, Inc. v. Pitch, 140 M 349, 372 P2d 90 (1962).

Appeals — How Tried:

Appeals from orders of the Board of County Commissioners disallowing claims against a county must, under this section, be tried and determined as appeals from Justices' Courts; i.e., they must be tried de novo (25-33-301 and 25-33-302). Yancey v. Park County, 111 M 73, 106 P2d 349 (1940).

The language of subsection (3) can mean no more than that the court may try de novo the question whether the action of the Board in its allowance or disallowance was correct. The Board is not a court, and its action is not tantamount to a judgment. Its refusal to allow a claim is not conclusive, even though the claimant does not appeal. Albers v. Barnett, 53 M 71, 161 P 521 (1916); Greeley v. Cascade County, 22 M 580, 57 P 274 (1899).

Appeals from actions of Boards of County Commissioners are prosecuted and tried like appeals from a Justice of the Peace. State ex rel. Seres v. District Court, 19 M 501, 48 P 1104 (1897).

Effect of Failure to Appeal Allowance of Claim — Suit by County Attorney: Failure of a taxpayer to appeal to the District Court from an order of the Board of County Commissioners allowing a claim against the county under the authority given him by this section does not limit the right of the County Attorney to sue in the name of the county to recover money illegally paid under 7-4-2714. Carbon County v. Draper, 84 M 413, 276 P 667 (1929).

Record on Appeal: An appeal from an order of the Board of County Commissioners disallowing a claim against the county was submitted to the District Court without a hearing, resulting in a reversal of the order. The County Attorney made an appeal from the court's order declining to set aside its decision on the ground of inadvertence and mistake based on the assertion that the Clerk of the Board had failed to lodge with the court a copy of the Board's record in the case. The Supreme Court held that it was apparent that to arrive at its decision the court must have impliedly found that the proper record was before it. Huntington v. Yellowstone County, 80 M 20, 257 P 1041 (1927).

Board to Allow or Disallow Claims Against County: When the Auditor has disapproved a claim, the Board of County Commissioners must disallow it so that the claimant may proceed to enforce it against the county by appeal to the District Court. State ex rel. Dolin v. Major, 58 M 140, 192 P 618 (1920).

Jurisdiction on Appeal: The jurisdiction of the District Court on appeal from an order made by County Commissioners allowing or disallowing a claim against the county is limited to the determination of the question whether the action of the Board of County Commissioners was correct and to a declaration affirming or reversing it, with a judgment for costs. Albers v. Barnett, 53 M 71, 161 P 521 (1916).

Parties:

On appeal from an order of the Board of County Commissioners allowing or disallowing a claim under this section, the parties are the county and the claimant, or in a taxpayer's suit, the county and the objecting taxpayer. Albers v. Barnett, 53 M 71, 161 P 521 (1916).

In the case of claims against counties, the claimant, or the objecting taxpayer, and the county are the real parties in interest, and therefore adversary parties. State ex rel. Hackshaw v. District Court, 48 M 477, 138 P 1100 (1913).

Independent Action on Claim: A claimant against the county has the right to maintain an independent action on a claim rejected by the Board of Commissioners in view of 27-2-209. Greeley v. Cascade County, 22 M 580, 57 P 274 (1899).

Appeal of Portion of Allowance: An appeal may be taken by a taxpayer from one or more items of a claim against the county allowed by the Commissioners, without appealing from the whole of the allowance. Twohy v. Bd. of Comm'rs, 17 M 461, 43 P 494 (1896).

Sufficiency of Notice — Waiver by Clerk: An appeal was taken by a taxpayer from the allowance by the Commissioners of a bill against the county. A notice of appeal was served upon the County Clerk, and the Clerk thereupon complied with applicable law on appeal. The Clerk thereby waived any irregularity or insufficiency of the service of the notice. Twohy v. Bd. of Comm'rs, 17 M 461, 43 P 494 (1896).

Appeal Allowance of Claims — Default Against County: A taxpayer took an appeal to the District Court from an allowance by a Board of County Commissioners of a claim against a county under sections 764 and 765, 5th Div. Comp. Stat. 1887. A judgment by default was rendered by the court upon the failure of the Board to appear, adjudging the claim illegal and setting aside the allowance of the same without a trial or inquiry of any character respecting its merits. The judgment was unauthorized and constituted no defense to an application for a Writ of Mandamus to compel the payment by the County Treasurer of a warrant issued in payment of such claim. State ex rel. Cope v. Minar, 13 M 1, 31 P 723 (1892), explained in Albers v. Barnett, 53 M 71, 161 P 521 (1916).

7-6-2426. Enumeration of county charges.

Compiler's Comments

2001 Amendment: Chapter 585 at end of (1)(b) inserted exception clause; inserted (2) requiring department of corrections to pay for certain criminal prosecution costs; and made minor changes in style. Amendment effective July 1, 2002.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1985 Amendment: Deleted former (5) that read: "the sums required by law to be paid to grand and trial jurors and witnesses in criminal cases".

Case Notes

Criminal Case — Sheriff's Out-of-State Expenses Denied: A Sheriff predicated his demand for reimbursement for expenses incurred by him for services performed beyond the state line upon his legal rights incident to his position as Sheriff and not upon a contract of employment by the County Attorney, at who's direction he acted, nor did he show that he first obtained the consent of the Board of County Commissioners to absent himself from the state under 7-4-2208; thus he was not entitled to recover on the theory that the claim was allowable under authority of subsection (2), making the county chargeable with expenses necessarily incurred by the County Attorney in criminal cases arising within the county. Brannin v. Sweet Grass County, 88 M 412, 293 P 970 (1930).

Contingent Expenses: A County Attorney of a county of the third class had power to bind the county for services of a stenographer employed by the day if such services were necessary to the proper discharge of the duties of his office. In the absence of a showing that they were unnecessary, the District Court properly directed the Board of County Commissioners to pay the claim, under this section, providing that contingent expenses necessarily incurred for the use and benefit of the county are county charges. In re Claims of Hyde, 73 M 363, 236 P 248 (1925).

Expenses Not Imposed by Law:

That which the law does not impose as an expense upon a county is not properly chargeable to it. In re Claims of Hyde, 73 M 363, 236 P 248 (1925).

Expenses not imposed by law are not a charge against a county. Wade v. Lewis & Clark County, 24 M 335, 61 P 879 (1900).

Criminal Case — County Attorney: Under subsection (2), all expenses necessarily incurred by a County Attorney in prosecutions for public offenses arising in the county are a county charge. Independent Publishing Co. v. Lewis & Clark County, 30 M 83, 75 P 860 (1904).

Restriction of Liability: This section restricts the liability of the county to such expenses as may be incurred under statutory authority directly conferred or necessarily implied from the powers granted to the county. Sears v. Gallatin County, 20 M 462, 52 P 204 (1898).

Attorney General's Opinions

County Responsible for Charges Incurred by City Police — Criminal Prosecutions: The county bears the financial responsibility for charges incurred at the request of the County Attorney, after an arrest by city police, for the preservation and preparation of evidence to be used in felony cases. 38 A.G. Op. 94 (1980).

Cost of Defending Official Misconduct: A county is not obligated to pay the costs of defending a nonindigent county officer charged with official misconduct. 37 A.G. Op. 57 (1977).

Financial Obligation for Psychiatric Evaluation in Criminal Trials: The county is financially responsible for psychiatric evaluations conducted to determine whether a criminal defendant is mentally fit to proceed at trial. 37 A.G. Op. 37 (1977).

Costs of Prosecuting Offenses: The Department of Institutions (now Department of Corrections) is liable for the portion of a Deputy County Attorney's salary spent on prosecuting offenses committed at the state prison. 36 A.G. Op. 108 (1976).

Printing Expenses to Be Paid by County: The office of the County Attorney is covered by the county printing contract and is required to purchase its stationery and office supplies exclusively from the printer who holds the county printing contract. 36 A.G. Op. 37 (1975).

7-6-2429. Examination and allowance of officers' accounts.

Case Notes

Board for County Prisoners: The Sheriff has no clear legal duty to provide Board of County Commissioners with detailed itemized account of county funds received for furnishing board to prisoners of county jail. State ex rel. Lucier v. Murphy, 156 M 186, 478 P2d 273 (1970).

7-6-2430. Accounts to be examined, settled, and allowed.

Case Notes

Failure to Examine — Waiver of Right to Complain: Since under this section, the Board of County Commissioners is authorized to examine, settle, and allow all claims against the county, its failure to ascertain whether charges made under a county printing contract were in accordance therewith deprives the county of the right to charge that claims filed for work done under the contract were fraudulent. Carbon County v. Draper, 84 M 413, 276 P 667 (1929).

"Accounts": The word "accounts" used in this section must be understood in a broad, generic sense, and as including any right to or claim for money which is due and payable from the county treasury. State ex rel. Dolin v. Major, 58 M 140, 192 P 618 (1920).

Part 25
County Taxation

Part Case Notes

Increased Valuations: State Board of Equalization (now State Tax Appeal Board) issued a directive to Board of County Commissioners and County Assessor in November 1963, requiring use of certain valuations on grade of farmland for 1964 and years thereafter, that the officials of the county refused to do. The State Board was entitled to mandamus to compel the county officials to comply with the directive. Alleged impossibility of compliance on July 22, 1964, was no defense. The officials had from November until the second Monday in August to accomplish the task but chose to do nothing except contest the matter. State ex rel. Bd. of Equalization v. Koch, 145 M 474, 401 P2d 765 (1965).

Time of Attachment of Lien: Even though 15-16-403 provides that the tax lien attaches at date certain, the lien cannot become choate for the purpose of determining its priority as against federal tax liens until the amount is determined pursuant to 7-6-2502 (now repealed). Streeter Bros. v. Overfelt, 202 F. Supp. 143 (D.C. Mont. 1961).

Time for Fixing Rate: Board of County Commissioners, at the conclusion of its sitting, must fix the rate of taxation for the year. State ex rel. Fadness v. Eie, 53 M 138, 162 P 164 (1916).

Part Attorney General's Opinions

Levy for Juvenile Detention Facility Not Subject to Voter Approval Unless Increase Sought in Previous Levy: House Bill No. 74, passed by the 1991 Legislature and approved as Ch. 745, L. 1991, does not require that a levy for juvenile detention facilities be approved by the voters subsequent to initial voter approval unless there is a proposal to increase the amount of the previously approved levy. If a governing body decides at any time that an increase in mills is necessary, it must follow the procedures outlined in 7-6-2531 (now repealed). 44 A.G. Op. 14 (1991).

Election for Mill Levy When Statutory Limits Exceeded: The election requirement of 7-6-2531 (now repealed) applies to general and special mill levies only when the levies exceed applicable statutory limits. 39 A.G. Op. 34 (1981).

Part Law Review Articles

Financing America's Public Infrastructure: Issues for Local Governments, 22 Akron L. Rev. 381 (1989).

The Justification for Taxation: A Forgotten Question, Vogel, 33 Am. J. Juris. (1988).

Part Collateral References

Estoppel of state or local government in tax matters. 21 ALR 4th 573.

Power to remit, release, or compromise tax claim. 28 ALR 2d 1425.

7-6-2501. Authorization for county mill levy.

Compiler's Comments

2001 Amendment: Chapter 574 near middle after "expenses" deleted "not exceeding 27 mills on each dollar of the taxable valuation for any 1 year for counties of the fourth, fifth, sixth, and seventh classes and 25 mills on each dollar of the taxable valuation for any 1 year for counties of the first, second, and third classes"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420 and after "expenses" deleted "including the salaries otherwise unprovided for"; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Attorney General's Opinions

Power of County Commissioners to Regulate Library Funded by County General Fund — Limitations as if Funded by Five-Mill Levy: The fact that Big Horn County funds its library through the county general fund does not allow the County Commissioners to usurp the library trustees' statutory authority for setting the library's budget and compensation for the library staff. If the County Commissioners fund the library's budget through the county general fund, the power to decide the library staff compensation still rests with the library trustees. The Commissioners may limit the overall funding of the library budget to 5 mills, as if the library were being funded pursuant to the 5-mill tax levy authorized by 22-1-304. (See 2001 amendment

to 22-1-304.) To hold otherwise would allow the library trustees to adopt a budget that could assume the entire county general fund levy. 48 A.G. Op. 3 (1999).

Mill Levy Limitations Not Impliedly Repealed by Property Tax Freeze: Initiative No. 105 and Senate Bill No. 71 (Ch. 654, L. 1987) do not amend or repeal by implication statutes limiting the total amount of mill levies. 42 A.G. Op. 21 (1987).

Special Tax Protest Refund Levy Not Subject to Voter Approval — Sale of Bonds Subject to Approval: A special tax protest refund levy authorized by 15-1-402 is not subject to the limitation on property taxes established in this section; therefore, the voter approval requirements of 7-6-2531 (now repealed) do not apply to such levy. However, voter approval is required before bonds may be issued and sold for the purpose of making tax protest refunds. (See 1999 amendment.) 42 A.G. Op. 18 (1987).

Separate Tax Levy for Air Pollution Program Not Permitted: The County Commissioners may not impose a separate tax levy to fund local air pollution programs. 41 A.G. Op. 28 (1985).

Park Board Partly Funded by County General Fund: The funding for the county park board's obligations is derived from the county general fund as well as from other specific sources as enumerated by 7-16-2324, 7-16-2328, and 76-3-606 (now repealed). Since a specific separate tax levy is not authorized for the park fund, additional money must be appropriated from the county general fund authorized by 7-6-2501 if the revenue from sources other than taxation is insufficient to meet the necessary expenditures. 40 A.G. Op. 49 (1984).

Levy of Property Taxes for Special Purposes: The mill levy limitation provided in 7-6-2501 does not apply to special levies authorized for particular purposes. Therefore, the mill levy authorized by 2-9-316, which is a special levy, is not subject to the limit provided in 7-6-2501. 39 A.G. Op. 34 (1981).

Expenses of Valid Interlocal Agreement Includable in Annual Mill Levy: A county may include the expenses of participation in a valid interlocal agreement in its annual county mill levy. 38 A.G. Op. 51 (1979).

Not Exclusive Vehicle for Funding District Court Operations: Section 7-6-2511 is not the exclusive vehicle for funding District Court operations. District Court funding may be supplemented by other revenue sources, such as the all-purpose levy provided by 7-6-2501. 38 A.G. Op. 31 (1979).

7-6-2511. County levy for certain court expenses.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 574 in temporary version in first sentence and in version effective July 1, 2002, in (1) before "district court costs" inserted "county" and deleted former second sentence that read: "The tax may not exceed 6 mills in the first- and second-class counties, 5 mills in third- and fourth-class counties, and 4 mills in fifth-, sixth-, and seventh-class counties." Amendment effective July 1, 2001.

(Version effective July 1, 2002) Chapter 585 in (1) at end of first sentence substituted "certain district court costs, as provided in subsection (2)" for "all district court costs, except those listed in 3-5-211, 3-5-213, and 3-5-215"; inserted (2) delineating district court costs for which a tax may be levied; in (3) substituted "Costs of the office of the clerk of district court include but are not limited to salary and benefits for clerks of district court, deputy clerks of district court, and other employees of the office of the clerk of district court and expenses of the office" for "District court costs include but are not limited to salary and benefits for court clerks, court reporters, youth probation officers, and other employees of the district court"; inserted (4) allowing use of excess funds to pay expenses of office of county attorney; inserted (5) referring to ability of county and district court to apply for, receive, and administer state, federal, and private grants; and made minor changes in style.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1983 Amendment: Made section permanent. (Section was to terminate June 30, 1983—sec. 3, Ch. 692, L. 1979.)

Interim Committee Bill: Senate Bill No. 19 (Ch. 254, L. 1983) was introduced by request of the Joint Subcommittee on Judiciary. See committee report entitled The District Courts, Indigent Defense, and Prosecutorial Services in Montana, Montana Legislative Council, December 1982.

Case Notes

County Employment of Independent Contractor to Provide Legal Services: There is no express prohibition under Montana law precluding or preventing a county from entering into an independent contractor relationship for the provision of legal services. Hamner v. Butte-Silver Bow County, 233 M 271, 760 P2d 76, 45 St. Rep. 1481 (1988).

Attorney General's Opinions

No Statutory Authority to Levy Taxes in Order to Fund Judicial Budget or Budget Deficit: Section 2-9-316 does not grant counties the authority to levy taxes in response to a District Court order that a judicial budget or budget deficit be funded. 43 A.G. Op. 37 (1989).

State Grants to District Courts — Maximum Mill Levy Not Required: Because of the requirements for establishing county mill levies under Title 7, ch. 6, part 23, and because of the unforeseeable nature of District Court expenses, the Department of Administration may not require a county to impose a maximum mill levy for District Court expenses in order to be considered eligible for a state grant to District Courts under 7-6-2352 (now repealed). 39 A.G. Op. 71 (1982).

District Court Employees as County Employees: District Court employees are paid by the county in which the court is located, receive the same county benefits as all other county employees, and are therefore county employees. 39 A.G. Op. 38 (1981).

Disposition of District Court Fees: Fees collected by Clerks of the District Courts do not accrue as a revenue item to the District Court fund in those counties adopting a 6-mill District Court levy (see 2001 amendment). The Board of County Commissioners, however, may supplement the 6-mill levy with general fund revenues in financing the District Court fund. 38 A.G. Op. 52 (1979). (See 38 A.G. Op. 31.)

Costs Resulting From Existence of the District Court as District Court Cost: Costs and charges assessed against a county by virtue of the existence of the District Court and the conduct of District Court proceedings fall within the term "district court cost". These can include family court services, public defender programs, personal staff and support personnel for district judges, and jury and witness fees. 38 A.G. Op. 31 (1979).

Not Exclusive Vehicle for Funding District Court Operations: Section 7-6-2511 is not the exclusive vehicle for funding District Court operations. District Court funding may be supplemented by other revenue sources, such as the all-purpose levy provided by 7-6-2501. 38 A.G. Op. 31 (1979).

7-6-2512. County tax levy for health care facilities.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 495 in (1) in fourth sentence deleted reference to 7-6-2532. Amendment effective October 1, 2001.

Chapter 571 in (1) deleted former third sentence that read: "The combined total number of mills levied under this section and for the county poor fund under 53-2-322 may not exceed 18 mills." Amendment effective July 1, 2001.

Chapter 574 in middle of first sentence after "levy of tax" deleted "not to exceed 10 mills on each dollar of taxable valuation of property" and deleted former third and fourth sentences that read: "The combined total number of mills levied under this section and for the county poor fund under 53-2-322 may not exceed 18 mills. A higher levy may be made upon compliance with 7-6-2531 through 7-6-2537, 15-10-420, or 53-2-322." Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 in two places in (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1995 Amendment: Chapter 520 in (1), in first sentence near end, substituted "health care facilities" for "hospitals and nursing homes or other hospital facilities" and deleted reference to 7-34-2301 and in second sentence changed defined term from hospital facilities to health care facilities and substituted "has the meaning as defined in 7-34-2201" for "means a hospital or hospital-related facility, including outpatient facilities, public health centers, rehabilitation facilities, long-term care facilities, and infirmaries"; inserted (2) relating to a pledge of taxes to pay off bonds or build facilities if authorized by a majority of the electors of the county voting on the matter; and made minor changes in style. Amendment effective April 25, 1995.

1993 Amendment: Chapter 561 in third sentence substituted "53-2-322" for "53-2-321" and at end of fourth sentence inserted "or 53-2-322". Amendment effective July 1, 1993.

7-6-2513. County public safety levy — purpose.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1995 Amendment: Chapter 390 inserted third sentence concerning placing tax money in special account. Amendment effective April 12, 1995.

Effective Date: Section 3, Ch. 318, L. 1993, provided: "[This act] is effective July 1, 1993."

7-6-2521. All-purpose levy authorized for counties.

Compiler's Comments

2001 Amendment: Chapter 278 near end inserted "7-6-2524 and". Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

Severability: Section 7, Ch. 291, L. 1987, was a severability section.

7-6-2522. All-purpose levy.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 26 at end of (1)(b) deleted "as certified by the department of revenue under 15-10-202". Amendment effective July 1, 2001.

Chapter 419 at end of (1)(b) deleted "as certified by the department of revenue under 15-10-202". Amendment effective April 28, 2001.

Chapter 574 at beginning of (1) inserted "Subject to 15-10-420" and at end deleted "Subject to 15-10-420, the all-purpose levy may not exceed the lesser of:

(a) 55 mills on the dollar; or

(b) the total number of mills levied in the prior year pursuant to the levies set forth in 7-6-2523 as certified by the department of revenue under 15-10-202." Amendment effective July 1, 2001.

Retroactive Applicability: Section 8, Ch. 419, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to property tax years beginning after December 31, 2000."

1999 Amendment: Chapter 584 in second sentence in (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Severability: Section 7, Ch. 291, L. 1987, was a severability section.

7-6-2523. Special service levies replaced by all-purpose mill levy.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 571 deleted former (7) that read: "(7) poor fund levy, as provided in 53-2-322"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 deleted former (7) that read: "(7) poor fund levy, as provided in 53-2-322"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 561 in (7) substituted "53-2-322" for "53-2-321". Amendment effective July 1, 1993.

Severability: Section 7, Ch. 291, L. 1987, was a severability section.

7-6-2524. Changes from all-purpose levy.

Compiler's Comments

2001 Amendment: Chapter 278 near middle after "7-6-2521 through" inserted "7-6-2524 and". Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

Severability: Section 7, Ch. 291, L. 1987, was a severability section.

7-6-2526. Future levies.

Compiler's Comments

Severability: Section 7, Ch. 291, L. 1987, was a severability section.

7-6-2541. County detention center inmate medical costs.

Compiler's Comments

2001 Amendment: Chapter 574 deleted former (2) that read: "(2) If approved at a tax election by a majority of the qualified electors voting on the question, the board may levy up to 2 mills on the taxable value of all property within its jurisdiction for the purpose of subsection (1)"; and made minor changes in style. Amendment effective July 1, 2001.

The amendments to this section in sec. 9, Ch. 495, L. 2001, were rendered void by sec. 255(1)(a), Ch. 574, L. 2001, a coordination section.

Effective Date: This section is effective October 1, 1999.

Part 26
County Warrants

Part Case Notes

Actions on County Warrants Prohibited: An action cannot be maintained against a county on a county warrant. Greeley v. Cascade County, 22 M 580, 57 P 274 (1899).

7-6-2601. Details related to county warrants — definition.

Compiler's Comments

2001 Amendment: Chapter 278 inserted (4) defining warrant; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

Attorney General's Opinions

Registration of Unpaid Hospital District Warrants as County Warrants and Subsequent Purchase by County Not Allowable: County Commissioners concerned with financing the indebtedness of a local hospital district sought to register the district's unpaid warrants in accordance with 7-6-2603 and this section and then invest surplus county funds in the unpaid warrants pursuant to 7-6-2701. However, the Legislature has authorized counties to invest only in county, municipal, or school district registered warrants, not hospital district warrants. Therefore, unpaid warrants of a hospital district may not be registered as county warrants and purchased by the county in which the district is located. 43 A.G. Op. 71 (1990).

7-6-2602. Payment of warrants.

Compiler's Comments

2001 Amendment: Chapter 278 deleted former (1) that read: "(1) When a warrant is presented for payment, if there is money in the treasury for that purpose, the county treasurer must pay the same, write on the face thereof "Paid" and the date of payment, and sign his name thereto. Warrants must be paid in the order of presentation to the treasurer"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

Case Notes

Actions Against County Warrants Prohibited: An action cannot be maintained against a county on a county warrant. Greeley v. Cascade County, 22 M 580, 57 P 274 (1899).

Attorney General's Opinions

Unpaid, Registered Warrants — Treatment: Counties may budget for and pay interest on unpaid, registered warrants resulting from inability to adopt a budget and fix the tax levy by the statutory deadline. 37 A.G. Op. 101 (1977).

7-6-2603. Registration of warrants.

Attorney General's Opinions

Registration of Unpaid Hospital District Warrants as County Warrants and Subsequent Purchase by County Not Allowable: County Commissioners concerned with financing the indebtedness of a local hospital district sought to register the district's unpaid warrants in accordance with 7-6-2601 and this section and then invest surplus county funds in the unpaid

warrants pursuant to 7-6-2701. However, the Legislature has authorized counties to invest only in county, municipal, or school district registered warrants, not hospital district warrants. Therefore, unpaid warrants of a hospital district may not be registered as county warrants and purchased by the county in which the district is located. 43 A.G. Op. 71 (1990).

7-6-2604. Interest on unpaid warrants.

Compiler's Comments

1981 Amendment: In (1), deleted "any county warrant" after "When"; in (3), substituted "board of county commissioners" for "county board".

Attorney General's Opinions

Unpaid, Registered Warrants — Treatment: Counties may budget for and pay interest on unpaid, registered warrants resulting from inability to adopt a budget and fix the tax levy by the statutory deadline. 37 A.G. Op. 101 (1977).

7-6-2605. Call for payment of warrants drawing interest.

Compiler's Comments

1985 Amendment: In (1) substituted "as provided in 7-1-2121" for "in some newspaper published in his county or, if none is published, then by written notice posted upon the courthouse door, stating therein".

Case Notes

Failure to Present for Payment Within Limit:

Failure to present a warrant for payment after it had been called is a complete defense to mandamus action to compel payment, but holder of the warrant need not anticipate and negative such defense. State ex rel. Blenkner v. Stillwater County, 104 M 387, 66 P2d 788 (1937).

The only penalty a holder of a registered warrant incurs, under this section, for failure to re-present it for payment within 60 days after issuance of the call is loss of interest thereon. State ex rel. Case v. Bolles, 74 M 54, 238 P 586 (1925).

Mandamus to Compel Payment of Warrant: Relator held a registered warrant and the fund out of which it was payable had sufficient money to cover the face value of all registered warrants but insufficient to pay them with accrued interest. It did not appear whether the Treasurer had called the warrants for payment or whether the 60 days specified in this section had elapsed. Writ of Mandate ordering the Treasurer to pay relator's warrant with interest was improper in the absence of a showing that there were sufficient funds to pay prior warrants and interest thereon entitled to payment and to pay relator's also. State ex rel. DeKalb v. Ferrell, 105 M 218, 70 P2d 290 (1937).

Mandatory Repayment — Payment Limit: The word "may" appearing in subsection (4)(b) that provides that the Board of County Commissioners may, on application of the holder of a warrant who failed to re-present a warrant within 60 days after issuance of the call for its payment, order the County Treasurer to pay it, means "must" or "shall". State ex rel. Case v. Bolles, 74 M 54, 238 P 586 (1925).

7-6-2607. Processing of warrants.

Compiler's Comments

2001 Amendment: Chapter 278 deleted former (1) that read: "(1) The board, at its annual March session or more often if necessary, must examine the county warrants returned by the county treasurer by comparing each warrant with the record of warrants issued in the county clerk's office"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

Part 27
Investment of County Money

7-6-2701. Investment of certain money in county, municipal, hospital, and school warrants.

Compiler's Comments

1997 Amendment: Chapter 219 in (1), at beginning, deleted "Except as provided in 7-6-2802"; and made minor changes in style. Amendment effective July 1, 1997.

Effective Date — Applicability: Section 23, Ch. 219, L. 1997, provided: "[This act] is effective July 1, 1997, and applies to bonds issued on or after [the effective date of this act]."

1991 Amendment: In (1), near middle after "municipal", inserted "hospital district"; and in (4), in two places after "school district", inserted "hospital district".

1985 Amendment: In (1) near middle before "warrants" inserted "municipal, or school district registered", near end substituted "purchase such warrants of entities located in the same county" for "purchase county warrants of the same county", and at end deleted "thereafter issued against funds in which there is not sufficient money to pay such county warrants at the time of issuance"; inserted (2)(c) relating to the rate of interest; in (2)(d) before "warrants" deleted "county warrant or"; in (3) at beginning substituted "The officer drawing a warrant to be purchased for investment by a county shall cause" for "The county clerk and recorder shall thereupon cause" and after "printed upon" substituted "the warrant" for "the warrants so ordered to be purchased"; inserted (4) relating to presentation to County or Municipal Clerk or Treasurer and requirement that warrant be registered; in (5), near beginning after "warrant", inserted "designated for purchase under the provisions of subsection (2)", deleted former second sentence that read: "The warrant so purchased shall be registered as other county warrants and bear interest as provided by law", and at end inserted "or the applicable officer authorized to draw such warrants"; and made numerous minor changes in style and phraseology.

Attorney General's Opinions

Registration of Unpaid Hospital District Warrants as County Warrants and Subsequent Purchase by County Not Allowable: County Commissioners concerned with financing the indebtedness of a local hospital district sought to register the district's unpaid warrants in accordance with 7-6-2601 and 7-6-2603 and then invest surplus county funds in the unpaid warrants pursuant to this section. However, the Legislature has authorized counties to invest only in county, municipal, or school district registered warrants, not hospital district warrants. Therefore, unpaid warrants of a hospital district may not be registered as county warrants and purchased by the county in which the district is located. 43 A.G. Op. 71 (1990).

Part 28
Management of School Money

Part Case Notes

Spending Disparities Not Allowed: Article X, sec. 8, Mont. Const., does not require that spending disparities between the school districts of the state be allowed to exist because the disparities cannot be described as the result of local control. School District v. St., 236 M 44, 769 P2d 684, 46 St. Rep. 169 (1989).

7-6-2801. Management of school funds.

Case Notes

Money From Sale of School Building — Resulting Trust: Complaint for Writ of Mandate by a county high school against the County Treasurer to compel payment of money realized from the sale of a building purchased with high school funds and sold by County Commissioners as trustee when no longer needed for school purposes stated a cause of action on the theory of a resulting trust. Although the pleading did not ask that a trust be declared, it was sufficient to authorize issuance of the Writ directing defendant to deposit the sale price to the credit of plaintiff. State ex rel. Gallatin County High School v. Brandenburg, 107 M 199, 82 P2d 593 (1938).

Part 40
Local Government Budget Act

Part Compiler's Comments

Effective Date: Section 63, Ch. 278, L. 2001, provided: "[This act] is effective July 1, 2001."

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

Part Case Notes

DECISIONS UNDER FORMER LAW

Agreement by County Commission to Pay Justice Court Expenses — Failure to Object — Appeal Precluded: A Justice of the Peace requested approval of funds from the County Commission for employment of a temporary clerical assistant. The County Commission initially refused to approve the funds. The claim was then submitted for certification pursuant to Browman v. Wood, 168 M 341, 543 P2d 184 (1975), and was subsequently certified as an actual

and necessary expense incurred in the performance of actual duties of the Justice Court. When the bill was still not paid, the Justice of the Peace filed a petition for a contempt order against the County Commissioners for failure to pay the certified claim. The order was amended to include attorney fees. The County Commission then agreed to pay the claim and did not oppose the motion to amend, nor did it file a responsive brief. However, it later alleged error. The Supreme Court held that the County Commission waived the right to appeal by agreeing to pay the claim and then failing to object to the District Court order to pay the claim and taking no further action to challenge the claim. In re Certain Justice Court Expenses, 264 M 510, 872 P2d 795, 51 St. Rep. 372 (1994).

County Employment of Independent Contractor to Provide Legal Services: There is no express prohibition under Montana law precluding or preventing a county from entering into an independent contractor relationship for the provision of legal services. Hamner v. Butte-Silver Bow County, 233 M 271, 760 P2d 76, 45 St. Rep. 1481 (1988).

Commissioners Not Personally Liable for Transfer of Funds: Big Horn County sued County Commissioners and County Clerk and Recorder personally to recover alleged excess funds transferred to pay the salary for a Justice of the Peace. In upholding the District Court's grant of summary judgment for the Commissioners, the Supreme Court held that the Commissioners and Clerk and Recorder acted within their statutory duty and were not personally liable where the transfer of funds was made to cover a deficit when judicial costs exceeded the estimated budget. The hourly cost in the budget was not increased. Big Horn County v. Gregory, 225 M 162, 730 P2d 1181, 44 St. Rep. 120 (1987).

Local Government Revision of Salary Schedules: A local government with self-government powers may revise a salary schedule that has been set forth in the final budget if such revision is done in accordance with the applicable law. Butte-Silver Bow, as a local government with self-government powers, adopted lawful procedures for such revision, but the facts of this case are such that the attempted revision was not in accord with the law. The court found that the salary revision was more than merely a revision of the salary schedule contained in the final budget. When Butte-Silver Bow adopted the proposed salary increase by motion, set the specific amount, and set specific effective dates, and then included the increase in the final budget, such salary became fixed for that period and could not subsequently be revised. Bukvich v. Butte-Silver Bow, 215 M 202, 696 P2d 444, 42 St. Rep. 293 (1985).

District Court's Power to Order Payment of Expenditures Beyond Budget: District Court's fiscal year budget was overrun, and this stopped or threatened to stop the efficient and orderly administration of justice and court business, creating an emergency. As a court of competent jurisdiction, the District Court may issue orders for the payment of out-of-budget expenditures that are reasonable and necessary. Compliance with the orders by the members of the Board of County Commissioners or by any other officer in the exercise of his official duties is within the exception to personal liability of the officers provided in 7-6-2323 (now repealed). The officers may pass on the propriety of the claims but may not deny them on the basis that they are outside the budget if the court has duly ordered them paid. State ex rel. District Court v. Whitaker, 210 M 363, 681 P2d 1097, 41 St. Rep. 1104 (1984).

Justices' Courts: Section 3-10-103, a specific statute mandating Commissioners to pay actual and necessary expenses of Justices' Courts, controlled where Justice of Peace incurred unforeseen workload and hired part-time, temporary clerk; thus County Commissioners had duty to pay this expense, even though it was not budgeted. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975).

Limitation on Expenditures — Exception: When the financial needs of Justices of the Peace were provided for by statute, those provisions prevailed over the provisions of 7-6-2324 (now repealed) as to limitations on expenditures. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184, 32 St. Rep. 1136 (1975).

Debt Limit: Board of County Commissioners which overtaxed taxpayers in 1 year in order to provide a fund out of which expenses for capital improvements and remodeling of airport that exceeded $21,000 clearly violated Art. XIII, sec. 5, 1889 Mont. Const. (replaced by Art. VIII, sec. 10, 1972 Mont. Const.), by incurring a liability for over $10,000 without the approval of a majority of the electors of the county. The county was not able to argue that "no indebtedness or liability" had been created because the money was already on hand. Extraordinarily high levy created a "reserve fund" to be used for capital improvements, which is not allowable due to restriction in 67-10-402 of reserve funds to improvement of surfaces of runways or ramps. Burlington N., Inc. v. Flathead County, 162 M 371, 512 P2d 710 (1973).

"Cash Balance": "Cash balance", referred to in 7-6-2319 (now repealed), and "all surplus moneys", referred to in section 16-2048, R.C.M. 1947 (since repealed), relate to the same subject

and have the same object, which is the disposition of unexpended funds on hand in the counties at the end of each fiscal year. Chicago, Milwaukee, St. Paul & Pac. R.R. v. Bennett, 145 M 191, 399 P2d 986 (1965).

Transfer of Cash Balance — Determination of Tax Rate: Increased tax on railroads for use of county road fund was held to be invalid, where Board of County Commissioners had transferred money from the road fund into the general fund before determining tax rate for road fund in that fiscal year. (See 1999 amendment.) Chicago, Milwaukee, St. Paul & Pac. R.R. v. Bennett, 145 M 191, 399 P2d 986 (1965).

Lease-Purchase Payments: Under resolution providing that city would convey title to properties to party who would cause to be built on one property a city-approved building which the city would rent for an annual rental for a period of 3 years with option in the city to purchase property together with the building thereon, lease payments were forms of indebtedness within Art. XIII, sec. 6, 1889 Mont. Const. (replaced by Art. VIII, sec. 10, 1972 Mont. Const.), limiting indebtedness that may be incurred by city. State ex rel. Simmons v. Missoula, 144 M 210, 395 P2d 249 (1964).

"Mandatory Expenditures Required by Law": The general words "mandatory expenditures required by law", as used in 7-6-2341 (now repealed), are not limited by the doctrine of ejusdem generis to the specific types of calamities enumerated earlier in the subsection since the general words are not associated in any way with the specific words, but rather they embrace an entirely different subject matter from those characterized by the specific words. Burke v. Sullivan, 127 M 374, 265 P2d 203 (1954).

Excess Funds — Reversion to General Fund: Where County Commissioners fix salary of officer at less than that provided in budget, it is not necessary that there be a resolution for a transfer of a part of the funds, since excess funds will revert to the general fund at the end of the fiscal year. State ex rel. Thompson v. Gallatin County, 120 M 263, 184 P2d 998 (1947).

Salary Schedule — Effect: When a salary schedule is adopted in the county budget, the Board of County Commissioners is not bound to pay each county employee the salary so fixed without diminution. State ex rel. Thompson v. Gallatin County, 120 M 263, 184 P2d 998 (1947).

Constitutionality: Section 7-6-2318 (now repealed), prohibiting consideration of anticipated loss of revenue for nonpayment of taxes, does not offend against Art. III, sec. 11, 1889 Mont. Const. (Art. II, sec. 31, 1972 Mont. Const.), as impairing obligations of contracts, since Title 7, ch. 6, part 2300 (now repealed), contemplates issuances of interest-bearing registered warrants up to budget appropriation, if there is no money in a particular fund that must be taken into consideration in fixing the budget for the succeeding year. Great N. Ry. v. Phillips County, 112 M 542, 118 P2d 754 (1941).

Emergency Budget for General Relief — Not Liability for "Single Purpose": County Commissioners establishing an emergency budget under 7-6-2342 (now repealed) for general relief purposes in the amount of $15,000, without the approval of the electors, did not create an indebtedness or liability for a "single purpose" in excess of $10,000 without such approval within the inhibition of Art. XIII, sec. 5, 1889 Mont. Const. (replaced by Art. VIII, sec. 10, 1972 Mont. Const.). The entire debt for all relief purposes cannot be regarded a single purpose because the emergency arose by virtue of many separate and distinct purposes founded on a duty expressly imposed in the normal functioning of a county. State ex rel. Nelson v. Bd. of County Comm'rs, 111 M 395, 109 P2d 1106 (1941).

Where Later Statute Controlling: It is not necessary that the City Council should pass upon a resolution authorizing expenditures to meet an emergency by unanimous vote as provided by 7-6-4252 (now repealed) in the matter of authorizing the creation of a city housing authority under Title 7, ch. 15, part 44, but 7-15-4417, a part of the housing authorities law, later in point of time and not requiring a unanimous vote, is controlling. State ex rel. Helena Housing Authority v. City Council, 108 M 347, 90 P2d 514 (1939).

Remedies for Illegal Levy — Estoppel: Payment of a tax deemed illegal, under protest, and then bringing an action to recover it back is not the exclusive remedy of the taxpayer where the levy is illegal. In the instant case, where there was no need to tax to raise funds for bond and sinking fund, plaintiff taxpayer was not estopped from maintaining action to enjoin collection by his failure to appear before the board at the time the preliminary budget (now proposed budget) was noticed for hearing under 7-6-2316 (now repealed). Rogge v. Petroleum County, 107 M 36, 80 P2d 380 (1938).

Taxing in Excess of Need — Illegal: It is against the policy of the law to raise taxes faster than the money is likely to be needed. In the absence of statutory authority a tax cannot be levied for the sole purpose of accumulating funds in the public treasury, such as for remote or future contingencies which may never arise, nor can it be levied in excess of the amount required for the

purpose for which it is levied, with the intention of using the excess for another purpose. Rogge v. Petroleum County, 107 M 36, 80 P2d 380 (1938).

Misapplication of Fund by Treasurer: The office of City Treasurer is a continuing one regardless of the person occupying the office at any particular time. The Treasurer is the servant of the city and not the agent of warrant holders; thus if he misapplies trust funds such as for special improvement purposes, the municipality is liable to the warrant holders. Blackford v. Libby, 103 M 272, 62 P2d 216 (1936).

Negotiability of Warrant: A city warrant is not a negotiable instrument in the sense of the law merchant, and while it may be transferred by delivery or assignment, the transferee takes it subject to all legal and equitable defenses which exist to it in the hands of the payee. Lillis v. Big Timber, 103 M 206, 62 P2d 219 (1936).

Conflict With Police Minimum Wages: If Title 7, ch. 6, part 42 (now repealed), contained any provisions in direct conflict with 7-32-4116 prescribing a minimum wage for policemen in cities of the first class, then 7-32-4116 controls as to such conflicts. State ex rel. Gebhardt v. City Council, 102 M 27, 55 P2d 671 (1936).

Judgment Debts Excluded From Budget Law: By Writ of Mandate, city was directed to pay policemen's salaries prescribed by 7-32-4116. City's objection that obedience to the Writ would compel it to violate the budget act held no defense, for under 7-6-4234 (now repealed), a court judgment giving rise to a municipal obligation is specifically excepted from the provisions of the budget law. State ex rel. Gebhardt v. City Council, 102 M 27, 55 P2d 671 (1936).

Emergency Warrants Proper for Unbudgeted Drain Assessments: Drain district assessments against a county that had been approved by the court and had the force of judgments were unpaid for lack of funds, and no budget appropriation had been made therefor. The Clerk and Chairman of the Board of County Commissioners should have issued emergency warrants for the assessments. A Writ of Mandate to the Board itself, directing it to pay the assessments, was improperly issued. State ex rel. Valley Center Drain District v. Bd. of County Comm'rs, 100 M 581, 51 P2d 635 (1935), explained in Burke v. Sullivan, 127 M 374, 265 P2d 203 (1954).

Statute of Limitation — Not on Right to Enforce: Section 7-6-4122 (now repealed) places a limitation upon the discretionary period and is not a Statute of Limitation with respect to the right to enforce the judgment. The bar of the Statute of Limitations is imposed because of the failure of the possessor of a right to enforce it. "Such a statute may be used as a shield, but not as a sword." State ex rel. N. Am. Life Ins. Co. v. District Court, 100 M 476, 49 P2d 1119 (1935).

Methods of Payment: Section 7-6-4122 (now repealed), makes it the duty of a City or Town Council to levy sufficient tax to pay a judgment against the municipality within 3 years where there is not sufficient money in the general fund to pay it and authorizes the council to fund the debt if the judgment exceeds $10,000. The Board of Councilmen is vested with discretionary power to proceed in any of the several methods of procedure prescribed and thus may not be compelled by the judgment creditor, through Writ of Mandate, to make a specific levy for any one year to satisfy the judgment. State ex rel. N. Am. Life Ins. Co. v. District Court, 97 M 523, 37 P2d 329 (1934).

Reason for Section: By enacting 7-6-4121 (now repealed), authorizing cities to operate on a cash basis where they have reached the limit of indebtedness (Art. XIII, sec. 6, 1889 Mont. Const., replaced by Art. VIII, sec. 10, 1972 Mont. Const.), the Legislature did not attempt what it has no power to do: permit them to create indebtedness in excess of such limit, but provided a device by which, without creating an additional indebtedness, they may function on a cash basis. Commonwealth Pub. Serv. Co. v. Deer Lodge, 96 M 15, 28 P2d 472 (1934); Palmer v. Helena, 40 M 498, 107 P 512 (1910).

Reduction in Force — Failure to Use Section: A city which, having reached the constitutional limit of indebtedness, finds itself in financial straits, will not be heard to say, in defense of its violation of a civil service statute in removing a firefighter contrary to its provisions, that it did so to reduce expenses, where it has failed to take advantage of 7-6-4121 (now repealed) authorizing cities in such condition to pay their running expenses from current revenues upon a cash basis. State ex rel. Driffill v. Anaconda, 41 M 577, 111 P 345 (1910).

What Are Current Expenses:

Under 7-6-4121 (now repealed), a city which is indebted in excess of the limit prescribed by Art. XIII, sec. 6, 1889 Mont. Const. (replaced by Art. VIII, sec. 10, 1972 Mont. Const.), is permitted to conduct its affairs upon a cash basis and pay "reasonable and necessary current expenses from its current revenues", but the authority of such a city extends no further than to make expenditures both reasonable and necessary for the corporate existence of the city; in other words, the right to expend public money is limited to those items of expense which may properly be designated as "living expenses". Palmer v. Helena, 40 M 498, 107 P 512 (1910).

The determination of what is a current expense is for the courts; but the determination of the City Council as to whether a particular current expense is reasonable and necessary is not subject to review by the courts in the absence of fraud or abuse of discretion. Helena Water Works Co. v. Helena, 31 M 243, 78 P 220 (1904). See also State ex rel. Rowling v. Butte, 43 M 331, 117 P 604 (1911).

The term "current" was doubtless employed by the Legislature to distinguish the common, recurring, running expenses of a city from such expenses as partake of the nature of an investment or such as are to be incurred in a substantial or permanent improvement. Helena Water Works Co. v. Helena, 31 M 243, 78 P 220 (1904).

Reports of Money Received and Disbursed: In an action by a city against the sureties on the official bond of the Treasurer, the reports of the Treasurer to the City Council of money received and disbursed during the month, made under 7-6-4105 (now repealed), may be given in evidence against such sureties and are prima facie true, and when not contradicted by the sureties, are binding on them. Philipsburg v. Degenhart, 30 M 299, 76 P 694 (1904).

City Exceeding Debt Limit — Appropriation of Funds: Where a city had exceeded its debt limit, it could not incur an indebtedness not payable from a specially authorized tax but payable from funds previously appropriated, under an agreement that the claimants should accept warrants in payment of their claims, and if the warrant should not be paid, the city should not be liable thereon. The payment of such claims on the theory that the appropriation by ordinance was an assignment of the funds so appropriated for the payment of the claims was unauthorized. Helena Water Works Co. v. Helena, 27 M 205, 70 P 513 (1902).

No Liability for Void Contract: Although the City Council appropriated a sum to pay for water furnished under a contract, such action does not make the city liable therefor, since the contract out of which the liability arose was void and no lawful authority to pay it exists. State ex rel. Helena Water Works Co. v. Helena, 24 M 521, 63 P 99 (1900).

Part Attorney General's Opinions

DECISIONS UNDER FORMER LAW

Power of County Commissioners to Regulate Library Funded by County General Fund — Limitations as if Funded by Five-Mill Levy: The fact that Big Horn County funds its library through the county general fund does not allow the County Commissioners to usurp the library trustees' statutory authority for setting the library's budget and compensation for the library staff. If the County Commissioners fund the library's budget through the county general fund, the power to decide the library staff compensation still rests with the library trustees. The Commissioners may limit the overall funding of the library budget to 5 mills, as if the library were being funded pursuant to the 5-mill tax levy authorized by 22-1-304. To hold otherwise would allow the library trustees to adopt a budget that could assume the entire county general fund levy. 48 A.G. Op. 3 (1999).

Setting of Compensation for Mosquito Control Board Employees — Approval Required: A mosquito control board may not set the level of compensation of board employees without the approval of the Board of County Commissioners. 47 A.G. Op. 11 (1998). See also 38 A.G. Op. 35 (1979).

Setting of Compensation for Weed Control Board Employees — Approval Required: A weed control board may not set the level of compensation of board employees without the approval of the Board of County Commissioners. 47 A.G. Op. 11 (1998). See also 38 A.G. Op. 35 (1979).

Excess Cash Balance to Be Added to Annual Budget Calculations — Establishment of Trust Fund With Excess Prohibited: A city with general government powers that has a cash balance from previously unbudgeted nontax revenue in excess of outstanding unpaid warrants at the close of the preceding fiscal year in any fund must add the cash balance into the all-purpose general fund to be used in calculating the city's annual operating budget and to set future tax levies. The cash may not be placed in a trust fund, such as a 10-year irrevocable trust fund operated by a third-party trustee. 46 A.G. Op. 15 (1996).

"Cash Balance" Defined: The term "cash balance", as used in 7-6-2319(1) (now repealed), means the cash in a fund on June 30 less any current liabilities. 44 A.G. Op. 18 (1991).

Prior Fiscal Year Reserve Not to Be Included in Current Year's Reserve: Because a prior fiscal year's reserve is not considered part of the amount "appropriated and authorized to be spent during the current fiscal year", as that phrase is used in 7-6-2319(2) (now repealed), it may not be used to calculate the current fiscal year's reserve. (See 1999 amendment.) 44 A.G. Op. 18 (1991).

Equipment Reserve Account as Capital Improvement Fund: An equipment reserve fund within the central garage internal service fund, established by a city with self-governing powers

to provide for future equipment replacement, is a capital improvement fund within the meaning of 7-6-4134 (now repealed). 44 A.G. Op. 5 (1991).

Percentage Limitation Mandatory — Retroactive Transfer of Greater Percentage Impermissible: By its clear terms, 7-6-4134 (now repealed) regulates budget procedures of a city with self-governing powers. The 5% (see 1997 amendment) limitation in 7-6-4134 (now repealed) is a mandatory provision with which a city must comply in establishing its budget. Therefore, the retroactive transfer of more than 5% of all-purpose levy revenue is prohibited. 44 A.G. Op. 5 (1991).

Separate Accounting Required for Equipment Reserve Account in Enterprise Fund: Enterprise funds, such as funds generated from the provision of income-producing municipal services like water and sewer systems, may not be consolidated with revenue from other sources. A city may not reclassify equipment reserves maintained in the enterprise funds. Therefore, equipment reserve accounts in enterprise funds must be maintained separately from other equipment reserve accounts in a capital improvement fund. 44 A.G. Op. 5 (1991).

Transfer of Funds to Equipment Reserve Account From Sources Other Than All-Purpose Levy Fund Not Prohibited: Section 7-6-4134 (now repealed) does not prohibit the transfer of funds to an equipment reserve account from sources other than the all-purpose levy fund. 44 A.G. Op. 5 (1991).

Authorization by County Commission of Increase in Salary of County Officer: Even if the county budget allows for an increase in the salary of a county officer, only the Board of County Commissioners may authorize an increase through the budgetary process. Therefore, a Clerk of Court is not authorized to promote a deputy clerk to a chief deputy position at a higher pay scale without authorization in the county budget and approval of the Board. 43 A.G. Op. 77 (1990).

Use of Separately Appropriated Funds to Satisfy Negotiated Salary Increases: Section 7-6-4236 (now repealed) does not prohibit a municipality from using funds separately appropriated for the purpose of satisfying salary increases that may arise from collective bargaining negotiations ongoing at the time of a final budget's adoption to pay such increases. Use of such funds constitutes neither a "transfer" within the statutory meaning nor an increase in affected employees' salaries over amounts appropriated for those salaries. 42 A.G. Op. 65 (1988).

Authority of County Officer to Retain Defense Counsel: An elected county officer is not required to obtain the consent of the County Attorney or the County Commissioners in order to retain counsel in defense of a suit brought by the County Attorney pursuant to 7-6-2323 (now repealed). The county must reimburse the officer for legal fees incurred in the defense of the action unless an exclusion, as provided in 2-9-305, applies. 42 A.G. Op. 34 (1985).

Distribution of Corporate License Fees: Corporate license fees received between July 1, 1983, and June 30, 1984, under 15-31-702 (now repealed), are properly distributed pursuant to tax levies adopted by the Board of County Commissioners for fiscal year 1984, including any levy promulgated pursuant to 53-2-813 (now repealed). 41 A.G. Op. 26 (1985).

Change in County Classification — Time for Setting County Officials' Salaries: When a county's classification changes pursuant to 7-1-2111, the salaries of the county officials listed in 7-4-2503(1) must also change. The salaries must change as of July 1 of the following year, with the onset of a new fiscal year for the county. 40 A.G. Op. 81 (1984).

Grants Available Only After Completion of Fiscal Year: Under 7-6-2352 (now repealed), county governments may be eligible to receive state grants to District Courts only after the completion of the fiscal year in which the need for assistance arose. 40 A.G. Op. 39 (1984).

Restrictions on Segregation of Cash and Transfer of Poor Fund: Title 53, ch. 2, part 3, does not authorize a county to set aside money in the poor fund that will not be available for supporting public assistance activities in the county, as provided in 53-2-322 (now repealed). All money in the poor fund must be used for public assistance activities. However, 7-6-2326 (now repealed) permits the transfer of a poor fund cash balance to another fund at the end of a fiscal year. This may be done only when there is an ending balance in excess of the amount budgeted for the poor fund for the next fiscal year, and only the excess may be transferred. 40 A.G. Op. 29 (1983).

Source of Depletion Allowance Reserve Fund — Not Subject to Budgeting: Section 7-34-2402 permits poor fund money to be used to fund a depletion allowance reserve fund only to the extent that the money represents actual money received in excess of expenses incurred from or for the care of indigent patients in the county facility. Because depletion allowance reserve fund money is not derived from tax revenues and the sources and uses of the fund are limited statutorily, the transfer of money to a depletion allowance reserve fund is not subject to the requirements of 7-6-2326 (now repealed). 40 A.G. Op. 29 (1983).

Clerk and Recorder's Report — Basis for Determining Levy: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) should rely upon the tax levies presented in the County Clerk and Recorder's report that is provided pursuant to 7-6-2322 (now repealed) for determining the amount levied by the county for purposes of its county poor fund during fiscal year 1982. (See 1999 amendment.) 40 A.G. Op. 18 (1983).

Maximum Mill Levy Not Required: Because of the requirements for establishing county mill levies under Title 7, ch. 6, part 23 (now repealed), and because of the unforeseeable nature of District Court expenses, the Department of Administration (now Supreme Court Administrator) may not require a county to impose the maximum levy established in 7-6-2511, for District Court expenses, in order to be considered eligible for a state grant to District Courts under 7-6-2352 (now repealed). 39 A.G. Op. 71 (1982).

Money Freed by Termination of Tax Protest Litigation — Use and Effect: Once tax money tied up in tax protest litigation is received by a municipality upon completion of litigation, it must be deposited to the credit of the fund or funds to which it would have been credited had it been timely received without protest, and it is then available for use. If money remains in a fund at the end of a fiscal year in which it was received, it is a part of the cash balance and is to be included in the calculations to determine the tax levy for the next year. 39 A.G. Op. 55 (1982).

District Court Employees as County Employees: District Court employees are paid by the county in which the court is located, receive the same county benefits as all other county employees, and are therefore county employees. 39 A.G. Op. 38 (1981).

Restrictions in Appropriation Bill Subservient to Statutory Power to Provide Assistance to Counties: Section 7-6-2352 (now repealed) reflects legislative intent to make financial assistance grants for the purpose of offsetting virtually all excess costs associated with the operation of a District Court except those for building, capital, and library maintenance, replacement, and acquisition. Restrictive language in the general appropriation bill of the 1981 legislative session limited the appropriation to emergency funding and only when extraordinary expenses are incurred, expressly conflicting with 7-6-2352 (now repealed). The Attorney General noted that the courts have considered such restrictions with disfavor, that the appropriation bill title did not refer to restrictions on the appropriation, and that the language of Art. V, sec. 11, Mont. Const., limits a general appropriation bill to appropriations. Rejecting the repeal by implication of 7-6-2352 (now repealed) by the restrictions in the appropriation bill, it was concluded that the Department of Administration (now Supreme Court Administrator) should follow the provisions of 7-6-2352 (now repealed) in providing financial assistance to counties for District Court expenses. 39 A.G. Op. 25 (1981).

Emergency Grant Made Only if Funds Appropriated for That Purpose: No funds were appropriated by the 1979 Legislature to fund emergency grants authorized by 7-6-2352 (now repealed). The statute provided that the Department of Administration (now Supreme Court Administrator) may make grants only from funds specifically appropriated for that purpose. If no such funds are provided, the Department is under no obligation to make grants and would by negative implication be precluded from doing so. 38 A.G. Op. 31 (1979).

Emergency Expenditures: A county may make emergency expenditures not reflected in its budget to cover the employer's share of PERS when the responsibility to pay that share arose after adoption of the budget for that fiscal year. 38 A.G. Op. 19 (1979).

Disaster Relief Eligibility: A county road reserve established pursuant to 7-6-2318 (now repealed) to pay costs of county road operations during the first 4 months of the next fiscal year is not a financial resource available to meet emergencies and disasters. 37 A.G. Op. 118 (1978).

Police Dispatch Services: A county may contract with a city or town to provide the municipal police department with police dispatch services operated through the County Sheriff's office. 37 A.G. Op. 10 (1977).

All-Purpose Levy Encompassing Multiple Levies: Required multiple levies must be included within the all-purpose levy. 36 A.G. Op. 94 (1976).

Disposition of Unexpended County Funds: Unexpended money remaining in a county's classification and appraisal fund as of July 1 may be transferred to other county funds, and the Department of Revenue may not utilize such unexpended money for classification and appraisal of taxable lands and improvements. 35 A.G. Op. 37 (1973).

7-6-4003. Budget and levies supplied to department of administration.

Compiler's Comments

Code Commissioner Instruction: Pursuant to sec. 221(1), Ch. 483, L. 2001, in (1) and in two places in (2) the code commissioner changed "department of commerce" to "department of administration".

7-6-4004. Budget fund structure.

Compiler's Comments

Code Commissioner Instruction: Pursuant to sec. 221(1), Ch. 483, L. 2001, the code commissioner changed "department of commerce" to "department of administration".

Part 43
Claims Against Municipalities

7-6-4301. Presentation of claims against municipality.

Compiler's Comments

1985 Amendment: In (2) substituted language relating to claims payment documentation for: "All claims against a city or town shall contain the following statement: "I certify that this claim is correct and just in all respects and that payment or credit has not been received." Claims need not be accompanied by affidavit by the party or his agent"; and inserted (3) relating to review of claims before submission to council.

Case Notes

Power of General Powers Town to Arbitrate Contract Held Included in Power to Contract: Holm-Sutherland contracted with the town of Shelby to construct sewer and water improvements within the town. The contract included a provision requiring that all disputes involving the interpretation of the contract documents or breach of the contract were to be settled by arbitration. When a dispute arose, Holm-Sutherland sought arbitration. Litigation ensued, and the town argued that as a noncharter government, it had only those powers granted by the Legislature and that a municipality's council had a duty pursuant to 7-6-4302 and this section to determine the validity of claims and that duty could not be delegated to an arbitrator. The Supreme Court agreed with the District Court that a general powers municipality has broad powers to enter into contracts pursuant to 7-1-4124(4) and (23), that Title 27, ch. 5, evidences a general state policy favoring arbitration, and that the powers granted a municipality establish its ability to be bound to the terms of a contract that contains a binding arbitration clause. Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053, 56 St. Rep. 595 (1999).

Purpose of Section: This section was evidently intended to cover claims against the city arising in the ordinary course of carrying on the city government, in providing for the city's welfare in sundry directions, and in transacting the business and economic affairs of the city, but not on such contracts as are specifically provided for, which it must be presumed are designed to contain their own specific provisions, and among other material and essential conditions, stipulations respecting the time and manner of the payment of the consideration on the part of the city. Forsyth v. Crellin, 210 F 835 (9th Cir. 1914).

Claim Not Required for Salary: The provision of this section, requiring claims against a city to be verified and filed with the municipality, has no application to a claim for salary fixed by ordinance; hence a police officer was under no obligation to so present his claim to entitle him to recover his salary for the time he was unlawfully deprived of his office. Wynne v. Butte, 45 M 417, 123 P 531 (1912).

Tort Claims — No Claim Required: The provisions of this section do not apply to a claim for damages arising from personal injuries. Dawes v. Great Falls, 31 M 9, 77 P 309 (1904).

Attorney General's Opinions

Claims Against Cities and Towns: This section bars the city's payment of that part of the claim that represents items which were purchased by the city more than 1 year prior to the date of presentment of such claim. 37 A.G. Op. 140 (1978).

Law Review Articles

Enforcement of Judgments Against States and Local Governments: Judicial Control Over the Power to Tax, La Pierre, 61 Geo. Wash. L. Rev. 299 (1993).

Collateral References

Validity and construction of statute or ordinance limiting the kinds or amount of actual damages recoverable in tort action against governmental unit. 43 ALR 4th 19.

Actual notice or knowledge by governmental body or officer of injury or incident resulting in injury as constituting required claim or notice of claim for injury—modern status. 7 ALR 4th 1063.

7-6-4302. Payment of claims by warrant or check.

Compiler's Comments

2001 Amendment: Chapter 278 in introduction at beginning of first sentence deleted "Except as provided in 7-6-4121"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1985 Amendment: After first sentence inserted introductory clause; near beginning of (1) substituted "may" for "must"; and inserted (2) allowing city treasurer or town clerk to pay the demand by check if there are sufficient funds.

Case Notes

Power of General Powers Town to Arbitrate Contract Held Included in Power to Contract: Holm-Sutherland contracted with the town of Shelby to construct sewer and water improvements within the town. The contract included a provision requiring that all disputes involving the interpretation of the contract documents or breach of the contract were to be settled by arbitration. When a dispute arose, Holm-Sutherland sought arbitration. Litigation ensued, and the town argued that as a noncharter government, it had only those powers granted by the Legislature and that a municipality's council had a duty pursuant to 7-6-4301 and this section to determine the validity of claims and that duty could not be delegated to an arbitrator. The Supreme Court agreed with the District Court that a general powers municipality has broad powers to enter into contracts pursuant to 7-1-4124(4) and (23), that Title 27, ch. 5, evidences a general state policy favoring arbitration, and that the powers granted a municipality establish its ability to be bound to the terms of a contract that contains a binding arbitration clause. Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053, 56 St. Rep. 595 (1999).

7-6-4304. Issuance of duplicate warrants and checks.

Compiler's Comments

1989 Amendment: Near end of (1) substituted "municipality" for "city".

Part 44
Municipal Taxation

Part Case Notes

Certification by City Clerk: The requirement of 7-6-4407 (now repealed) that after the City Council has determined the amount of city taxes to be levied on city property for all purposes, the City Clerk must certify the resolution passed by the Council in that behalf to the County Clerk, was sufficiently complied with by Clerk's attestation. The terms "certify" and "attest" mean substantially the same thing: that what appears in the instrument is genuine or true. Morse v. Kroger, 87 M 54, 285 P 185 (1930).

Part Attorney General's Opinions

Mill Levy Limitations Not Impliedly Repealed by Property Tax Freeze: Initiative No. 105 and Senate Bill No. 71 (Ch. 654, L. 1987) do not amend or repeal by implication statutes limiting the total amount of mill levies. 42 A.G. Op. 21 (1987).

Authority to Exceed Mill Levy — Voter Approval Required: Only if the voters of a municipality approve may the municipality exceed 7-6-4452's (now repealed) mill levy maximum in order to offset an anticipated lowering of expendable revenue due to tax protests involving tax money tied up in litigation. (See 1999 amendment.) 39 A.G. Op. 55 (1982).

Part Law Review Articles

Of Castles and Kings: A Perspective for Property Tax Reform, Even, 50 Mont. L. Rev. 243 (1989).

Part Collateral References

Estoppel of state or local government in tax matters. 21 ALR 4th 573.

7-6-4401. General taxing power of municipalities.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Case Notes

Licensing Fee for Adult Movie Video Booths as Regulatory Measure — Free Speech Not Violated: The Supreme Court affirmed a city ordinance imposing a $300 annual fee for adult movie video booths, finding the city met its burden of proving the fee was both reasonable and designed as a regulatory measure to provide funds for administrative costs, policing of the booths, and health enforcement costs and expenses. The court held that estimates of future expenses may be included for purposes of setting a fee and that, being regulatory in nature, the fee did not violate the right to free speech guaranteed by the first amendment to the U.S. Constitution and Art. II, sec. 7, Mont. Const. Great Falls v. M.K. Enterprises, Inc., 225 M 292, 732 P2d 413, 44 St. Rep. 242 (1987).

Attorney General's Opinions

Garbage Removal — Burning — Constitutional Law: A city may provide tax-supported garbage-hauling services. The service in Kalispell came under the state health department rules which also provide that the geographical area covered by a private hauler or tax-supported service is within the area where open burning is prohibited. Neither due process nor equal protection is violated by a prohibition of open burning in some areas when the object and tendency of the prohibiting legislation or a rule adopted thereunder is promotion of public health. 38 A.G. Op. 30 (1979).

7-6-4406. Authority to levy special taxes and assessments.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Case Notes

Special Taxes: A city, under this section, had the power to levy special taxes for the purpose of paying interest on bonded indebtedness and creating a sinking fund, and the contention that the taxing power of a city of a class other than the first class was limited to a 10-mill levy for all purposes by 7-6-4405 (now repealed) was without merit. First Nat'l Bank of Glendive v. Sorenson, 65 M 1, 210 P 900 (1922).

7-6-4409. Determination of assessments.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in first sentence, after "department", inserted "of revenue" and deleted "or its agent" and substituted "property tax record" for "assessment book"; deleted (2) that allowed the Department of Revenue to charge for copies of assessment books; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Case Notes

Valuation by County Assessor: Under the provisions of this section and other statutes applicable and in force from time to time, the basis of taxation for a city or town has been the valuation made by the County Assessor for state and county purposes. The City or Town Council has had no authority to amend or change the items listed in the roll furnished by him, its office being merely to ascertain the rate of taxation necessary to produce the amount required to meet the expenses of the city or town government and to certify it to the County Treasurer. (See 1993 special session amendment.) Lockey v. Bozeman, 42 M 387, 113 P 286 (1910).

Assessment of City Property: Under this section and 7-6-4407 (now repealed), the assessment of property of a city was not completed until the date of the resolution of the City Council fixing

and levying the amount of taxes to be levied and assessed for such year. State ex rel. Butte v. Johnson, 16 M 570, 41 P 706 (1895).

Legal Levy: The municipal authorities of an incorporated city could make a legal assessment in electing to take the assessment made by the county and state assessing authorities as the basis for the levy of municipal taxes on property within such city; and the levy of lawful taxes thereon by such city, according to the provisions of its charter and ordinances, constituted a legal levy. Lockey v. Walker, 12 M 577, 31 P 639 (1892).

Collateral References

Standing of one taxpayer to complain of underassessment or nonassessment of property of another for state and local taxation. 9 ALR 4th 428.

Power to remit, release, or compromise tax claim. 28 ALR 2d 1425.

7-6-4410. Property tax record to be furnished to certain municipalities.

Compiler's Comments

2003 Amendment: Chapter 34 near beginning of first sentence after "before the" substituted "first Monday in August" for "second Monday in July". Amendment effective February 18, 2003.

Retroactive Applicability: Section 9(4), Ch. 34, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to any assessment or levy by any taxing jurisdiction for calendar year 2003 for which an assessment or levy date is not specified."

1993 Special Session Amendment: Chapter 27 in first sentence, after "department", inserted "of revenue" and deleted "or its agent" and substituted "property tax record" for "assessment book"; deleted (2) that allowed the Department of Revenue to charge for copies of assessment books; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

7-6-4412. Preparation of municipal property tax record.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (1), in first sentence, substituted "shall provide a copy of the property tax record to" for "to make a duplicate of the corrected assessment book for" and at beginning of last sentence substituted "The record must be" for "Such book shall be styled "The Duplicate Assessment Book for the City of ...." and must contain" and near middle substituted "property tax record" for "assessment book"; in (2) substituted "The copy must be in a form that itemizes" for "Such duplicate must be made in a book furnished by the city clerk of each city in the county and ruled in columns specifying"; deleted (3) that read: "(3) The county clerk must deliver such duplicate assessment book to each city treasurer and take his receipt therefor, having attached thereto the affidavit similar to the one set out in 15-10-306"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Case Notes

Affidavit of County Clerk: The word "similar" in subsection (3) does not require the County Clerk to make an affidavit identical with the one required by 15-10-306 (now repealed) but merely requires an affidavit covering all the facts showing that the Clerk had done his duty in making the copy of the assessment book. (See 1993 special session amendment.) State ex rel. Butte v. Weston, 29 M 125, 74 P 415 (1903).

Delivery to City Treasurer: It is the duty of the County Clerk to deliver to the City Treasurer the duplicate assessment book required by this section at the same time the original or duplicate is delivered to the County Treasurer. (See 1993 special session amendment.) State ex rel. Butte v. Weston, 29 M 125, 74 P 415 (1903).

7-6-4413. Collection of taxes.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (1) substituted "property tax record" for "assessment book"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Case Notes

Assessments as Tax: Assessments for special city improvements, which under 7-12-4181 the County Treasurer is required to collect, fall within the meaning of the words "tax" and "taxes" as

employed in this section, making it the duty of the County Treasurer to collect city taxes where a city has not imposed that duty upon its own Treasurer. State ex rel. Wolf Point v. McFarlan, 78 M 156, 252 P 805 (1927).

Remittance to City Without Delay: Where a city has failed to provide by ordinance for the collection of its taxes by its own Treasurer, the Treasurer of the county in which such city is situated must, under this section, collect and pay them to the City Treasurer without delay. State ex rel. Wolf Point v. McFarlan, 78 M 156, 252 P 805 (1927), explained in School District v. Pondera County, 89 M 342, 297 P 498 (1931).

Remittance to Municipal Treasurer: Although, under this section, the County Treasurer must collect taxes for a city or town which has not by ordinance placed the duty of collection upon its own Treasurer, no provision is made as to when the money so collected must be turned over to the City or Town Treasurer. The County Treasurer must, within a reasonable time after collection, compute the amount due the city or town and pay it over to the proper custodian. The lapse of 1 month after collection of the bulk of the city or town taxes is not a reasonable time within which to perform that duty. State ex rel. Cut Bank v. McNamer, 62 M 490, 205 P 951 (1922).

Attorney General's Opinions

Delinquency Interest, Penalties, and Costs to Follow Tax: The Montana Supreme Court held in School District v. Pondera County, 89 M 342, 297 P 498 (1931), that unless a statute provides otherwise, interest, penalties, and costs collected on delinquent taxes follow the tax; therefore, school districts, cities, and other government entities authorized to levy taxes are entitled to a pro rata share of the penalties collected on delinquent property taxes by the County Treasurer. 41 A.G. Op. 25 (1985).

Collection of Special Assessment for Demolition of Dangerous Building: Special assessments imposed by a city or town for the demolition by it of dangerous buildings constitute city or town taxes under this section, and the County Treasurer must collect a properly certified special assessment for demolition of a dangerous building unless the city or town has provided for the City Treasurer to collect taxes under this section. 39 A.G. Op. 39 (1981).

Liability for Tortious Collection: A County Treasurer acts as an agent of the city when collecting city taxes, and although he must follow proper collection procedures and must exercise due care to collect only properly certified assessments, if there is any problem with the validity of an assessment it is the city, not the County Treasurer, that may be liable. 39 A.G. Op. 39 (1981).

Purpose: The purposes of this section are clearly to avoid needless duplication of the effort and cost of billing property owners and collecting the money and to provide taxpayers the convenience of a single bill, purposes best served by a broad interpretation of the term "taxes" as used in this section. 39 A.G. Op. 39 (1981).

Collateral References

Estoppel of state or local government in tax matters. 21 ALR 4th 573.

7-6-4414. Sales for delinquent taxes when county collects municipal tax.

Compiler's Comments

1987 Amendment: In (2), after "money received from sales", deleted "and redemptions" and substituted "15-17-322" for "15-18-108".

Collateral References

Provisions of Soldiers' and Sailor's Civil Relief Act relating to taxation of property of military personnel. 32 ALR 2d 618.

Tax sale as freeing property from possibility of further assessments for benefits to land. 11 ALR 2d 1133.

7-6-4421. Authorization for tax levy and collection by municipality.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-6-4423. Sales for delinquent taxes when municipality collects municipal tax.

Compiler's Comments

1995 Amendment: Chapter 105 at beginning of (1)(a), after "town", deleted "whose city treasurer or town clerk", after "held" substituted "by the city or town unless the" for "therefor by such city treasurer or town clerk but such", and before "days" inserted "working"; at end of (1)(b)(iv), after "added", substituted "if any" for "and the total amount of such delinquent tax or assessment with penalty added"; and near end of (1)(c), before "be included", substituted "that total must" for "the whole of the assessment remaining unpaid shall"; and made minor changes in style.

1987 Amendment: Near end of (1)(c) changed "7-12-4181" to "7-12-4182".

Case Notes

Assessments for Special Improvements: A County Treasurer could not be compelled, under this section, to spread upon the delinquent tax roll of the county certain assessments for special city improvements which became delinquent on a city lot after the county had bought it in at a tax sale, since special assessments are not taxes within the meaning of 15-18-403 (since repealed) and the liens of such assessments were extinguished upon issuance of the tax deed. State ex rel. Great Falls v. Jeffries, 83 M 111, 270 P 638 (1928), explained in Cascade County v. Weaver, 108 M 1, 90 P2d 164 (1939).

Collateral References

Tax sale as freeing property from possibility of further assessments for benefits to land. 11 ALR 2d 1133.

7-6-4431. Authorization to exceed or impose less than maximum mill levy — election required to exceed.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 361 inserted (3) concerning imposing less than maximum levy and carryforward of levy authority without an election; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 495 in (2) in first sentence substituted "an election as provided in 15-10-425" for "the next regular primary or general election on either odd-numbered or even-numbered years" and in third sentence substituted "impose the mill levy" for "exceed the statutory mill levy limit" and at end deleted "for a period not to exceed 2 years"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 574 near end of introductory clause substituted "15-10-420" for "law"; deleted former (1)(d) that read: "(d) the specific mill levy limitation to be exceeded"; in (2) at end of first sentence substituted "an election as provided in 15-10-425" for "the next regular primary or general election on either odd-numbered or even-numbered years" and at end of third sentence substituted "impose the mill levy in the amount specified in the resolution" for "exceed the statutory mill levy limit in the amount specified in the resolution for a period not to exceed 2 years"; and made minor changes in style. Amendment effective July 1, 2001.

Attorney General's Opinions

Voter Approval of Mill Levy in Excess of Legal Maximum: This section allows the municipality's voters to approve a mill levy in excess of the maximum set by 7-6-4452 (now repealed). 39 A.G. Op. 55 (1982).

7-6-4438. Tax levy and expenditures for municipal and administrative purposes when limits on municipal indebtedness exceeded.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of (1) and (2) inserted reference to 15-10-420; deleted former (2) that read: "(2) However, the aggregate of all taxes authorized for general municipal and administrative purposes may not exceed 1.5% annually of the taxable value of all property subject to taxation in the city or town"; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-6-4451. All-purpose mill levy authorized.

Compiler's Comments

2001 Amendment: Chapter 574 near beginning deleted reference to 7-6-4452; and made minor changes in style. Amendment effective July 1, 2001.

Attorney General's Opinions

Calculation and Expenditure of "Carryforward" Mills Under 2001 Revision to Local Government Property Tax Levy and Budget Provisions: The 2001 revisions to local government property tax levy and budget laws instituted a general approach of deleting numeric limits on the number of mills that a local government could levy for any specific purpose and placed a cap on the number of mills that a local government is allowed to levy through property taxation. The combined effect was to free a local government to dedicate as much of its annual mill levy as it chooses for any lawful governmental purpose, as long as the total millage covered by the cap does not exceed the cap measured by the prior year's property tax assessments. Likewise, the "carryforward" provision in 15-10-420 does not depend on how many mills, if any, that a city chooses to devote to a particular purpose in any year. Instead, the provision allows a city, if it finds itself able to fund its operations without levying the full number of mills allowed, to hold in reserve for future years the authority to levy the difference between the number of mills allowed and the number actually levied. That authority is not calculated on the basis of the amount budgeted or the number of mills needed to fund a particular government function, but rather is calculated with reference to the whole amount raised by property taxes, subject to the statutory exceptions, without reference to how the money might have been spent in the prior year. However, the "carryforward" authority is prospective only and may not be applied to calculations for the 2001 budget year because the authority did not exist prior to July 1, 2001. Thus, "carryforward" mills may be levied in any future year after budget year 2001 and expended by a local government for any lawful purposes that the local government chooses. 49 A.G. Op. 5 (2001).

Unauthorized Levies Not to Be Used as Basis for Temporary Increase: The special levies authorized by 7-32-4117, 7-33-4130, and 19-10-301 (renumbered 19-19-301) must be included in the 65-mill levy authorized by 7-6-4451 and 7-6-4452 (now repealed). Any such special levies improperly levied in addition to the 65-mill all-purpose levy may not be used in computing the basis for a 5% increase under 15-7-122 (now repealed). 38 A.G. Op. 44 (1979).

All-Purpose Levy Encompassing Multiple Levies: Required multiple levies must be included within the 65-mill all-purpose levy authorized by 7-6-4451 and 7-6-4452 (now repealed). 36 A.G. Op. 94 (1976).

7-6-4453. Certain special mill levies also available.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) in third sentence and in (2) deleted reference to 7-6-4452; deleted former (3) that read: "(3) In a third-class city or town, the all-purpose mill levy may not include the special tax levy for the firefighters' disability and pension fund provided for in 19-18-503. This special tax levy must be made in addition to the all-purpose mill levy"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of second sentence in (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1986 Amendment: In (1) after "to pay judgments" inserted "or tax protest refunds"; and in (2) after "judgments," inserted "tax protest refunds".

1983 Amendment: Inserted (3) requiring special levy for firefighters' pension fund.

7-6-4455. Changes from all-purpose mill levy method.

Compiler's Comments

2001 Amendment: Chapter 574 near middle substituted reference to 7-6-4451 for reference to 7-6-4452; and made minor changes in style. Amendment effective July 1, 2001.

Part 45
Municipal Warrants

7-6-4501. Interest on unpaid warrants — definition.

Compiler's Comments

2001 Amendment: Chapter 278 inserted (3) defining warrant; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1985 Amendment: In (2) substituted "the time of the endorsement" for "that time", and after "ordinance", inserted remainder of text relating to interest on warrants subject to purchase by the county.

7-6-4502. Call for payment of warrants drawing interest.

Compiler's Comments

1985 Amendment: At the beginning of (1) inserted exception clause; inserted (1)(b) relating to notification of County Treasurer; inserted (2) relating to abbreviated notice; in (3), after "notice", inserted "unless all of such warrants are held by a county, in which case the warrants cease to draw interest from the time of notification of the county treasurer".

Part 46
Deposit and Investment of Municipal Money

7-6-4601. Deposit of public money.

Case Notes

Bank Failure:

A city may not receive a preference over other creditors of an insolvent bank in regard to money deposited in the bank in excess of the bank's security bond. Missoula v. Dick, 76 M 502, 248 P 193 (1926).

A City Treasurer may be liable for a loss occasioned by the failure of a bank in which he deposited city money. Livingston v. Woods, 20 M 91, 49 P 437 (1897). See also Comm'rs of Jefferson County v. Lineberger, 3 M 231 (1878).

7-6-4602. Interest rate on deposited public money.

Compiler's Comments

1989 Amendment: Substituted final clause relating to rate of interest for "the rate of 2 ½% per annum, payable quarter-annually". Amendment effective July 1, 1989.

CHAPTER 7
DEBT MANAGEMENT

Chapter Law Review Articles

Certain Legal Aspects of Secondary Market Municipal Derivative Products, Wolf, Herrmann, & Glass, 49 Bus. Law. 1629 (1994).

Tribal Bonds: Indian Sovereignty and the Tax Legislative Process, Aprill, 46 Admin. L. Rev. 333 (1994).

The Local Government Capital Improvements Financing Game: Who Plays, Who Pays, and Who stays: Symposium, Leitner, 25 Urb. Law. 481 (1993).

The Community Reinvestment Act—Asset or Liability?, Cohen, 75 Marq. L. Rev. 599 (1992).

Financing America's Public Infrastructure: Issues for Local Governments, 22 Akron L. Rev. 381 (1989).

SEC Registration Requirements for Taxable Municipal Securities, Lyons, 21 Urb. Law. 223 (1989).

The Elimination of the Federal Income Tax Exemption for Interest Earned on Unregistered State and Local Bonds: South Carolina v. Baker [108 S. Ct. 1355], 42 Tax Law. 409 (1989).

Chapter Collateral References

Inclusion of tax exempt property in determining value of taxable property for debt limit purposes. 30 ALR 2d 903.

Validity of municipal bond issue as against owners of property annexation of which to municipality became effective after date of election at which issue was approved by voters. 10 ALR 2d 559.

Power of governmental unit to issue bonds as implying power to refund them. 1 ALR 2d 134.

Sale of municipal or other public bonds at less than par or face value. 162 ALR 396; 91 ALR 7.

Estoppel by recitals in municipal bonds as to lawfulness of issue. 158 ALR 938; 86 ALR 1057.

Effect of delay after authorization by voters on power of governmental unit to issue bonds. 135 ALR 768.

Validity of municipal bond issue for purpose of paying employees. 96 ALR 1204.

Effect of inclusion in call for election, or in proposal for bond issue submitted to people, of unauthorized method of payment or retirement. 93 ALR 362.

Negotiability of municipal bonds as affected by reference to funds from which they are to be paid. 42 ALR 1027.

Part 1
General Provisions Related to Local Governments

7-7-102. Reason for review by attorney general.

Compiler's Comments

Section Not Codified: Part of section 82-413, R.C.M. 1947, a severability clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 4, Ch. 139, L. 1939.

7-7-103. Review by attorney general — report — review of citizen bonds.

Compiler's Comments

1993 Amendment: Chapter 559 near beginning of (3) inserted reference to 7-7-2213; and made minor changes in style. Amendment effective April 28, 1993.

1989 Amendment: Inserted (3) regarding imposition of bond protective requirements by the Attorney General; and made minor change in phraseology. Amendment effective April 12, 1989.

7-7-105. Challenges to local government bond elections.

Case Notes

Noncompliance With Statutes: This section has no application where there was not just a mere defect or irregularity in the proceedings but an entire absence of any attempt to comply with the statutes controlling such election. Weber v. Helena, 89 M 109, 297 P 455 (1931), distinguished in State ex rel. Wolff v. Guerkink, 111 M 417, 109 P2d 1094 (1941).

Law Review Articles

Municipal Bond Financing After South Carolina v. Baker [108 S. Ct. 1355] and the Tax Reform Act of 1986: Can State Sovereignty Reemerge?, 42 Tax Law. 147 (1988).

Collateral References

Action *key* 20; Counties *key* 196(5); Municipal Corporations *key* 1000.

1 C.J.S. Actions §42; 20 C.J.S. Counties §290; 64 C.J.S. Municipal Corporations §2160.

64 Am. Jur. 2d Public Securities and Obligations §§376 through 387, 454 through 476.

7-7-106. Hearing and determination on challenge.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §138.

7-7-107. Limitation on amount of bonds for city-county consolidated units.

Compiler's Comments

2001 Amendment: Chapter 29 in (1) near middle after "exceeds" substituted "2.5% of the total assessed value of taxable property, determined as provided in 15-8-111, within the consolidated" for former language that read: "(a) (i) 39% of the taxable value of the property of the local", after "government" deleted "subject to taxation", and after "taxes" deleted "plus

(ii) an additional 50% of the taxable value of telecommunications property under 15-6-141 within the local government for tax year 1999, multiplied by 39%, and an additional 50% of the taxable value attributable to electrical generation property under 15-6-141 within the local government for tax year 1999, multiplied by 39%; plus

(b) for bonds to be issued during fiscal year 2001, an additional 25% of the taxable value of class six property within the local government for tax year 1999, multiplied by 39%, and an additional 60% of the taxable value of class eight property within the local government for tax year 1999, multiplied by 39%;

(c) for bonds to be issued during fiscal year 2002, an additional 50% of the taxable value of class six property within the local government for tax year 1999, multiplied by 39%, and an additional 60% of the taxable value of class eight property within the local government for tax year 1999, multiplied by 39%;

(d) for bonds to be issued during fiscal year 2003, an additional 75% of the taxable value of class six property within the local government for tax year 1999, multiplied by 39%, and an additional 60% of the taxable value of class eight property within the local government for tax year 1999, multiplied by 39%;

(e) for bonds to be issued during fiscal years in which the tax rate for class eight property is 2%, an additional 100% of the taxable value of class six property within the local government for tax year 1999, in each case of class six property, multiplied by 39%, and an additional 77% of the taxable value of class eight property within the local government for tax year 1999, multiplied by 39%;

(f) for bonds to be issued during fiscal years in which the tax rate for class eight property is 1%, an additional 94% of the taxable value of former class eight property within the local government for tax year 1999, in each case of former class eight property, multiplied by 39%; and

(g) for bonds to be issued during the fiscal year and succeeding fiscal years in which 15-6-138 is repealed, an additional 100% of the taxable value of class eight property within the local government for tax year 1999, in each case of former class eight property, multiplied by 39%"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1999 Amendments — Composite Section: (Version effective July 1, 2000) Chapter 285 in (1)(a)(i) at end after "taxes" inserted "plus"; inserted (1)(b) relating to bonds to be issued during fiscal year 2001; inserted (1)(c) relating to bonds to be issued during fiscal year 2002; inserted (1)(d) relating to bonds to be issued during fiscal year 2003; inserted (1)(e) relating to bonds to be issued during fiscal years when class eight property tax rate is 2%; inserted (1)(f) relating to bonds to be issued during fiscal years when class eight property tax rate is 1%; inserted (1)(g) relating to bonds to be issued after repeal of 15-6-138; and made minor changes in style. Amendment effective July 1, 2000.

Chapter 426 at end of (1) in temporary version and in (1)(a)(ii) in July 1, 2000, version inserted provision relating to telecommunications property; and made minor changes in style. Amendment effective January 1, 2000.

Chapter 556 at end of (1) in temporary version and in (1)(a)(ii) in July 1, 2000, version inserted clause including in bonding limitation formula 50% of taxable value attributable to electrical generation property multiplied by 39%; and made minor changes in style. Amendment effective January 1, 2000.

Saving Clause: Section 29, Ch. 285, L. 1999, was a saving clause.

Section 36, Ch. 556, L. 1999, was a saving clause.

Severability: Section 30, Ch. 285, L. 1999, was a severability clause.

Section 37, Ch. 556, L. 1999, was a severability clause.

Applicability: Section 43, Ch. 426, L. 1999, provided: "[This act] applies to tax years beginning after December 31, 1999."

Section 39(2), Ch. 556, L. 1999, provided that this section applies to fiscal years beginning after June 30, 2000.

1981 Amendment: Increased the bond indebtedness limitation from 27% to 39% of the taxable value in (1).

Effect of 1981 Amendment: The primary purpose of Ch. 614, L. 1981, was to replace the system of taxation of automobiles and light trucks with a fee system. With the adoption of the fee system, automobiles and light trucks are no longer taxable property. The resulting loss of taxable valuation has a direct effect on the amount of indebtedness a political subdivision can incur. Thus it was necessary in Ch. 614 to increase the percentage of taxable valuation used as a limitation on indebtedness to offset the loss of taxable valuation attributable to automobiles and light trucks.

Collateral References

56 Am. Jur. 2d Municipal Corporations §§592 through 676.

7-7-108. Authorization for additional indebtedness for water or sewer systems.

Compiler's Comments

2001 Amendment: Chapter 29 in (2) near end substituted "10% over and above" for "10% of", after "limitation" deleted "as adjusted", and after "7-7-107" deleted "of the taxable value of the property of the consolidated government subject to taxation as ascertained by the last assessment for state and county taxes". Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1999 Amendment: Chapter 285 near end of (2) substituted "exceed 10% of the debt limitation, as adjusted" for "exceed 10% over and above the 39%"; and made minor changes in style. Amendment effective July 1, 2000.

Saving Clause: Section 29, Ch. 285, L. 1999, was a saving clause.

Severability: Section 30, Ch. 285, L. 1999, was a severability clause.

1981 Amendment: Increased the bond indebtedness limitation from 27% to 39% of the taxable value in (2).

Effect of 1981 Amendment: The primary purpose of Ch. 614, L. 1981, was to replace the system of taxation of automobiles and light trucks with a fee system. With the adoption of the fee system, automobiles and light trucks are no longer taxable property. The resulting loss of taxable valuation has a direct effect on the amount of indebtedness a political subdivision can incur. Thus it was necessary in Ch. 614 to increase the percentage of taxable valuation used as a limitation on indebtedness to offset the loss of taxable valuation attributable to automobiles and light trucks.

Collateral References

56 Am. Jur. 2d Municipal Corporations §§592 through 676.

7-7-109. Definitions — sale of notes in anticipation of federal or state revenue or issuance of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in (2), in first sentence after "applied for", inserted "and received a commitment for", after "federal funds" inserted "or has received a commitment from a person or entity to purchase bonds", and after "loan" inserted "or bonds", inserted second sentence concerning outstanding term of notes, and inserted third sentence concerning written commitment prior to issuance; in (3), after "loan", inserted "or bonds"; in (4), in first sentence after "loan", inserted "or bond sale", after "maturity" substituted "the holders of the notes have the right to" for "those bondholders may, in exchange", before "bonds" deleted "long-term", and at end inserted "in exchange for the notes with the bonds maturing as amortization bonds, bearing interest at a rate, and secured over a term as provided in the resolution authorizing the issuance of the notes", inserted second sentence concerning issuing bonds in an amount equal to outstanding notes, and deleted former second, third, and fourth sentences that read: "The bonds so issued are secured and subject to the terms and conditions provided by the law authorizing their issuance. Notes and bonds may be issued as provided in this section regardless of the amount authorized if the amount which may legally be issued is less than the commitment for which the grant or loan is made. Before the notes or bonds are issued, the political subdivision must receive a written commitment for a grant or loan in an amount equal to the remaining estimated costs and must by resolution provide for the fulfillment of the conditions of the commitment"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1985 Amendment: In definition of political subdivision inserted "rural special improvement district" and "county water or sewer district"; at end of first sentence of (4), substituted "may, in exchange, require the issuance of long-term bonds" for "may require the issuance, in exchange, of bonds bearing interest at the maximum rate permitted by law".

1985 Amendment — Remedial: Section 19, Ch. 512, L. 1985, provided: "Section 1 of this act [amending 7-7-109] is remedial in character, and nothing therein may be considered to imply that authority for the taking of any action therein expressly authorized did not previously exist."

7-7-121. Misconduct in relation to bond funds.

Law Review Articles

Full Liability Under Section 10(b) for Municipal Officers and Issuers, Ostrin, 21 Urb. Law. 197 (1989).

Collateral References

Counties *key* 88, 186 ½; Municipal Corporations *key* 170, 951; Officers *key* 111, 114.

20 C.J.S. Counties §§139, 277; 62 C.J.S. Municipal Corporations §545; 64 C.J.S. Municipal Corporations §1953; 67 C.J.S. Officers and Public Employees §334.

7-7-122. Prosecution for misconduct.

Collateral References

Counties *key* 186 ½; District and Prosecuting Attorneys *key* 9.

20 C.J.S. Counties §277; 27 C.J.S. District and Prosecuting Attorneys §10.

7-7-123. Investment of sinking funds of local governments.

Compiler's Comments

1995 Amendment: Chapter 179 in (1), at end, deleted "All those investments must first be approved by the department of commerce"; and made minor changes in style. Amendment effective July 1, 1995.

1983 Amendment: Substituted reference to department of commerce for reference to department of administration.

1981 Amendment: Substituted "department of administration" for "department of community affairs" in (1)(a).

Transfer of Function: The function of the Department of Commerce in this section was transferred from the Department of Administration by sec. 1, Ch. 287, L. 1983. Those functions were transferred to the Department of Administration from the Department of Community Affairs by sec. 7, Ch. 274, L. 1981.

Attorney General's Opinions

When Investment of Bond Proceeds in Government Securities Authorized: Money in a sinking fund is not available for investment if any of the bonds for which the sinking fund was established are not yet due but are then redeemable under optional provisions. While investment in government securities is authorized under this section, it is authorized only to the extent that the sinking fund is not needed for payment of the bonds or interest. Therefore, excess bond proceeds may not be retained in a separate fund and invested without first using the proceeds to calculate the amount of annual tax levy for a sinking fund. Any remainder of the proceeds may then be invested in accordance with this section. 44 A.G. Op. 18 (1991).

Collateral References

Counties *key* 186 ½.

20 C.J.S. Counties §277.

7-7-124. Limitation on investment of sinking funds.

Attorney General's Opinions

When Investment of Bond Proceeds in Government Securities Authorized: Money in a sinking fund is not available for investment if any of the bonds for which the sinking fund was established are not yet due but are then redeemable under optional provisions. While investment in government securities is authorized under 7-7-123, it is authorized only to the extent that the sinking fund is not needed for payment of the bonds or interest. Therefore, excess bond proceeds may not be retained in a separate fund and invested without first using the proceeds to calculate the amount of annual tax levy for a sinking fund. Any remainder of the proceeds may then be invested in accordance with 7-7-123. 44 A.G. Op. 18 (1991).

Collateral References

20 C.J.S. Counties §277.

7-7-132. Procedure to declare bankruptcy.

Compiler's Comments

1995 Amendment: Chapter 296 in (1), in first sentence at beginning, substituted "A local entity" for "Any city or town" and near middle substituted "adjustment" for "composition" and in second sentence, at beginning, inserted "If the local entity submits a proposed plan of adjustment, it is" and after "governed" inserted "subject to the provisions of Montana law applicable to the local entity"; in (2), at beginning of introductory clause, substituted "local entity shall" for "city or town may" and near middle substituted "adjustment" for "composition"; in (2)(a) substituted "legislative body" for "city council or town council"; in (2)(a)(ii) substituted "adjustment" for "composition"; in (2)(a)(iii) substituted "local entity" for "city or town", substituted "adjustment" for "composition", and before "indebtedness" deleted "municipal"; substituted (2)(b) regarding acceptance of the proposed plan for former language that read: "upon the acceptance in writing of the proposed plan of composition of municipal indebtedness by creditors of the petitioning municipal corporation owning not less than the percentage thereof in amount of the municipal securities affected or to be affected by the proposed plan of composition, as provided in the federal laws"; and made minor changes in style.

7-7-133. Power to comply with court decrees related to bankruptcy.

Compiler's Comments

1995 Amendment: Chapter 296 at beginning of first sentence substituted "A local entity shall" for "Any city or town may" and near middle substituted "adjustment" for "composition" and inserted second sentence requiring that orders and decrees of the Bankruptcy Court be based on applicable Montana law.

7-7-134. Role of state and state agencies in relation to bankruptcy.

Compiler's Comments

1995 Amendment: Chapter 296 in two places substituted "local entity" for "city or town", near middle, after "plan of", substituted "adjustment" for "composition", after "board" inserted "or official", and at end deleted "or by any other official or officials having such custody and control"; and made minor changes in style.

Part 21
General Provisions Related to Counties

7-7-2101. Limitation on amount of county indebtedness.

Compiler's Comments

2003 Amendment: Chapter 35 in (2) after "7-21-3413" deleted "and 7-21-3414"; and made minor changes in style. Amendment effective July 1, 2003.

2001 Amendments — Composite Section: Chapter 7 in (1)(a)(i) substituted "15-36-324(14)" for "15-36-324(13)". Amendment effective October 1, 2001. The amendment by Ch. 29 rendered the amendment by Ch. 7 void.

Chapter 29 in (1) near beginning after "may not" substituted "issue bonds or incur other indebtedness" for "become indebted in any manner or", after "aggregate" substituted "exceeds 1.4%" for "exceeding 23%", after "total" substituted "assessed" for "of the taxable", after "value of" inserted taxable", after "property" inserted "determined as provided in 15-8-111", and after "county" substituted "as ascertained by the last assessment for state and county taxes" for "subject to taxation plus:

(a) (i) the value provided by the department of revenue in 15-36-324(13), as ascertained by the last assessment for state and county taxes previous to the incurring of the indebtedness;

(ii) an additional 50% of the taxable value of telecommunications property under 15-6-141 within the county for tax year 1999, multiplied by 23%, and an additional 50% of the taxable value attributable to electrical generation property under 15-6-141 within the county for tax year 1999, multiplied by 23%;

(b) for indebtedness to be incurred during fiscal years 1999 through 2008, an additional 33% of the taxable value of class eight property within the county for tax year 1995, multiplied by 23%;

(c) for indebtedness to be incurred during fiscal year 2001, an additional 25% of the taxable value of class six property within the county for tax year 1999, multiplied by 23%, and an

additional 60% of the taxable value of class eight property within the county for tax year 1999, multiplied by 23%;

(d) for indebtedness to be incurred during fiscal year 2002, an additional 50% of the taxable value of class six property within the county for tax year 1999, multiplied by 23%, and an additional 60% of the taxable value of class eight property within the county for tax year 1999, multiplied by 23%;

(e) for indebtedness to be incurred during fiscal year 2003, an additional 75% of the taxable value of class six property within the county for tax year 1999, multiplied by 23%, and an additional 60% of the taxable value of class eight property within the county for tax year 1999, multiplied by 23%;

(f) for indebtedness to be incurred during fiscal years in which the tax rate for class eight property is 2%, an additional 100% of the taxable value of class six property within the county for tax year 1999, in each case of class six property, multiplied by 23%, and an additional 77% of the taxable value of class eight property within the county for tax year 1999, multiplied by 23%;

(g) for indebtedness to be incurred during fiscal years in which the tax rate for class eight property is 1%, an additional 94% of the taxable value of former class eight property within the county for tax year 1999, in each case of former class eight property, multiplied by 23%; and

(h) for indebtedness to be incurred during the fiscal year and succeeding fiscal years in which 15-6-138 is repealed, an additional 100% of the taxable value of former class eight property within the county for tax year 1999, in each case of former class eight property, multiplied by 23%"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1999 Amendments — Composite Section: (Version effective July 1, 2000) Chapter 285 at beginning of (1)(b) deleted "for indebtedness to be incurred during fiscal year 1997, an additional 11% of the taxable value of class eight property within the county for tax year 1995, for indebtedness to be incurred during fiscal year 1998, an additional 22% of the taxable value of class eight property within the county for tax year 1995, and"; inserted (1)(c) relating to indebtedness incurred during fiscal year 2001; inserted (1)(d) relating to indebtedness incurred during fiscal year 2002; inserted (1)(e) relating to indebtedness incurred during fiscal year 2003; inserted (1)(f) relating to indebtedness incurred during fiscal years when class eight property tax rate is 2%; inserted (1)(g) relating to indebtedness incurred during fiscal years when class eight property tax rate is 1%; inserted (1)(h) relating to indebtedness incurred after repeal of 15-6-138; and made minor changes in style. Amendment effective July 1, 2000.

Chapter 426 in (1)(b) at beginning deleted "for indebtedness to be incurred during fiscal year 1997, an additional 11% of the taxable value of class eight property within the county for tax year 1995, for indebtedness to be incurred during fiscal year 1998, an additional 22% of the taxable value of class eight property within the county for tax year 1995, and"; inserted (1)(c) in temporary version and (1)(a)(ii) in July 1, 2000, version relating to taxable value of telecommunications property; and made minor changes in style. Amendment effective January 1, 2000.

Chapter 556 in (1)(b) at beginning deleted "for indebtedness to be incurred during fiscal year 1997, an additional 11% of the taxable value of class eight property within the county for tax year 1995, for indebtedness to be incurred during fiscal year 1998, an additional 22% of the taxable value of class eight property within the county for tax year 1995, and" and near end after "tax year 1995" deleted "in each case of class eight property"; inserted (1)(c) in temporary version and (1)(a)(ii) in July 1, 2000, version relating to taxable value attributable to electrical generation property; and made minor changes in style. Amendment effective January 1, 2000.

Saving Clause: Section 29, Ch. 285, L. 1999, was a saving clause.

Section 36, Ch. 556, L. 1999, was a saving clause.

Severability: Section 30, Ch. 285, L. 1999, was a severability clause.

Section 37, Ch. 556, L. 1999, was a severability clause.

Applicability: Section 43, Ch. 426, L. 1999, provided: "[This act] applies to tax years beginning after December 31, 1999."

Section 39(2), Ch. 556, L. 1999, provided that this section applies to fiscal years beginning after June 30, 2000.

1997 Amendments: Chapter 227 in (2), near end, inserted "7-7-2402"; and made minor changes in style.

Chapter 466 in (1), near middle, substituted "15-36-324(13)" for "15-36-324(10)". Amendment effective April 30, 1997.

1995 Amendments: Chapter 451 in (1), after "plus the", substituted "value provided by the department of revenue in 15-36-324(10)" for previous formula (see 1995 Session Law for text). Amendment effective January 1, 1996.

Chapter 570 in middle of (1), after "indebtedness", inserted language revising county government indebtedness limitations (see 1995 Session Law for text).

Applicability: Section 55, Ch. 451, L. 1995, provided: "(1) [This act] applies to oil and natural gas produced and sold on or after January 1, 1996.

(2) (a) [Sections 21 through 26] [7-1-2111, 7-7-2101, 7-7-2203, 7-14-2524, 7-14-2525, and 7-16-2327] apply to county fiscal years beginning after June 30, 1996.

(b) [Sections 38 through 46] [20-9-104, 20-9-141, 20-9-161, 20-9-331, 20-9-333, 20-9-501, 20-9-507, 20-10-144, and 20-10-146] apply to school fiscal years beginning after June 30, 1996.

(3) (a) An operator is subject to provisions of Title 15, chapter 23, parts 1 and 6 [part 6 now repealed]; Title 15, chapter 36; Title 15, chapter 38; and Title 82, chapter 11, part 1, as those laws read on December 31, 1995, for all oil and natural gas produced and sold by the operator before January 1, 1996. [On December 31, 1995, Title 15, ch. 36, contained only part 1, now repealed. Part 3 of that chapter became effective January 1, 1996.]

(b) Except as provided in subsection (3)(c), the payment, collection, and distribution of taxes on oil and natural gas production occurring before January 1, 1996, must be made according to the provisions of the laws referred to in subsection (3)(a) governing the tax in effect on the last day of the tax period in which the activity, enterprise, or product being taxed was engaged in, took place, or was produced and sold.

(c) [Section 19] [15-36-325, now repealed] applies to the payment, collection, and distribution of the local government severance tax for oil and natural gas produced and sold after December 31, 1994, and before January 1, 1996.

(d) All taxes collected pursuant to audit or collected after the date the tax is payable under the laws referred to in subsection (3)(a) must be distributed according to the statute governing allocation of the tax in effect on the date when the tax liability was incurred."

1993 Special Session Amendment: Chapter 9 near middle of (1), after "amount of", substituted "taxes levied on new production, production from horizontally completed wells, and incremental production" for "interim production and new production taxes levied", inserted reference to subsection (2)(c), and after "new production" inserted "and production from horizontally completed wells"; and made minor changes in style. Amendment effective December 17, 1993.

Report Required: Section 21, Ch. 9, Sp. L. November 1993, provided: "The board of oil and gas conservation shall report at least once a year to the revenue oversight committee [now revenue and transportation interim committee] regarding the implementation of [this act]. The reports must include but are not limited to information regarding:

(1) the methods used to determine production decline rates;

(2) rules adopted to implement [this act];

(3) the number of enhanced recovery projects completed or anticipated to be completed in a year; and

(4) the number of horizontal wells completed or anticipated to be completed in a year and the method of recovery from the horizontal wells."

Severability: Section 23, Ch. 9, Sp. L. November 1993, was a severability clause.

Effective Date — Applicability: Section 24, Ch. 9, Sp. L. November 1993, provided: "[This act] is effective on passage and approval [approved December 17, 1993] and applies to oil production from new or expanded enhanced recovery projects and to tax years that begin after December 31, 1993."

1989 Special Session Amendment: In (1), after "15-23-612" (now repealed), inserted "multiplied by 60%, plus the value of any other production occurring after December 31, 1988, multiplied by 60%"; and made minor change in phraseology. Amendment effective August 11, 1989, and applies retroactively to net proceeds taxes, severance taxes, and local government taxes on oil and gas, other than interim production and new production, produced after December 31, 1988.

1987 Amendment: In (1), before "new production taxes", inserted "interim production and" and after "multiplied by 60%" inserted "plus the amount of value represented by new production exempted from tax as provided in 15-23-612".

Effective Date — Applicability — 1987 Enactment: Section 28, Ch. 655, L. 1987, provided: "This act is effective on passage and approval [approved April 13, 1987] and applies

retroactively, within the meaning of 1-2-109, to taxable quarters beginning on or after April 1, 1987. The tax rate and filing method applicable to a well that qualifies as interim production under section 10 but which did not qualify as new production under 15-23-601 [now repealed] prior to the applicability date of this act does not change for tax periods prior to the applicability date."

1985 Amendments: Chapter 584 in (2) increased the limitation on indebtedness from $150,000 to $500,000; and inserted (3) relating to acquisition of conservation easements.

Chapter 695 in (1) near middle, before "taxable value", inserted "total of the" and after "subject to taxation", inserted "plus the amount of new production taxes levied divided by the appropriate tax rates described in 15-23-607(2)(a) or (2)(b) [now repealed] and multiplied by 60%".

1981 Amendments: Chapter 134 increased indebtedness amount in (2) from $40,000 to $150,000.

Chapter 614 increased the indebtedness limitation from 18% to 23% of the taxable value in (1).

Effect of 1981 Amendment: The primary purpose of Ch. 614, L. 1981, was to replace the system of taxation of automobiles and light trucks with a fee system. With the adoption of the fee system, automobiles and light trucks are no longer taxable property. The resulting loss of taxable valuation has a direct effect on the amount of indebtedness a political subdivision can incur. Thus it was necessary in Ch. 614 to increase the percentage of taxable valuation used as a limitation on indebtedness to offset the loss of taxable valuation attributable to automobiles and light trucks.

Case Notes

Federal Revenue Sharing Funds: The expenditure of federal revenue sharing funds is not an indebtedness or liability of the county within the meaning of the statutory restriction. Yovetich v. McClintock, 165 M 80, 526 P2d 999 (1974).

Airport Commission:

Board of County Commissioners which overtaxed taxpayers in one year in order to provide a fund out of which expenses for capital improvements and remodeling of airport were to be paid, which expenses exceeded $21,000, clearly violated Art. XIII, sec. 5, 1889 Mont. Const., by incurring a liability for over $10,000 without the approval of a majority of the electors of the county; county was not able to argue that "no indebtedness or liability" had been created because the money was already on hand. Extraordinarily high levy created a "reserve fund" to be used for capital improvements, which is not allowable due to restriction in 67-10-402 of reserve funds to improvement of surfaces of runways or ramps. Burlington N., Inc. v. Flathead County, 162 M 371, 512 P2d 710 (1973), distinguished in Yovetich v. McClintock, 165 M 80, 526 P2d 999 (1974).

City-county airport commission which borrowed $200,000 from the Aeronautics Commission (now Board of Aeronautics) without consent of electorate and which was obligated to repay a total sum of $238,500 over a 10-year period had incurred a debt upon which an amount over $10,000 was due each year and had violated Art. XII, 1889 Mont. Const. Resolution by airport commission which approved the loan and which obligated the county to repay the Aeronautics Commission (now Board of Aeronautics) only $10,000 did not bring the debt within the Constitution since the commission was itself obligated and was an agent of the county. Burlington N., Inc. v. Richland County, 162 M 364, 152 P2d 707 (1973), distinguished in Yovetich v. McClintock, 165 M 80, 526 P2d 999 (1974).

Redemption Bonds: The issuance by a county of coupon bonds for the purpose of redeeming outstanding county warrants is merely a change in the form of a subsisting liability and not the creation of a new indebtedness or liability and is, therefore, not within the inhibition of the laws of the state which provide in effect that counties shall not incur an indebtedness or liability for any single purpose in excess of a stated amount without the approval of a majority of the electors of the county. Hotchkiss v. Marion, 12 M 218, 29 P 821 (1892). See Edwards v. Lewis & Clark County, 53 M 359, 165 P 297 (1917).

Attorney General's Opinions

County Authorized to Incur Debt or Borrow Without Election: A county is authorized under this section to incur a liability or indebtedness up to $500,000 or, pursuant to 7-7-2402, to borrow up to $10,000 (see 1997 amendment) without an election. An installment purchase contract is not a "borrowing of money" within the meaning of 7-7-2402. A municipality is not required to hold an election to borrow money by a method other than issuing bonds, but it is limited by 7-7-4201 to a 28% debt ceiling. 42 A.G. Op. 13 (1987).

Authority to Contract for Lease Without Election: A contract providing for a total liability in excess of $40,000, prior to 1981 amendment, must be approved by the voters under this section even though it provides for annual payments of less than $40,000, an option to purchase at the end of the contract term for an additional payment less than $40,000, and an option to cancel at any time. 38 A.G. Op. 56 (1979).

Collateral References

Counties *key* 150(1) through (3).

20 C.J.S. Counties §223.

56 Am. Jur. 2d Municipal Corporations §§592 through 676.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes. 30 ALR 2d 903.

7-7-2102. Effect of exceeding limits on indebtedness.

Collateral References

56 Am. Jur. 2d Municipal Corporations §§614 through 618.

7-7-2103. Restriction on use of county credit by private persons.

Attorney General's Opinions

County Authorized to Appropriate Money for Museum — City Authorized to Appropriate Money for Public Purpose — Constitutionality Analyzed: Pursuant to 7-16-2202, a county, but not a city, is authorized to create a program to provide grants to private, nonprofit museums. However, pursuant to 7-1-4124, a city is allowed to grant money to public or private entities as long as the grant is for a public purpose, such as a museum that would enhance the education and enjoyment of the general public, but that would not be merely for the gain of a private entity. The Attorney General declined to opine regarding the constitutionality of 7-1-4124 or 7-16-2202, in light of the prohibition in Art. V, sec. 11(5), Mont. Const., against the appropriation of public funds for any private individual, private association, or private corporation not under control of the state, but did analyze that constitutional provision as it related to the question of county or city expenditures for grants to private museum programs, concluding that the constitutional prohibition applies only to the appropriation of public funds by the Legislature, not by local governmental entities. 48 A.G. Op. 12 (2000), overruling prior opinions to the contrary in 37 A.G. Op. 25 (1977), 37 A.G. Op. 105 (1978), and 39 A.G. Op. 25 (1981).

Federal Revenue Sharing Funds — Allocation by Board of County Commissioners: The Board of County Commissioners for a county that has not adopted a self-government form of local government may not make a grant of federal revenue sharing funds to individual county residents for the purpose of creating a water district under Title 7, ch. 13, parts 22 and 23, because there is no express or necessarily implied authority under which such a grant could be made and because the statutes provide a different mechanism for the creation and funding of a water district. 39 A.G. Op. 6 (1981).

Gift to Private Nonprofit Corporation: Under 20-8-111, the Board of Public Education, in its discretion, may give money that has been donated for the use and benefit of the Montana School for the Deaf and Blind to a private nonprofit corporation created and controlled by the Board and operated for the benefit of that school. However, the Board remains accountable for the money until it is used directly for the general support, maintenance, or improvement of the Montana School for the Deaf and Blind. 38 A.G. Op. 111 (1980).

Collateral References

Counties *key* 153 ½.

20 C.J.S. Counties §237.

56 Am. Jur. 2d Municipal Corporations §210.

7-7-2104. Replacement of lost bond, warrant, or coupon.

Compiler's Comments

1985 Amendment: In (3)(c), after "association", inserted "credit union".

Collateral References

Counties *key* 165, 166.

20 C.J.S. Counties §§248, 249.

64 Am. Jur. 2d Public Securities and Obligations §298.

7-7-2106. Procedure if original bond, warrant, or coupon is presented.

Collateral References

Counties *key* 187.
20 C.J.S. Counties §276.
64 Am. Jur. 2d Public Securities and Obligations §298.

7-7-2111. Authorization to issue construction bonds.

Collateral References

Counties *key* 172, 173(1) through (3).
20 C.J.S. Counties §§258 through 271.

Part 22
County General Obligation Bonds

Part Law Review Articles

An Introduction to the Revised U.C.C. Article 8 and Review of Other Recent Developments With Investment Securities, Mooney, Rocks, & Schwartz, 49 Bus. Law. 1891 (1994).

Part Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§12, 13, 52, 134, 151, 414, 417, 420, 503.

7-7-2201. Purposes for which general obligation bonds of county may be issued.

Compiler's Comments

2001 Amendment: Chapter 571 in (6) near end deleted "or poor fund"; and made minor changes in style. Amendment effective July 1, 2001.

1985 Amendment: At end of (1) and (3) inserted exception relating to multicounty jail facilities.

Subsection Not Codified: Subsection (f) of section 16-2008, R.C.M. 1947, a provision authorizing the Board of County Commissioners to retire outstanding seed grain warrants and special relief warrants, was not codified in the MCA. This subsection has not been repealed and is still valid law. Citation may be made to sec. 1(g), Ch. 188, L. 1931.

Attorney General's Opinions

Act Allowing Private Parties to Contract for Jails Not in Conflict With Local Government Regulatory Statutes: The act allowing counties to contract with private parties for the building, maintenance, and operation of jails, enacted as Chapter 447, L. 1985, does not directly conflict with other Montana statutes regulating the indebtedness, contracts, jail facilities, or interlocal agreements of local governments. However, Chapter 447 is subject to the various applicable limitations contained in those statutes. 42 A.G. Op. 81 (1988).

Law Review Articles

Tenth Amendment—Intergovernmental Tax Immunity—Federal Taxation of State and Municipal Bond Interest—The United States Supreme Court Has Held That the Federal Government May Tax the Interest From State and Municipal Bonds, South Carolina v. Baker, 108 S. Ct. 1355, 27 Duq. L. Rev. 355 (1989).

Collateral References

Counties *key* 174, 175.
20 C.J.S. Counties §§258, 261.
64 Am. Jur. 2d Public Securities and Obligations §§94 through 123.

7-7-2202. Authority to issue general obligation bonds to satisfy judgments.

Compiler's Comments

2001 Amendment: Chapter 574 deleted former (1)(b) that read: "(b) sufficient money cannot be raised to satisfy such judgment by an annual tax levy of 10 mills levied on all the taxable property within the county through a period of 3 years"; and made minor changes in style. Amendment effective July 1, 2001.

1989 Amendment: At end of (1), after "jurisdiction", inserted "including the repayment of tax protests lost by the county". Amendment effective March 21, 1989.

Effective Date — Retroactive Applicability: Section 14, Ch. 213, L. 1989, provided: "[This act] is effective on passage and approval [approved March 21, 1989] and applies retroactively, within the meaning of 1-2-109, to any tax appeal or tax paid under protest after December 31, 1983."

Collateral References

Counties *key* 174, 175.

20 C.J.S. Counties §§258, 261.

7-7-2203. Limitation on amount of bonded indebtedness.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 7 in (1)(a)(i) substituted "15-36-324(14)" for "15-36-324(13)". Amendment effective October 1, 2001. The amendment by Ch. 29 rendered the amendment by Ch. 7 void.

Chapter 29 in (1) near beginning after "provided in" substituted "subsection (2)" for "subsections (2) and (3)" and after "emergency bonds" substituted "exceeds the debt limitation referred to in 7-7-2101" for "will exceed 11.25% of the total of the taxable value of the property in the county plus:

(a) (i) the value provided by the department of revenue under 15-36-324(13), to be ascertained by the last assessment for state and county taxes prior to the proposed issuance of bonds;

(ii) for general obligation bonds to be issued during fiscal years 1999 through 2008, an additional 33% of the taxable value of class eight property within the county for tax year 1995, multiplied by 11.25%; and

(iii) an additional 50% of the taxable value of telecommunications property under 15-6-141 within the county for tax year 1999, multiplied by 11.25%, and an additional 50% of the taxable value attributable to electrical generation property under 15-6-141 within the county for tax year 1999, multiplied by 11.25%;

(b) for general obligation bonds to be issued during fiscal year 2001, an additional 25% of the taxable value of class six property within the county for tax year 1999, multiplied by 11.25%, and an additional 60% of the taxable value of class eight property within the county for tax year 1999, multiplied by 11.25%;

(c) for general obligation bonds to be issued during fiscal year 2002, an additional 50% of the taxable value of class six property within the county for tax year 1999, multiplied by 11.25%, and an additional 60% of the taxable value of class eight property within the county for tax year 1999, multiplied by 11.25%;

(d) for general obligation bonds to be issued during fiscal year 2003, an additional 75% of the taxable value of class six property within the county for tax year 1999, multiplied by 11.25%, and an additional 60% of the taxable value of class eight property within the county for tax year 1999, multiplied by 11.25%;

(e) for general obligation bonds to be issued during fiscal years in which the tax rate for class eight property is 2%, an additional 100% of the taxable value of class six property within the county for tax year 1999, in each case of class six property, multiplied by 11.25%, and an additional 77% of the taxable value of class eight property within the county for tax year 1999, multiplied by 11.25%;

(f) for general obligation bonds to be issued during fiscal years in which the tax rate for class eight property is 1%, an additional 94% of the taxable value of former class eight property within the county for tax year 1999, in each case of former class eight property, multiplied by 11.25%; and

(g) for general obligation bonds to be issued during the fiscal year and succeeding fiscal years in which 15-6-138 is repealed, an additional 100% of the taxable value of former class eight property within the county for tax year 1999, in each case of former class eight property, multiplied by 11.25%.

(2) In addition to the bonds allowed by subsection (1), a county may issue bonds for the construction or improvement of a detention center that will not exceed 12.5% of the taxable value of the property in the county subject to taxation, plus the adjustments permitted by subsection (1)"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1999 Amendments — Composite Section: Chapter 51 deleted former (2) that read: "(2) In addition to the bonds allowed by subsection (1), a county may issue bonds that, with all outstanding bonds and warrants, will not exceed 27.75% of the total of the taxable value of the property in the county subject to taxation, plus the value provided by the department of revenue

under 15-36-324(13), when necessary to do so, to be ascertained by the last assessment for state and county taxes, plus, for bonds to be issued during fiscal year 1997, an additional 11% of the taxable value of class eight property within the county for tax year 1995, and for bonds to be issued during fiscal year 1998, an additional 22% of the taxable value of class eight property within the county for tax year 1995"; and made minor changes in style. Amendment effective March 15, 1999.

(Version effective July 1, 2000) Chapter 285 at beginning of (1)(a)(ii) deleted "for general obligation bonds to be issued during fiscal year 1997, an additional 11% of the taxable value of class eight property within the county for tax year 1995, for general obligation bonds to be issued during fiscal year 1998, an additional 22% of the taxable value of class eight property within the county for tax year 1995, and"; inserted (1)(b) relating to bonds issued during fiscal year 2001; inserted (1)(c) relating to bonds issued during fiscal year 2002; inserted (1)(d) relating to bonds issued during fiscal year 2003; inserted (1)(e) relating to bonds issued when class eight property tax rate is 2%; inserted (1)(f) relating to bonds issued when class eight property tax rate is 1%; inserted (1)(g) relating to bonds issued after repeal of 15-6-138; deleted former (2) that read: "(2) In addition to the bonds allowed by subsection (1), a county may issue bonds that, with all outstanding bonds and warrants, will not exceed 27.75% of the total of the taxable value of the property in the county subject to taxation, plus the value provided by the department of revenue under 15-36-324(13), when necessary to do so, to be ascertained by the last assessment for state and county taxes, plus, for bonds to be issued during fiscal year 1997, an additional 11% of the taxable value of class eight property within the county for tax year 1995, and for bonds to be issued during fiscal year 1998, an additional 22% of the taxable value of class eight property within the county for tax year 1995"; in (2) substituted "detention center" for "jail" and at end substituted "subsection (1)" for "7-7-2101"; and made minor changes in style. Amendment effective July 1, 2000.

Chapter 426 in (1)(b) in temporary version and (1)(a)(ii) in July 1, 2000, version at beginning deleted "for general obligation bonds to be issued during fiscal year 1997, an additional 11% of the taxable value of class eight property within the county for tax year 1995, for general obligation bonds to be issued during fiscal year 1998, an additional 22% of the taxable value of class eight property within the county for tax year 1995, and"; inserted (1)(c) in temporary version and (1)(a)(iii) in July 1, 2000, version relating to taxable value of telecommunications property; deleted former (2) that read: "(2) In addition to the bonds allowed by subsection (1), a county may issue bonds that, with all outstanding bonds and warrants, will not exceed 27.75% of the total of the taxable value of the property in the county subject to taxation, plus the value provided by the department of revenue under 15-36-324(13), when necessary to do so, to be ascertained by the last assessment for state and county taxes, plus, for bonds to be issued during fiscal year 1997, an additional 11% of the taxable value of class eight property within the county for tax year 1995, and for bonds to be issued during fiscal year 1998, an additional 22% of the taxable value of class eight property within the county for tax year 1995"; in (2) substituted "detention center" for "jail" and at end substituted "subsection (1)" for "7-7-2101"; and made minor changes in style. Amendment effective January 1, 2000.

Chapter 556 in (1)(b) in temporary version and (1)(a)(ii) in July 1, 2000, version at beginning deleted "for general obligation bonds to be issued during fiscal year 1997, an additional 11% of the taxable value of class eight property within the county for tax year 1995, for general obligation bonds to be issued during fiscal year 1998, an additional 22% of the taxable value of class eight property within the county for tax year 1995, and" and near end after "tax year 1995" deleted "in each case of class eight property"; inserted (1)(c) in temporary version and (1)(a)(iii) in July 1, 2000, version relating to taxable value attributable to electrical generation property; deleted former (2) that read: "(2) In addition to the bonds allowed by subsection (1), a county may issue bonds that, with all outstanding bonds and warrants, will not exceed 27.75% of the total of the taxable value of the property in the county subject to taxation, plus the value provided by the department of revenue under 15-36-324(13), when necessary to do so, to be ascertained by the last assessment for state and county taxes, plus, for bonds to be issued during fiscal year 1997, an additional 11% of the taxable value of class eight property within the county for tax year 1995, and for bonds to be issued during fiscal year 1998, an additional 22% of the taxable value of class eight property within the county for tax year 1995"; in (2) substituted "detention center" for "jail" and at end substituted "subsection (1)" for "7-7-2101"; and made minor changes in style. Amendment effective January 1, 2000.

Saving Clause: Section 29, Ch. 285, L. 1999, was a saving clause.

Section 36, Ch. 556, L. 1999, was a saving clause.

Severability: Section 30, Ch. 285, L. 1999, was a severability clause.

Section 37, Ch. 556, L. 1999, was a severability clause.

Applicability: Section 43, Ch. 426, L. 1999, provided: "[This act] applies to tax years beginning after December 31, 1999."

Section 39(2), Ch. 556, L. 1999, provided that this section applies to fiscal years beginning after June 30, 2000.

1997 Amendments: Chapter 219 in (1), near beginning after "bonds and warrants except", deleted "county high school bonds and"; in (2), at end after "tax year 1995", deleted "and for bonds to be issued during fiscal years 1999 through 2008, an additional 33% of the taxable value of class eight property within the county for tax year 1995, in each case of class eight property, multiplied by 27.75%, for the purpose of acquiring land for a site for county high school buildings and for erecting or acquiring buildings on the site and furnishing and equipping the buildings for county high school purposes"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 466 in (1), near middle, and (2), near beginning, substituted "15-36-324(13)" for "15-36-324(10)". Amendment effective April 30, 1997.

Effective Date — Applicability: Section 23, Ch. 219, L. 1997, provided: "[This act] is effective July 1, 1997, and applies to bonds issued on or after [the effective date of this act]."

1995 Amendments: Chapter 451 in (1) and (2), after "plus the", substituted "value provided by the department of revenue under 15-36-324(10)" for previous formula (see 1995 Session Law for text); and in (2), after "necessary to do so", deleted "plus the value of any other production occurring after December 31, 1988, multiplied by 60%". Amendment effective January 1, 1996.

Chapter 570 at end of (1), after "issuance of bonds", inserted language revising county government indebtedness limitations (see 1995 Session Law for text); in middle of (2), after "multiplied by 60%", inserted language limiting bonded indebtedness for class eight property (see 1995 Session Law for text); and at end of (3) inserted "plus the adjustments permitted by 7-7-2101".

Applicability: Section 55, Ch. 451, L. 1995, provided: "(1) [This act] applies to oil and natural gas produced and sold on or after January 1, 1996.

(2) (a) [Sections 21 through 26] [7-1-2111, 7-7-2101, 7-7-2203, 7-14-2524, 7-14-2525, and 7-16-2327] apply to county fiscal years beginning after June 30, 1996.

(b) [Sections 38 through 46] [20-9-104, 20-9-141, 20-9-161, 20-9-331, 20-9-333, 20-9-501, 20-9-507, 20-10-144, and 20-10-146] apply to school fiscal years beginning after June 30, 1996.

(3) (a) An operator is subject to provisions of Title 15, chapter 23, parts 1 and 6 [part 6 now repealed]; Title 15, chapter 36; Title 15, chapter 38; and Title 82, chapter 11, part 1, as those laws read on December 31, 1995, for all oil and natural gas produced and sold by the operator before January 1, 1996. [On December 31, 1995, Title 15, ch. 36, contained only part 1, now repealed. Part 3 of that chapter became effective January 1, 1996.]

(b) Except as provided in subsection (3)(c), the payment, collection, and distribution of taxes on oil and natural gas production occurring before January 1, 1996, must be made according to the provisions of the laws referred to in subsection (3)(a) governing the tax in effect on the last day of the tax period in which the activity, enterprise, or product being taxed was engaged in, took place, or was produced and sold.

(c) [Section 19] [15-36-325, now repealed] applies to the payment, collection, and distribution of the local government severance tax for oil and natural gas produced and sold after December 31, 1994, and before January 1, 1996.

(d) All taxes collected pursuant to audit or collected after the date the tax is payable under the laws referred to in subsection (3)(a) must be distributed according to the statute governing allocation of the tax in effect on the date when the tax liability was incurred."

1993 Special Session Amendment: Chapter 9 near middle of (1) and (2), after "amount of", substituted "taxes levied on new production, production from horizontally completed wells, and incremental production" for "interim production and new production taxes levied", inserted reference to subsection (2)(c), and after "new production" inserted "and production from horizontally completed wells"; and made minor changes in style. Amendment effective December 17, 1993.

Report Required: Section 21, Ch. 9, Sp. L. November 1993, provided: "The board of oil and gas conservation shall report at least once a year to the revenue oversight committee [now revenue and transportation interim committee] regarding the implementation of [this act]. The reports must include but are not limited to information regarding:

(1) the methods used to determine production decline rates;

(2) rules adopted to implement [this act];

(3) the number of enhanced recovery projects completed or anticipated to be completed in a year; and

(4) the number of horizontal wells completed or anticipated to be completed in a year and the method of recovery from the horizontal wells."

Severability: Section 23, Ch. 9, Sp. L. November 1993, was a severability clause.

Effective Date — Applicability: Section 24, Ch. 9, Sp. L. November 1993, provided: "[This act] is effective on passage and approval [approved December 17, 1993] and applies to oil production from new or expanded enhanced recovery projects and to tax years that begin after December 31, 1993."

1989 Special Session Amendment: In (1), after "15-23-612" [now repealed], inserted "multiplied by 60%, plus the value of any other production occurring after December 31, 1988, multiplied by 60%"; and in (2), after "15-23-612" [now repealed], inserted "multiplied by 60%" and after "do so" inserted "plus the value of any other production occurring after December 31, 1988, multiplied by 60%". Amendment effective August 11, 1989, and applies retroactively to net proceeds taxes, severance taxes, and local government taxes on oil and gas, other than interim production and new production, produced after December 31, 1988.

1989 Amendment: At end of (4) inserted "or to bonds issued for the repayment of tax protests lost by the county"; and made minor change in grammar. Amendment effective March 21, 1989.

Effective Date — Retroactive Applicability: Section 14, Ch. 213, L. 1989, provided: "[This act] is effective on passage and approval [approved March 21, 1989] and applies retroactively, within the meaning of 1-2-109, to any tax appeal or tax paid under protest after December 31, 1983."

1987 Amendment: In (1) and (2), before "new production taxes", inserted "interim production and" and after "multiplied by 60%" inserted "plus the amount of value represented by new production exempted from tax as provided in 15-23-612".

Effective Date — Applicability — 1987 Enactment: Section 28, Ch. 655, L. 1987, provided: "This act is effective on passage and approval [approved April 13, 1987] and applies retroactively, within the meaning of 1-2-109, to taxable quarters beginning on or after April 1, 1987. The tax rate and filing method applicable to a well that qualifies as interim production under section 10 but which did not qualify as new production under 15-23-601 [now repealed] prior to the applicability date of this act does not change for tax periods prior to the applicability date."

1985 Amendments: Chapter 447 in (1) near beginning, after "(2)", substituted "through (4)" for "and (3)"; in (2) at beginning, inserted "In addition to the bonds allowed by subsection (1)", in middle, after "warrants", deleted "will exceed 11.25% but", reduced "37%" to "25.75%", and after "value of" substituted "the property in the county subject to taxation" for "such property"; inserted (3) relating to bonds issued for jail improvement or construction; in (4) substituted "limitation in subsection (1)" for "foregoing limitation".

Chapter 695 in (1) and (2) near middle, before "taxable value", inserted "total of the"; and in (1) and (2) inserted "plus the amount of new production taxes levied divided by the appropriate tax rates described in 15-23-607(2)(a) or (2)(b) [now repealed] and multiplied by 60%".

1981 Amendment: Increased 9% to 11.25% wherever it appears; and increased 29% to 37% in (2).

Effect of 1981 Amendment: The primary purpose of Ch. 614, L. 1981, was to replace the system of taxation of automobiles and light trucks with a fee system. With the adoption of the fee system, automobiles and light trucks are no longer taxable property. The resulting loss of taxable valuation has a direct effect on the amount of indebtedness a political subdivision can incur. Thus it was necessary in Ch. 614 to increase the percentage of taxable valuation used as a limitation on indebtedness to offset the loss of taxable valuation attributable to automobiles and light trucks.

Collateral References

Counties *key* 173(2).

20 C.J.S. Counties §259.

56 Am. Jur. 2d Municipal Corporations §§592 through 600; 64 Am. Jur. 2d Public Securities and Obligations §§55 through 67.

Meaning of term "assessment" or "assessed valuation" when used as basis of tax or debt limit. 156 ALR 594.

Funding or refunding obligations as subject to conditions respecting limitation of indebtedness or approval by voter. 97 ALR 442.

Obligation for local improvements as within municipal debt limit. 33 ALR 1415.

7-7-2204. Effect of issuing bonds in excess of limitations on amount.

Collateral References

Counties *key* 173(2).

20 C.J.S. Counties §259.

56 Am. Jur. 2d Municipal Corporations §§614 through 618; 64 Am. Jur. 2d Public Securities and Obligations §57.

Funding or refunding obligations as subject to conditions respecting limitation of indebtedness or approval by voter. 97 ALR 442.

Obligation for local improvements as within municipal debt limit. 33 ALR 1415.

7-7-2205. Nature of general obligation bonds.

Law Review Articles

SEC Registration Requirements for Taxable Municipal Securities, Lyons, 21 Urb. Law. 223 (1989).

Collateral References

Counties *key* 184.

20 C.J.S. Counties §273.

64 Am. Jur. 2d Public Securities and Obligations §§9 through 13.

7-7-2206. Term of general obligation bonds.

Compiler's Comments

2001 Amendment: Chapter 574 in (3) after "longer term than" deleted "will be required to repay the bonds with interest through a tax levy of 10 mills on all the property within the county subject to taxation, and the term may not exceed"; and made minor changes in style. Amendment effective July 1, 2001.

1989 Amendment: Inserted (5) relating to when the term of a bond issue commences; and made minor changes in phraseology. Amendment effective March 23, 1989.

Saving Clause: Section 9, Ch. 256, L. 1989, was a saving clause.

Section Not Codified: Part of section 16-2011, R.C.M. 1947, a provision concerning the issuance of bonds to retire seed grain warrants and special relief warrants, was not codified in the MCA. This part has not been repealed and is still valid law. Citation may be made to sec. 4, Ch. 188, L. 1931, as amended by sec. 2, Ch. 115, L. 1933, as amended by sec. 3, Ch. 135, L. 1937, as amended by sec. 1, Ch. 33, L. 1943.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§193 through 205.

7-7-2207. Redemption of bonds.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§193 through 205.

7-7-2209. Types of bonds.

Compiler's Comments

1997 Amendment: Chapter 459 in (1) deleted second sentence that read: "All things being equal, amortization bonds must be issued in preference to serial bonds; otherwise, serial bonds may be issued"; and made minor changes in style.

1993 Amendment: Chapter 559 at beginning of (1) inserted exception clause; inserted (2) regarding types of bonds that citizen bonds may be; and made minor changes in style. Amendment effective April 28, 1993.

Collateral References

Counties *key* 183(2).

20 C.J.S. Counties §268.

7-7-2210. Amortization bonds.

Compiler's Comments

1995 Amendment: Chapter 423 inserted third sentence concerning initial interest payment; in fourth sentence substituted "rounding amounts" for "disregarding fractional cents"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Collateral References
Counties *key* 183(2).
20 C.J.S. Counties §268.

7-7-2211. Serial bonds.

Compiler's Comments
1989 Amendment: After "annual installments" substituted "commencing not more than 2 years from the date of issue, any one installment consisting of one or more bonds" for "one installment consisting of one or more bonds, becoming due and payable each year"; and made minor changes in phraseology. Amendment effective March 23, 1989.
Saving Clause: Section 9, Ch. 256, L. 1989, was a saving clause.
1983 Amendment: Rewrote section by substituting entire text (see 1983 Session Law) for former text, which read: "The term "serial bonds", as used in this part, is hereby defined as being a bond issue payable in equal annual installments, one installment consisting of one or more bonds, becoming due and payable each year (the amount to be paid and redeemed each year being determined by dividing the total amount of the bonds to be issued by the total number of years the issue is to run), so that the total amount of principal to be paid each year the bonds are to run will be the same; provided, however, that the installments becoming due and payable the first year or the first and second years may vary in amount from the others to the extent resulting from fixing the amount of each bond of the other installments at $100, $500, or $1,000, as may be determined by the board of county commissioners."

Collateral References
Counties *key* 183(2).
20 C.J.S. Counties §268.

7-7-2212. Citizen bonds authorized.

Compiler's Comments
Effective Date: Section 12, Ch. 559, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 28, 1993.

7-7-2213. Citizen bonds — procedural requirements prior to issuance.

Compiler's Comments
Effective Date: Section 12, Ch. 559, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 28, 1993.

7-7-2214. Citizen bonds — procedure when issue not fully subscribed.

Compiler's Comments
Effective Date: Section 12, Ch. 559, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 28, 1993.

7-7-2215. Zero-coupon bonds and capital appreciation bonds.

Compiler's Comments
Effective Date: Section 12, Ch. 559, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 28, 1993.

7-7-2221. Issuance of certain general obligation bonds without election.

Compiler's Comments
1989 Amendment: At end of (2) inserted "and 15-1-402". Amendment effective March 21, 1989.
Effective Date — Retroactive Applicability: Section 14, Ch. 213, L. 1989, provided: "[This act] is effective on passage and approval [approved March 21, 1989] and applies retroactively, within the meaning of 1-2-109, to any tax appeal or tax paid under protest after December 31, 1983."

Collateral References
Counties *key* 176 through 178.
20 C.J.S. Counties §266.

7-7-2222. Procedure to issue bonds without election.

Collateral References
Counties *key* 176 through 178.
20 C.J.S. Counties §266.

7-7-2223. Election required for issuance of certain bonds.

Compiler's Comments

1997 Amendment: Chapter 234 in (1), near middle, inserted "special election that is conducted by mail ballot, as provided in Title 13, chapter 19, at a"; and made minor changes in style. Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 in (1) inserted "election held in conjunction with a regular or primary election"; and made minor changes in style.

1983 Amendment: Inserted (2)(a) authorizing election to be initiated by board of county commissioners.

Transition: Section 404, Ch. 571, L. 1979, is a transition section, the text of which may be found in the compiler's comment to 13-1-104.

Sections Not Codified: Sections 16-2014 through 16-2020, R.C.M. 1947, providing for special levies for the fiscal years 1944 and 1945 to pay poor fund indebtedness, were not codified in the MCA. These sections have not been repealed and are still valid law. Citation may be made to Ch. 92 and 98, L. 1943.

7-7-2227. Examination of petition — resolution calling for election.

Compiler's Comments

1997 Amendment: Chapter 234 in (2)(d), near middle, inserted "conducted by mail ballot, as provided in Title 13, chapter 19, or that is". Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 in (2)(d) inserted "that is held in conjunction with a regular or primary election"; and made minor changes in style.

1983 Amendment: At end of (1), inserted "that contains the provisions of subsection (2) plus the essential facts in regard to the petition and its filing and presentation"; in (2)(a), after "recite" deleted "the essential facts in regard to the petition and its filing and presentation and"; and inserted (3) relating to contents of board-initiated resolution.

7-7-2229. Notice of election.

Compiler's Comments

1997 Amendment: Chapter 234 in (1), after "general election", inserted "at an election that is conducted by mail ballot, as provided in Title 13, chapter 19"; and made minor changes in style. Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 in (1) inserted "held in conjunction with a regular or primary election"; deleted former (2)(a)(ii) that read: "(ii) the hours between which the polls will be open"; and made minor changes in style.

Section Not Codified: Part of section 16-2025, R.C.M. 1947, was not codified in the MCA because it is obsolete. The remaining part of section 16-2025, R.C.M. 1947, was codified and then repealed by sec. 407, Ch. 571, L. 1979. The part not codified has not been repealed and is still valid law. Citation may be made to sec. 11, Ch. 188, L. 1931.

7-7-2237. Percentage of electors required to authorize bond issue.

Compiler's Comments

1997 Amendment: Chapter 234 in introductory clause, near middle after "general election", inserted "at an election that is conducted by mail ballot, as provided in Title 13, chapter 19"; and made minor changes in style. Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 in (1) inserted "held in conjunction with a regular or primary election"; and made minor changes in style.

1989 Amendment: Near beginning, after "special election", inserted "the determination of the approval or rejection of the bond proposition is made in the following manner"; substituted (1) through (6) relating to method of determining election results (see 1989 Session Law for text) for remainder of former section that read: "not less than 40% of the registered electors entitled to vote on the question must vote thereon; otherwise, the proposition shall be considered to have been rejected.

(2) If 40% or more of the registered electors do vote on the question at the election and a majority of the votes shall be cast in favor of the proposition, then the proposition shall be considered to have been approved and adopted"; and made minor change in form.

Source: The process for determining approval or rejection of a bond proposition parallels the process described in 20-9-428 that is used in school bond elections. The 1989 amendment adopted the school bond process for county bond elections.

7-7-2238. Resolution to sell bonds.

Compiler's Comments

1995 Amendment: Chapter 423 at end of (1) substituted "adopt a resolution calling for the sale" for "at a regular or special meeting held within 30 days after the election, pass and adopt a resolution providing for the issuance"; in (2), after "resolution", inserted "calling for the sale of the bonds" and at end substituted "state" for "recite"; deleted former (2)(c) that read: "(c) the maximum rate of interest the bonds may bear"; inserted (2)(c) concerning minimum purchase price; in (2)(f), after "optional", inserted "redemption"; inserted (2)(g) concerning form of notice; in (3) deleted former first sentence that read: "The resolution must provide for the manner of the execution of the bonds" and in first sentence, after "citizen bonds", deleted "preference must be given to amortization bonds, but it must"; substituted (4) concerning minimum price for the bonds for former text that read: "The resolution must adopt a form of notice of the sale of the bonds"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1993 Amendment: Chapter 559 in second sentence of (3), before "preference", inserted "except in a bond issue of citizen bonds"; and made minor changes in style. Amendment effective April 28, 1993.

1989 Amendment: At beginning of (1), after "If", substituted "a sufficient percentage" for "it is found that at the bonding election 40% or more", near middle substituted "sufficient percentage" for "majority", and after "such bonds" inserted "as provided in 7-7-2237"; and made minor change in phraseology.

Case Notes

Resolution for Bond Issue — Compliance With Statute: In view of the purpose of Ch. 24, L. Ex. Session 1933-34 (omitted), i.e., to permit counties to secure the benefits of the National Industrial Recovery Act by borrowing money from the federal government for emergency relief, and the fact that it was apparent at the time the act was passed that the conditions and requirements of the government would conflict with the general laws of the state with relation to issuance and sale of bonds, failure of a Board of County Commissioners strictly to comply with the provisions of this section and 7-7-2251 as to the form of resolution to be passed by it providing for the issuance of bonds voted to obtain a federal loan was not fatal to their validity; having followed those provisions as closely as it was possible for it to do and at the same time conform to the requirements of the federal government, the Board's action was sufficient; so far as not in harmony with the federal requirements, this section and 7-7-2251 must be held inapplicable. Shekelton v. Toole County, 97 M 213, 33 P2d 531 (1934).

7-7-2251. Form of notice of sale of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in form of notice, in first paragraph near end, substituted "general obligation bonds" for "either amortization or serial bonds"; deleted former second and third paragraphs that read: "Amortization bonds will be the first choice and serial bonds will be the second choice of the board.

If amortization bonds are sold and issued, the entire issue may be put into one single bond or divided into several bonds, as the board may determine at the time of sale, both principal and interest to be payable in semiannual installments during a period of .... years from the date of issue"; in second paragraph, before "amount", inserted "aggregate principal" and at end inserted parenthetical concerning amortization bonds; in third paragraph, near beginning after "bonds", deleted "whether amortization or serial bonds", after "bear" inserted "an original issue", and after "interest" deleted "at a rate not exceeding ....% per annum"; in fourth paragraph, after "less than", deleted "their par value", after "interest" inserted "on the principal amount of the bonds", after "bonds at" substituted "the purchase price specified for the bonds" for "par", and inserted parenthetical concerning interest rate; in fifth paragraph, after "bids", deleted "other than by or on behalf of the board of investments of the state of Montana" and substituted parenthetical concerning bid security for "a certified check"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1993 Amendment: Chapter 559 inserted (2) allowing the form of notice to be modified to accommodate citizen bonds; and made minor changes in style. Amendment effective April 28, 1993.

1983 Amendments — Composite: Chapter 11 made permanent 1981 amendment that allowed political subdivisions to set the interest rates on bonds. (Amendment was to terminate July 1, 1983—sec. 21, Ch. 500, L. 1981.) The 1981 amendment was made permanent on February 4, 1983.

Chapter 631, in first paragraph of "Notice of Sale" form before "amount" substituted "principal" for "total"; in fourth paragraph of notice substituted provision for amount of serial bonds and inclusion of maturity schedule for "If serial bonds are issued and sold, they will be in the amount of .... dollars ($....) each, except the last bond which will be in the amount of .... dollars ($....); the sum of .... dollars ($....) of the said serial bonds will become payable on the .... day of ...., 19.., and a like amount on the same day each year thereafter until all of such bonds are paid, except that the last installment will be in the amount of .... dollars ($....)."; and in fifth paragraph of notice after "....% per annum" inserted "commencing on the ... day of ... (month), 19 .., and" and after "year" inserted "thereafter".

Chapter 631 amended the version of the section that set the interest rate at 6% per annum. The Code Commissioner has made the amendments contained in Ch. 631 to the version of the section made permanent by Ch. 11. Chapter 631 is effective October 1, 1983.

1981 Amendment: Changed "6%" to "....%" in the sixth paragraph.

Case Notes

Resolution for Bond Issue — Compliance With Statute: In view of the purpose of Ch. 24, L. Ex. Session 1933-34 (omitted), i.e., to permit counties to secure the benefits of the National Industrial Recovery Act by borrowing money from the federal government for emergency relief, and the fact that it was apparent at the time the act was passed that the conditions and requirements of the government would conflict with the general laws of the state with relation to issuance and sale of bonds, failure of a Board of County Commissioners strictly to comply with the provisions of 7-7-2238 and this section as to the form of resolution to be passed by it providing for the issuance of bonds voted to obtain a federal loan was not fatal to their validity; having followed those provisions as closely as it was possible for it to do and at the same time conform to the requirements of the federal government, the Board's action was sufficient; so far as not in harmony with the federal requirements, 7-7-2238 and this section must be held inapplicable. Shekelton v. Toole County, 97 M 213, 33 P2d 531 (1934).

Collateral References

Counties *key* 182.

20 C.J.S. Counties §275.

7-7-2252. Publication of notice of sale of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in second sentence, after "notice", inserted "or a summary of the notice"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1987 Amendment: At end of first sentence, after "county", substituted "as provided in 17-5-106" for "once each week for 4 successive weeks immediately preceding the date of sale".

7-7-2254. Procedure for sale of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in (2), in first sentence after "less than", substituted "the minimum bid specified for their sale" for "par", after "specify" deleted "the form of bonds to be issued, whether amortization or serial", and after "interest" inserted "and the purchase price", deleted former second and third sentences that read: "A bid for amortization bonds shall have preference over a bid for serial bonds, all other things being equal. In determining the kind of bonds to be issued, the board shall take into consideration not only the rate of interest demanded on each kind but also all other known elements affecting the interests of the county", and at end of last sentence deleted "provided, however, that such bonds shall not be sold at less than par with accrued interest to date of delivery"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1983 Amendment: Near beginning and end of (2), after "par" substituted "with" for "and"; and at beginning of (3), substituted "Consultants' fees and attorneys' fees may be paid" for "No attorneys' fees or brokerage or other fees or commissions of any kind shall be paid".

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§218 through 229.

Sale of public bonds at less than par or face value. 162 ALR 396; 91 ALR 7.

7-7-2255. Form and execution of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in (1), after "commissioners shall", inserted "adopt a resolution providing for the issuance of the bonds" and at end substituted "providing the manner of execution of the bonds" for "of the coupons to be attached thereto"; in (2), in first sentence after "signed by", inserted "or bear the facsimile signatures of" and at end inserted proviso concerning manual signature and at end of second sentence substituted "or its facsimile imprinted on the bond" for "affixed thereto"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Collateral References

Counties *key* 183(2).

20 C.J.S. Counties §268.

7-7-2256. Printing of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in (1), in first sentence after "bonds", deleted "with coupons attached thereto" and inserted second sentence concerning typewritten bonds; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Collateral References

Counties *key* 183(1).

20 C.J.S. Counties §269.

Printing, lithographing, or other mechanical signature on public bonds, coupons, or other public pecuniary obligation. 94 ALR 768.

7-7-2257. Registration of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in (1), after "treasurer", deleted "in a book provided for that purpose"; deleted former (2)(a) that read: "(a) the number and amount of each bond"; in (2)(a) substituted "the maturities of the bonds subject to early redemption and the redemption dates" for "date redeemable"; deleted (2)(d) that read: "(d) the name and address of the purchaser"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Collateral References

Counties *key* 185.

20 C.J.S. Counties §274.

7-7-2258. Copy of bond to be kept by county treasurer.

Collateral References

Counties *key* 185.

20 C.J.S. Counties §274.

7-7-2259. Delivery of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 substituted current text concerning delivery to purchasers for former text that read: "(1) If the board of investments is the purchaser of the bonds, the county treasurer shall forward the registered bonds to the department of commerce. The department shall deliver them to the state treasurer, and payment therefor shall be made in the manner provided by law.

(2) If the bonds are purchased by other investors, the county treasurer shall deliver the bonds to the purchaser upon receiving full payment therefor." Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1987 Amendment: In (1), at end of first sentence, changed "department of administration" to "department of commerce".

Collateral References

Counties *key* 184.

20 C.J.S. Counties §273.

64 Am. Jur. 2d Public Securities and Obligations §213.

7-7-2260. Disposition of sale proceeds.

Attorney General's Opinions

When Investment of Bond Proceeds in Government Securities Authorized: Money in a sinking fund is not available for investment if any of the bonds for which the sinking fund was established are not yet due but are then redeemable under optional provisions. While investment in government securities is authorized under 7-7-123, it is authorized only to the extent that the sinking fund is not needed for payment of the bonds or interest. Therefore, excess bond proceeds may not be retained in a separate fund and invested without first using the proceeds to calculate the amount of annual tax levy for a sinking fund. Any remainder of the proceeds may then be invested in accordance with 7-7-123. 44 A.G. Op. 18 (1991).

Collateral References

Counties *key* 184.

20 C.J.S. Counties §273.

7-7-2261. Maintenance of accounts for bond issues.

Compiler's Comments

1993 Amendment: Chapter 559 in first sentence of (1), before "issued", inserted "including citizen bonds as provided in 7-7-2212 through 7-7-2215"; and made minor changes in style. Amendment effective April 28, 1993.

Collateral References

Counties *key* 186 ½.

20 C.J.S. Counties §277.

7-7-2262. Payment of principal and interest.

Compiler's Comments

1995 Amendment: Chapter 423 deleted former last sentence that read: "If the bonds are held by the state of Montana, then all such payments shall be made at the office of the state treasurer, who shall cancel the coupons or bonds and return the same to the county treasurer, together with his receipt"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Law Review Articles

Tenth Amendment—Intergovernmental Tax Immunity—Federal Taxation of State and Municipal Bond Interest—The United States Supreme Court Has Held That the Federal Government May Tax the Interest From State and Municipal Bonds, South Carolina v. Baker, 108 S. Ct. 1355, 27 Duq. L. Rev. 355 (1989).

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§399 through 453.

7-7-2263. Interest on late payments of principal and interest on bonds held by state.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§197, 388 through 453.

7-7-2264. Statement as to amount of principal and interest due and payable on bonds.

Attorney General's Opinions

When Investment of Bond Proceeds in Government Securities Authorized: Money in a sinking fund is not available for investment if any of the bonds for which the sinking fund was established are not yet due but are then redeemable under optional provisions. While investment in government securities is authorized under 7-7-123, it is authorized only to the extent that the sinking fund is not needed for payment of the bonds or interest. Therefore, excess

bond proceeds may not be retained in a separate fund and invested without first using the proceeds to calculate the amount of annual tax levy for a sinking fund. Any remainder of the proceeds may then be invested in accordance with 7-7-123. 44 A.G. Op. 18 (1991).

Collateral References

Counties *key* 187.
20 C.J.S. Counties §276.

7-7-2265. Tax levy for payment of bonds.

Compiler's Comments

1993 Amendment: Chapter 559 at beginning of (2) inserted exception clause; inserted (3) requiring that annual levies be actuarially sufficient to redeem discount bonds; and made minor changes in style. Amendment effective April 28, 1993.

Collateral References

Counties *key* 192.
20 C.J.S. Counties §281.

7-7-2266. Procedure in case of insufficient tax levy — individual liability of county commissioners.

Collateral References

Mandamus *key* 115.
55 C.J.S. Mandamus §182.

7-7-2268. Redemption of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in (2), near beginning of first sentence, inserted "by mail sent at least 30 days before the redemption date" and near end, after "payable", deleted "by mail sent at least 15 days before the redemption date", in second sentence, at end after "installment", inserted "not affected by the defect or failure", in third sentence, after "county", substituted "or other newspaper designated in the resolution authorizing the issuance of the bonds once, not less than 30 days prior to the redemption date" for "once a week for 2 consecutive weeks immediately preceding the interest payment date", and in fourth sentence, after "been", substituted "received" for "given through a different means for its redemption"; at end of (3) inserted "if the funds for payment and redemption have been deposited in a bank or financial institution"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1993 Amendment: Chapter 453 throughout section, after "bonds", deleted reference to coupons; near middle of (1), after "outstanding", deleted "optional", in two places, after "bonds, or", substituted "principal installments" for "coupons", after "redeemable on" inserted "or before", after "payment date" deleted "and whenever such bonds or coupons are not held by the state of Montana", after "money in" deleted "payment and", and near end, after "redeem", inserted "to a redemption date on or before the next interest payment date, as fixed by the county treasurer"; in first sentence of (2), near beginning after "if", inserted "ownership of the bonds is registered or is otherwise", after "the treasurer" inserted "to the registered owners at their addresses as they appear in the bond registration books", near middle, after "payable", inserted "by mail sent", before "date" substituted "redemption" for "next interest payment", and after "bonds" substituted "or principal installments" for "and coupons", inserted second sentence clarifying that certain defects do not affect validity of redemption proceedings, at beginning of third sentence inserted "If the ownership of the bonds is not registered", near middle substituted "principal installments" for "coupons", and at end, before "date", substituted "redemption" for "interest payment", and inserted last sentence regarding waiver of notice; near beginning of first sentence of (3), after "bonds or", substituted "principal installments" for "coupons", near middle, before "date", substituted "the redemption" for "such interest payment", and near end, after "bonds or", substituted "principal installments with interest accrued on the bonds or principal installments" for "coupons" and in second sentence, before "date", substituted "the redemption" for "such interest payment"; and made minor changes in style.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§197, 388 through 398.

When limitations begin to run against actions on public securities or obligations to be paid out of special or particular fund. 50 ALR 2d 271.

7-7-2269. Order of redemption of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 deleted reference to 7-7-2267; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1993 Amendment: Chapter 453 near beginning, after "bonds or", inserted "principal installments of", after "amortization" substituted "bonds to be" for "bond coupons paid and", after "7-7-2268" substituted "may" for "must", and at end substituted "order the county treasurer selects, consistent with the provisions of the resolution authorizing the issuance of the bonds" for "numerical order in which the same were issued or become due".

7-7-2274. Closing of accounts and transfer of money to other accounts.

Collateral References

Counties *key* 186 ½.

20 C.J.S. Counties §§258, 277.

Part 23
County Refunding General Obligation Bonds

Part Compiler's Comments

Section Not Codified: Section 16-2047, R.C.M. 1947, a validation clause, was not codified in the MCA. This section has not been repealed and is still valid law. Citation may be made to sec. 33, Ch. 188, L. 1931.

Sections 16-2101 through 16-2104, R.C.M. 1947, concerning release of lien on county seed grain loans, were not codified in the MCA. These sections have not been repealed and are still valid law. Citation may be made to Ch. 121, L. 1945.

Part Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§261 through 269.

7-7-2301. Authority to issue refunding general obligation bonds.

Compiler's Comments

2001 Amendment: Chapter 29 in (2)(a)(i) after "exceeds" substituted "0.3% of the total assessed value of taxable property, determined as provided in 15-8-111, within the county, as ascertained by the last assessment for state and county taxes" for "5% of the value of the taxable property in the county"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1995 Amendment: Chapter 423 in (1)(a), at end, inserted "or there is a reduction in debt service as a result of issuing refunding bonds pursuant to 7-7-2304"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Collateral References

Counties *key* 174, 175.

20 C.J.S. Counties §§258, 261.

7-7-2302. Applicability of certain other bond provisions.

Compiler's Comments

1995 Amendment: Chapter 423 in (1) deleted reference to 7-7-2267; and inserted (2) concerning unrefunded portion of outstanding bond issue. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1993 Amendment: Chapter 6 near end deleted reference to 7-7-2253.

1987 Amendment: At beginning deleted references to 7-7-2208 and 7-7-2271.

1983 Amendment: After "7-7-2222, and" changed "7-7-2251" to "7-7-2255"; and at end of section inserted "however" clause allowing board to sell bonds at its option.

7-7-2303. Term of refunding general obligation bonds.

Compiler's Comments

2001 Amendment: Chapter 574 deleted former (1)(b)(ii) that read: "(ii) If such 10-year term will require an annual tax levy for payment of such refunding bonds exceeding 10 mills on all property subject to taxation in the county, the term may be so extended as to reduce the required annual levy to 10 mills; provided, however, that the term shall not under any circumstances exceed 20 years"; in (2) after "longer term than" deleted "will be required to repay the bonds with interest through a tax levy of 10 mills on all the property within the county subject to taxation, and the term shall not exceed"; and made minor changes in style. Amendment effective July 1, 2001.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§182 through 205.

7-7-2304. Interest rate on refunding general obligation bonds.

Compiler's Comments

2003 Amendment: Chapter 277 in (1) at end inserted second sentence concerning savings requirement; inserted (1)(a) and (1)(b) concerning the determination of whether refunding bonds satisfy the savings requirement of this section; and made minor changes in style. Amendment effective July 1, 2003.

1995 Amendment: Chapter 423 inserted (3) concerning amount of refunding bonds; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1989 Amendment: At beginning of (1) inserted exception clause; inserted (2) allowing issuance of refunding bonds at an interest rate in excess of the rate on refunded bonds if issuance results in a reduction of total debt service cost; and made minor changes in style and phraseology. Amendment effective March 8, 1989.

Collateral References

Counties *key* 176 through 178.

20 C.J.S. Counties §266.

7-7-2311. Issuance of refunding general obligation bonds without election.

Collateral References

Counties *key* 176 through 178.

7-7-2316. Advance refunding bonds.

Compiler's Comments

2003 Amendment: Chapter 277 in (2) at beginning inserted exception clause; inserted (3) allowing funds to be invested if they are sufficient when initially deposited in escrow; and made minor changes in style. Amendment effective July 1, 2003.

Part 24
County Loans

7-7-2401. Authorization to borrow money.

Collateral References

Counties *key* 153.

20 C.J.S. Counties §222.

56 Am. Jur. 2d Municipal Corporations §580.

7-7-2402. Election required to borrow money — exceptions.

Compiler's Comments

1997 Amendment: Chapter 227 in (1), near beginning, substituted "subsection (4)" for "subsection (3)" and near end of introductory clause substituted "the limits set in subsection (2)" for "$500,000"; inserted (2) limiting amount of loans to county without electorate vote; and made minor changes in style.

1991 Amendment: In (1), near end of introductory clause after "exceeding", substituted "$500,000" for "$10,000"; and made minor changes in style.

Case Notes

Bonds for Health Care Facility Not Subject to Voter Approval: When Toole County proposed to borrow $1.7 million to construct a county hospital and nursing home, plaintiff sued, alleging that the county could not borrow money without first submitting the bond proposal to the voters for approval. Affirming the District Court decision, the Supreme Court ruled that the indebtedness for the repayment of bonds for the proposed health care facility is not indebtedness of the county for which an election is required under this section. State ex rel. Lovins v. Toole County, 278 M 253, 924 P2d 693, 53 St. Rep. 887 (1996).

Emergency Budget for General Relief Not for "Single Purpose" Requiring Electors' Approval: County Commissioners establishment of an emergency budget under 7-6-2341 through 7-6-2345 (7-6-2341, 7-6-2342, 7-6-2343, and 7-6-2345 now repealed) for general relief purposes in the amount of $15,000, without approval of the electors, is not creating an indebtedness or liability for a "single purpose" in excess of $10,000 (see 1991 and 1997 amendments) without such approval within the inhibition of this section since the entire debt for all relief purposes cannot be regarded as a single purpose but arises by virtue of many separate and distinct purposes, founded on a duty expressly imposed in normal functioning of county. State ex rel. Nelson v. Bd. of County Comm'rs, 111 M 395, 109 P2d 1106 (1941).

Approval of Electors:

The Board of County Commissioners cannot borrow money to refund outstanding indebtedness exceeding $10,000 (see 1991 and 1997 amendments), by the issuance of bonds or otherwise, without having first obtained the approval of the electors of the county. Edwards v. Lewis & Clark County, 53 M 359, 165 P 297 (1917).

"The approval of a majority of the electors" and "a majority of the votes cast" are the same. The approval of a majority of the electors voting at an election to determine whether a proposed indebtedness shall be incurred was sufficient to legalize a bond issue. Morse v. Granite County, 44 M 78, 119 P 286 (1911).

Attorney General's Opinions

County Authorized to Incur Debt or Borrow Without Election: A county is authorized under 7-7-2101 to incur a liability or indebtedness up to $500,000 or, pursuant to this section, to borrow up to $10,000 (see 1991 and 1997 amendments) without an election. An installment purchase contract is not a "borrowing of money" within the meaning of this section. A municipality is not required to hold an election to borrow money by a method other than issuing bonds, but it is limited by 7-7-4201 to a 28% debt ceiling. 42 A.G. Op. 13 (1987).

Collateral References

Counties *key* 151.

20 C.J.S. Counties §226.

7-7-2403. Determination of amount of loan.

Case Notes

Necessity of Loan: Upon submitting the question of a bond issue to the voters, the determination by the Board of the amount of the issue is a necessary prerequisite to the validity of subsequent proceedings, and in so doing the Board may proceed upon its own initiative and determine the necessity of the loan, without waiting for the filing of a petition. Morse v. Granite County, 44 M 78, 119 P 286 (1911).

Question Submitted to Electors: Where the Board of County Commissioners has determined the amount necessary for the general purpose of a proposed bond issue, such as the erection of a courthouse, it is not required, before submitting the question to a vote, to ascertain the cost of a suitable site for the building or that of the necessary furnishings. Morse v. Granite County, 44 M 78, 119 P 286 (1911).

7-7-2404. Notice of election.

Case Notes

Sufficiency of Notice: The provision of this section that the notice of election shall clearly state the object of the loan means the general object of the loan. It is not necessary to specify all of the details. So long as a reasonably comprehensive notice is given, the courts have no power to declare it insufficient. Reid v. Lincoln County, 46 M 31, 125 P 429 (1912). See Mansur v. Polson, 45 M 585, 125 P 1002 (1912).

7-7-2405. Form of ballots.

Case Notes

Nature and Purpose of Loan: In an election held for the incurring of indebtedness by the issue of bonds for the erection and furnishing of a county courthouse, ballots on which were printed the words "for the loan" and "against the loan", without specifying the nature and purpose of the proposed loan, were held sufficient. Reid v. Lincoln County, 46 M 31, 125 P 429 (1912); Tinkel v. Griffin, 26 M 426, 68 P 859 (1902).

7-7-2406. Conduct of election and canvass of results.

Case Notes

Authority of Electors: A constitutional restriction that a Board of County Commissioners shall not incur any indebtedness or liability above a designated amount is a limitation upon the authority of the Board; it has no reference to the power of the people. Reid v. Lincoln County, 46 M 31, 125 P 429 (1912).

Application of Section: This section has no reference to the printed form of the ballot but merely requires that the provisions of the general election law touching the qualifications of the voters, the appointment of judges and clerks, the secrecy of the ballot, and the method of voting should be observed. Tinkel v. Griffin, 26 M 426, 68 P 859 (1902).

7-7-2407. Restriction on use of loan proceeds.

Compiler's Comments

1995 Amendment: Chapter 423 at end deleted "authorizing the loan"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Part 25
County Revenue Bonds

7-7-2501. Authority to issue revenue bonds — refunding revenue bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in (1), in second sentence, deleted reference to Title 7, chapter 34, part 22 or 23; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1991 Amendment: In (1), at end of second sentence, inserted "or in Title 75, chapter 10, part 1". Amendment effective July 1, 1991.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

Part 41
General Provisions Related to Municipalities

Part Law Review Articles

Full Liability Under Section 10(b) for Municipal Officers and Issuers, Ostrin, 21 Urb. Law. 197 (1989).

Tenth Amendment—Intergovernmental Tax Immunity—Federal Taxation of State and Municipal Bond Interest—The United States Supreme Court Has Held That the Federal Government May Tax the Interest From State and Municipal Bonds, South Carolina v. Baker, 108 S. Ct. 1355, 27 Duq. L. Rev. 355 (1989).

Part Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§94 through 123.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes. 30 ALR 2d 903.

Validity of municipal bond issue as against owners of property annexation of which to municipality became effective after date of election at which issue was approved by voters. 10 ALR 2d 559.

Power of governmental unit to issue bonds as implying power to refund them. 1 ALR 2d 134.

Effect of delay after authorization by voters on power of governmental unit to issue bonds. 135 ALR 768.

Validity of municipal bond issue for purpose of paying employees. 96 ALR 1204.

Effect of inclusion in call for election, or in proposal for bond issue submitted to people, of unauthorized method of payment or retirement. 93 ALR 362.

7-7-4101. Purposes for which indebtedness may be incurred.

Compiler's Comments

1999 Amendment: Chapter 139 in introductory clause inserted "issuing notes, entering into leases, entering into lease-purchase agreements, or entering into installment purchase contracts"; at beginning of (1) and (2) inserted "acquiring land for and designing and"; at beginning of (4) inserted "designing and"; in (6) at beginning inserted "or leasing" and at end inserted "and personal property, including without limitation, vehicles, telephone systems, and photocopy and office equipment, including computer hardware and software"; in (7) inserted "designing"; and made minor changes in style. Amendment effective March 23, 1999.

1989 Amendment: Inserted (9) authorizing city or town council to contract to borrow money or issue bonds to repay lost tax protests. Amendment effective March 21, 1989.

Effective Date — Retroactive Applicability: Section 14, Ch. 213, L. 1989, provided: "[This act] is effective on passage and approval [approved March 21, 1989] and applies retroactively, within the meaning of 1-2-109, to any tax appeal or tax paid under protest after December 31, 1983."

Case Notes

Street Improvements: This section does not authorize the city or town to incur indebtedness or issue bonds to carry out the power granted by 7-14-4101 or 7-16-4101. Dietrich v. Deer Lodge, 124 M 8, 218 P2d 708 (1950).

Application of Section: This section refers only to the contracting of an indebtedness in addition to the "then outstanding indebtedness of the city". Parker v. Butte, 58 M 531, 193 P 748 (1920).

Attorney General's Opinions

Long-Term Lease With Contractual Nonappropriation Clause Not Considered Accumulation of Municipal Debt — Vote Not Required: A question arose regarding the applicability of laws regulating municipal government debt based on a proposal by the city of Great Falls to enter a contract for the development and operation of a water park. Under the arrangement, the city would enter a long-term lease to a private party of real property adjacent to the municipal swimming pool and concurrently lease from that party certain personal property to be used for the water park. The personalty lease would include an option for the city to purchase the personal property at the close of the lease terms and a nonappropriation clause under which the personalty lease would terminate without penalty to the city if the city chose not to appropriate funds for the lease payment in any fiscal year, in which case possession of the personal property would revert to the lessor, who would retain possession under a separate realty lease until that lease expired. The Attorney General concluded that such an arrangement did not create a debt and thus would not violate provisions of state law limiting the accumulation of debt by municipal governments. Further, the city's proposal would not pledge the taxing power of the city to make the full term of lease payments and therefore would not qualify as an obligation for which the general credit of the city is pledged that would require a vote of the people under 7-7-4221. 49 A.G. Op. 3 (2001), distinguishing 38 A.G. Op. 56 (1979).

County Authorized to Incur Debt or Borrow Without Election: A county is authorized under 7-7-2101 to incur a liability or indebtedness up to $500,000 or, pursuant to 7-7-2402, to borrow up to $10,000 (see 1991 and 1997 amendments) without an election. An installment purchase contract is not a "borrowing of money" within the meaning of 7-7-2402. A municipality is not required to hold an election to borrow money by a method other than issuing bonds, but it is limited by 7-7-4201 to a 28% debt ceiling. 42 A.G. Op. 13 (1987).

Law Review Articles

SEC Registration Requirements for Taxable Municipal Securities, Lyons, 21 Urb. Law. 223 (1989).

Tax-Exempt Municipal Bonds—A Viable Alternative, Knox & Kazamias, 40 Mercer L. Rev. 621 (1989).

Collateral References

Municipal Corporations *key* 858, 863, 864.

64 C.J.S. Municipal Corporations §§1833, 1846, 1848.

56 Am. Jur. 2d Municipal Corporations §§579, 580; 64 Am. Jur. 2d Public Securities and Obligations §§94 through 123.

Estoppel by recitals in municipal bonds as to lawfulness of issue. 158 ALR 938; 86 ALR 1057.

Negotiability of municipal bonds as affected by reference to funds from which they are to be paid. 42 ALR 1027.

7-7-4103. General qualifications to vote on questions of municipal indebtedness.

Case Notes

Legislative Intent: By the enactment of Ch. 47, L. 1929, amendatory of Ch. 98, L. 1923 (this section), the Legislature intended to provide the procedure for the holding of all elections called for the purpose of determining whether indebtedness of the political units therein mentioned shall be created or increased when the approval of the electors is required by law, including the issuance of city water bonds. Weber v. Helena, 89 M 109, 297 P 455 (1931).

Collateral References

Elections *key* 83.

29 C.J.S. Elections §§14 through 35.

7-7-4104. Incurrence of certain general obligations.

Compiler's Comments

Effective Date: Section 6, Ch. 139, L. 1999, provided: "[This act] is effective on passage and approval." Approved March 23, 1999.

Part 42
Municipal General Obligation Bonds

Part Compiler's Comments

Section Not Codified: Section 11-2330, R.C.M. 1947, a validation clause, was not codified in the MCA. This section has not been repealed and is still valid law. Citation may be made to sec. 30, Ch. 160, L. 1931.

Part Attorney General's Opinions

Municipal Construction of Storm Sewers With Gas Tax Revenues — Sinking Fund for General Obligation Bonds Allowed: Where a city was authorized to use its gasoline tax allocation for construction of storm sewers and drains for draining city streets, it could also place the money allocated in a sinking fund used to pay general obligation bonds sold to finance construction of those sewers, as the only statutory restriction on the use of the funds is that the funds must be used exclusively for city streets. Nor do the statutes governing municipal financing prohibit the use of such money in a sinking fund for general obligation bonds. 40 A.G. Op. 19 (1983).

Paying a Consultant Prohibited: Section 7-7-4254(3) prohibits a municipality from paying a consultant for assistance or advice in any of the matters set forth in Title 7, ch. 7, part 42, relating to the issuance and sale of specific general obligation bonds, but it does not prohibit paying a consultant for assistance in matters involving the overall financial operation of the municipality, so long as the consultation is not limited to a simple bond issuance and sale and does not involve participation in specific bond proceedings. The prohibition is not limited to payment from the actual bond proceeds but includes all funds of the municipality. 38 A.G. Op. 34 (1979).

Part Law Review Articles

Tax-Exempt Municipal Bonds—A Viable Alternative, Knox & Kazamias, 40 Mercer L. Rev. 621 (1989).

7-7-4201. Limitation on amount of bonded indebtedness.

Compiler's Comments

2001 Amendment: Chapter 29 in (1) near beginning after "provided" inserted "in 7-7-4202", near middle after "unpaid indebtedness" substituted "exceeds 1.51% of the total assessed value of taxable property, determined as provided in 15-8-111" for "will exceed 28% of the taxable value of the property", and at end after "taxes" deleted "plus:

(a) for bonds to be issued or other indebtedness to be incurred during fiscal years 1999 through 2008, an additional 33% of the taxable value of class eight property within the city or town for tax year 1995, multiplied by 28%; and

(b) an additional 50% of the taxable value of telecommunications property under 15-6-141 within the city or town for tax year 1999, multiplied by 28%, and an additional 50% of the taxable value attributable to electrical generation property under 15-6-141 within the city or town for

tax year 1999, multiplied by 28%"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1999 Amendments — Composite Section: Chapter 426 in (1)(a) at beginning deleted "for bonds to be issued or other indebtedness to be incurred during fiscal year 1997, an additional 11% of the taxable value of class eight property within the city or town for tax year 1995, for bonds to be issued or other indebtedness to be incurred during fiscal year 1998, an additional 22% of the taxable value of class eight property within the city or town for tax year 1995, and"; inserted (1)(b) relating to taxable value of telecommunications property; and made minor changes in style. Amendment effective January 1, 2000.

Chapter 556 in (1)(a) at beginning deleted "for bonds to be issued or other indebtedness to be incurred during fiscal year 1998, an additional 22% of the taxable value of class eight property within the city or town for tax year 1995, and for bonds to be issued or other indebtedness to be incurred during fiscal years 1999 through 2008, an additional 33% of the taxable value of class eight property within the city or town for tax year 1995, and" and near end after "for tax year 1995" deleted "in each case of class eight property"; inserted (1)(b) regarding taxable valuation attributable to electrical generation property; and made minor changes in style. Amendment effective January 1, 2000.

Applicability: Section 43, Ch. 426, L. 1999, provided: "[This act] applies to tax years beginning after December 31, 1999."

Section 39(2), Ch. 556, L. 1999, provided that this section applies to fiscal years beginning after June 30, 2000.

Saving Clause: Section 36, Ch. 556, L. 1999, was a saving clause.

Severability: Section 37, Ch. 556, L. 1999, was a severability clause.

1995 Amendment: Chapter 570 in middle of (1), after "county taxes", inserted language limiting bonded indebtedness for class eight property for city or town (see 1995 Session Law for text); and made minor changes in style.

1989 Amendment: Inserted (3) providing that limitation of indebtedness does not apply to bonds issued to repay lost tax protests. Amendment effective March 21, 1989.

Effective Date — Retroactive Applicability: Section 14, Ch. 213, L. 1989, provided: "[This act] is effective on passage and approval [approved March 21, 1989] and applies retroactively, within the meaning of 1-2-109, to any tax appeal or tax paid under protest after December 31, 1983."

1981 Amendment: Increased 18% to 28% in (1).

Effect of 1981 Amendment: The primary purpose of Ch. 614, L. 1981, was to replace the system of taxation of automobiles and light trucks with a fee system. With the adoption of the fee system, automobiles and light trucks are no longer taxable property. The resulting loss of taxable valuation has a direct effect on the amount of indebtedness a political subdivision can incur. Thus it was necessary in Ch. 614 to increase the percentage of taxable valuation used as a limitation on indebtedness to offset the loss of taxable valuation attributable to automobiles and light trucks.

Case Notes

Purpose of Limitation: The purpose of the limitation in matters of indebtedness contained in this section is to prevent extravagance, and such provisions should be so construed as to accomplish the desired end so far as possible. Butler v. Andrus, 35 M 575, 90 P 785 (1907).

Attorney General's Opinions

Long-Term Lease With Contractual Nonappropriation Clause Not Considered Accumulation of Municipal Debt — Vote Not Required: A question arose regarding the applicability of laws regulating municipal government debt based on a proposal by the city of Great Falls to enter a contract for the development and operation of a water park. Under the arrangement, the city would enter a long-term lease to a private party of real property adjacent to the municipal swimming pool and concurrently lease from that party certain personal property to be used for the water park. The personalty lease would include an option for the city to purchase the personal property at the close of the lease terms and a nonappropriation clause under which the personalty lease would terminate without penalty to the city if the city chose not to appropriate funds for the lease payment in any fiscal year, in which case possession of the personal property would revert to the lessor, who would retain possession under a separate realty lease until that

lease expired. The Attorney General concluded that such an arrangement did not create a debt and thus would not violate provisions of state law limiting the accumulation of debt by municipal governments. Further, the city's proposal would not pledge the taxing power of the city to make the full term of lease payments and therefore would not qualify as an obligation for which the general credit of the city is pledged that would require a vote of the people under 7-7-4221. 49 A.G. Op. 3 (2001), distinguishing 38 A.G. Op. 56 (1979).

Construction of Streets With Gas Tax Revenues — Subject to General Debt Limitation: If a city contracts for street construction work to be paid exclusively from gasoline tax revenue received from the state, the indebtedness is considered part of the city's general debt limitation under this section unless the conditions of some specific exception are otherwise met. 42 A.G. Op. 120 (1988).

Collateral References

Municipal Corporations *key* 858, 863, 864.

64 C.J.S. Municipal Corporations §§1833, 1846, 1848.

56 Am. Jur. 2d Municipal Corporations §§592 through 679; 64 Am. Jur. 2d Public Securities and Obligations §§55, 56.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes. 30 ALR 2d 903.

Presumptions and burden of proof as to violation of or compliance with public debt limitations. 16 ALR 2d 515.

Meaning of term "assessment" or "assessed valuation" when used as basis of tax or debt limit. 156 ALR 594.

Constitutional or statutory requirement of prior approval by electors of issuance of bonds or incurring of indebtedness, by municipality, county, or state, as applicable to bonds or other instruments not creating indebtedness. 146 ALR 604.

Pledge or appropriation of revenue from utility or other property in payment therefor, as indebtedness within constitutional or statutory limitation of indebtedness of municipality. 146 ALR 328; 96 ALR 1385; 72 ALR 687.

Funding or refunding obligations as subject to conditions respecting limitation of indebtedness or approval by voters. 97 ALR 442.

Obligation for local improvements as within municipal debt limit. 33 ALR 1415.

7-7-4202. Special provisions relating to water and sewer systems.

Compiler's Comments

2001 Amendment: Chapter 29 at beginning of (1) substituted "A city or town may incur an additional indebtedness by borrowing money or issuing bonds beyond the amount authorized in" for "Notwithstanding the provisions of" and at end deleted "a city or town may incur an additional indebtedness by borrowing money or issuing bonds"; and in (2) near end substituted "55% over and above" for "55% of" and after "7-7-4201" deleted "of the taxable value of the property in the city or town subject to taxation, to be ascertained by the last assessment for state and county taxes, plus:

(a) for indebtedness to be incurred during fiscal years 1999 through 2008, an additional 33% of the taxable value of class eight property within the city or town for tax year 1995, multiplied by 55%; and

(b) an additional 50% of the taxable value of telecommunications property under 15-6-141 within the city or town for tax year 1999, multiplied by 55%, and an additional 50% of the taxable value attributable to electrical generation property under 15-6-141 within the city or town for tax year 1999, multiplied by 55%". Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1999 Amendments — Composite Section: Chapter 426 in (2)(a) at beginning deleted "for indebtedness to be incurred during fiscal year 1997, an additional 11% of the taxable value of class eight property within the city or town for tax year 1995, for indebtedness to be incurred during fiscal year 1998, an additional 22% of the taxable value of class eight property within the city or town for tax year 1995, and"; inserted (2)(b) relating to taxable value of telecommunications property; and made minor changes in style. Amendment effective January 1, 2000.

Chapter 556 in (2) near end substituted "55% of the debt limitation" for "55% over and above the 28%"; in (2)(a) at beginning deleted "for indebtedness to be incurred during fiscal year 1997, an additional 11% of the taxable value of class eight property within the city or town for tax year 1995, for indebtedness to be incurred during fiscal year 1998, an additional 22% of the taxable value of class eight property within the city or town for tax year 1995, and" and near end after "for tax year 1995" deleted "in each case of class eight property"; inserted (2)(b) regarding value attributable to electrical generation property; and made minor changes in style. Amendment effective January 1, 2000.

Applicability: Section 43, Ch. 426, L. 1999, provided: "[This act] applies to tax years beginning after December 31, 1999."

Section 39(2), Ch. 556, L. 1999, provided that this section applies to fiscal years beginning after June 30, 2000.

Saving Clause: Section 36, Ch. 556, L. 1999, was a saving clause.

Severability: Section 37, Ch. 556, L. 1999, was a severability clause.

1995 Amendment: Chapter 570 in middle of (2), after "county taxes", inserted language limiting bonded indebtedness for class eight property for city or town water or sewer system (see 1995 Session Law for text); and made minor changes in style.

1981 Amendment: Increased 36% to 55% and 18% to 28% in (2).

Effect of 1981 Amendment: The primary purpose of Ch. 614, L. 1981, was to replace the system of taxation of automobiles and light trucks with a fee system. With the adoption of the fee system, automobiles and light trucks are no longer taxable property. The resulting loss of taxable valuation has a direct effect on the amount of indebtedness a political subdivision can incur. Thus it was necessary in Ch. 614 to increase the percentage of taxable valuation used as a limitation on indebtedness to offset the loss of taxable valuation attributable to automobiles and light trucks.

Case Notes

Retirement of Bonded Indebtedness: The contention by defendant town that since it was levying the maximum amount of taxes allowable under 7-6-4405 (now repealed), it could not levy a tax each year to pay interest on water bonds and create a sinking fund, was without merit. The levy under 7-6-4405 (now repealed) is for general, municipal, or administrative purposes, while under this section, a special tax may be levied in addition to that provided for herein to retire bonded indebtedness and interest on such bonds. State ex rel. Mueller v. Todd, 114 M 35, 132 P2d 154 (1942).

When City Estopped to Claim Funded Debt Invalid: A city, after extending the limit of its indebtedness to acquire a water supply and system beyond the 3% constitutional limit under Art. XIII, sec. 6, 1889 Mont. Const. (replaced by Art. VIII, sec. 10, 1972 Mont. Const.), to the extent of $25,000, issued registered warrants aggregating $75,000 without authorization by its voters, then funded the indebtedness by selling bonds to retire the warrants. The bonds recited that all proper steps had been taken to make them legal obligations of the city. The Supreme Court held that the city was estopped from questioning the bonds' validity and refusing further payment after 18 years by claiming the bonds were invalid on constitutional grounds. Clerihew v. Baker, 109 M 317, 96 P2d 269 (1939), distinguished in State ex rel. Truax v. Lima, 121 M 152, 193 P2d 1008 (1948).

Water System — Contract for Installation: Town could not lawfully contract for installation of water system in excess of the debt limitation without approval of taxpayers. Lumbermen's Trust Co. v. Ryegate, 50 F2d 219 (9th Cir. 1931).

Additional Indebtedness: Authority of a city to incur indebtedness beyond the 3% limit for the purpose of rendering or maintaining its water supply wholesome and fit for the purpose intended is clearly implied, if not expressly conferred. McClintock v. Great Falls, 53 M 221, 163 P 99 (1917).

Water System — Subject to P.S.C. Control: A city which has acquired a water supply by resorting to the extended limit of indebtedness is not thereby exempted from control and regulation by the state through the agency of the Public Service Commission. P.S.C. v. Helena, 52 M 527, 159 P 24 (1916).

Water System: In the ownership and control of its water system, a city acts in its proprietary character, as distinguished from its governmental capacity. P.S.C. v. Helena, 52 M 527, 159 P 24 (1916); Helena Consol. Water Co. v. Steele, 20 M 1, 49 P 382 (1897).

Collateral References

Municipal Corporations *key* 858, 863, 864.

64 C.J.S. Municipal Corporations §§1833, 1846, 1848.

7-7-4203. What constitutes a single purpose.

Collateral References

Municipal Corporations *key* 910.

64 C.J.S. Municipal Corporations §1905.

7-7-4204. Nature of general obligation bonds.

Law Review Articles

Intergovernmental Tax Immunity Beyond South Carolina v. Baker [108 S. Ct. 1355], 1989 B.Y.U. L. Rev. 249 (1989).

Collateral References

Municipal Corporations *key* 397.

64 C.J.S. Municipal Corporations §§1956, 1961.

64 Am. Jur. 2d Public Securities and Obligations §§11 through 13.

Validity of municipal bond issue as against owners of property annexation of which to municipality became effective after date of election at which issue was approved by voters. 10 ALR 2d 559.

7-7-4205. Term of general obligation bonds.

Compiler's Comments

1989 Amendment: Inserted (2) relating to when the term of a bond issue commences; and made minor changes in phraseology. Amendment effective March 23, 1989.

Saving Clause: Section 9, Ch. 256, L. 1989, was a saving clause.

Collateral References

Municipal Corporations *key* 923, 926.

64 C.J.S. Municipal Corporations §1935.

Power and discretion of officer or board authorized to issue bonds of governmental unit as regards terms or conditions to be included therein. 119 ALR 190.

7-7-4206. Redemption of bonds.

Collateral References

Municipal Corporations *key* 923, 926.

64 C.J.S. Municipal Corporations §1935.

64 Am. Jur. 2d Public Securities and Obligations §§250, 251.

7-7-4208. Types of general obligation bonds.

Compiler's Comments

1997 Amendment: Chapter 459 in (1) deleted second sentence that read: "All things being equal, amortization bonds shall be issued in preference to serial bonds; otherwise, serial bonds may be issued"; and made minor changes in style.

1989 Amendment: At beginning of (1) inserted exception clause; and inserted (2) relating to citizen bonds. Amendment effective April 12, 1989.

Collateral References

Municipal Corporations *key* 923.

64 C.J.S. Municipal Corporations §1935.

Power and discretion of officer or board authorized to issue bonds of governmental unit as regards terms or conditions to be included therein. 119 ALR 190.

7-7-4209. Amortization bonds.

Compiler's Comments

1995 Amendment: Chapter 423 inserted third sentence concerning payment on initial payment date; in fourth sentence substituted "rounding amounts" for "disregarding fractional cents"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Collateral References

Municipal Corporations *key* 923.

64 C.J.S. Municipal Corporations §1935.

7-7-4210. Serial bonds.

Compiler's Comments

1989 Amendment: After "annual installments" substituted "commencing not more than 2 years from the date of issue, any one installment consisting of one or more bonds" for "one installment consisting of one or more bonds, becoming due and payable each year"; and made minor changes in phraseology. Amendment effective March 23, 1989.

Saving Clause: Section 9, Ch. 256, L. 1989, was a saving clause.

1983 Amendment: Substituted definition of serial bonds as having annual installments of one or more bonds, becoming payable each year, but the installments may not be more than three times the principal amount of the bonds maturing in the immediately preceding installment for "The term "serial bonds", as used in this part, is hereby defined as being a bond issue payable in equal annual installments, one installment consisting of one or more bonds, becoming due and payable each year (the amount to be paid and redeemed each year being determined by dividing the total amount of the bonds to be issued by the total number of years the issue is to run), so that the total amount of principal to be paid each year the bonds are to run will be the same; provided, however, that the payments becoming due the first year or the first and second years may vary in amount from the other payments to the extent resulting from fixing the amount of each bond of the other payments at $100, $500, or some multiple thereof."

Collateral References

Municipal Corporations *key* 923.

64 C.J.S. Municipal Corporations §1935.

7-7-4211. Citizen bonds authorized.

Compiler's Comments

Effective Date: Section 12, Ch. 511, L. 1989, provided that this section is effective April 12, 1989.

7-7-4212. Citizen bonds — procedural requirements prior to issuance.

Compiler's Comments

Effective Date: Section 12, Ch. 511, L. 1989, provided that this section is effective April 12, 1989.

7-7-4213. Citizen bonds — procedure when issue not fully subscribed.

Compiler's Comments

Effective Date: Section 12, Ch. 511, L. 1989, provided that this section is effective April 12, 1989.

7-7-4214. Zero-coupon and capital appreciation bonds.

Compiler's Comments

Effective Date: Section 12, Ch. 511, L. 1989, provided that this section is effective April 12, 1989.

7-7-4221. Election on question of incurring indebtedness — exception.

Compiler's Comments

1989 Amendment: In (1) inserted "and 15-1-402". Amendment effective March 21, 1989.

Effective Date — Retroactive Applicability: Section 14, Ch. 213, L. 1989, provided: "[This act] is effective on passage and approval [approved March 21, 1989] and applies retroactively, within the meaning of 1-2-109, to any tax appeal or tax paid under protest after December 31, 1983."

Transition: Section 404, Ch. 571, L. 1979, is a transition section, the text of which may be found in the compiler's comment to 13-1-104.

Attorney General's Opinions

Long-Term Lease With Contractual Nonappropriation Clause Not Considered Accumulation of Municipal Debt — Vote Not Required: A question arose regarding the applicability of laws regulating municipal government debt based on a proposal by the city of Great Falls to enter a contract for the development and operation of a water park. Under the arrangement, the city would enter a long-term lease to a private party of real property adjacent to the municipal swimming pool and concurrently lease from that party certain personal property to be used for the water park. The personalty lease would include an option for the city to purchase the personal property at the close of the lease terms and a nonappropriation clause under which the personalty lease would terminate without penalty to the city if the city chose not to appropriate

funds for the lease payment in any fiscal year, in which case possession of the personal property would revert to the lessor, who would retain possession under a separate realty lease until that lease expired. The Attorney General concluded that such an arrangement did not create a debt and thus would not violate provisions of state law limiting the accumulation of debt by municipal governments. Further, the city's proposal would not pledge the taxing power of the city to make the full term of lease payments and therefore would not qualify as an obligation for which the general credit of the city is pledged that would require a vote of the people under this section. 49 A.G. Op. 3 (2001), distinguishing 38 A.G. Op. 56 (1979).

Election Required to Issue Bonds to Furnish Swimming Pool: An election is required pursuant to 7-7-4221 to issue general obligation bonds for the purpose of furnishing a municipal swimming pool; however, there is no statutory requirement for an election to borrow money for that purpose by means other than issuing general obligation bonds. 41 A.G. Op. 73 (1986).

Collateral References

Municipal Corporations *key* 867, 918(1).

64 C.J.S. Municipal Corporations §§1859, 1920.

64 Am. Jur. 2d Public Securities and Obligations §§131 through 140.

Prohibition to control action of administrative officers in matters relating to bonds. 159 ALR 627; 115 ALR 22.

Statutory provision as to manner and time of notice as mandatory or directory. 119 ALR 661.

Mistake, ambiguity, or omission in statement as to indebtedness, in call for election or proposal for bond issue, as affecting validity of election or bonds issued pursuant thereto. 116 ALR 1258.

7-7-4222. Election required for bond issue relating to water and sewer systems.

Compiler's Comments

1993 Amendment: Chapter 73 at beginning substituted "Bonds backed by the full faith and credit of the city or town and" for "No money must be borrowed on bonds" and after "system" inserted "may not be issued".

Case Notes

Bonds Declared Void: A town which did not submit to taxpayers question whether debt limit might be exceeded was held not liable, on implied contract, to holder of special improvement district bonds for construction of water supply system, where bonds were declared void. Lumbermen's Trust Co. v. Ryegate, 50 F2d 219 (9th Cir. 1931).

Collateral References

Municipal Corporations *key* 858, 863, 864.

64 C.J.S. Municipal Corporations §§1833, 1846, 1848.

7-7-4223. Procedure to call election on question of bonded indebtedness.

Collateral References

Municipal Corporations *key* 918(1).

64 C.J.S. Municipal Corporations §1920.

64 Am. Jur. 2d Public Securities and Obligations §§141 through 150.

7-7-4224. Petition to request election.

Collateral References

Municipal Corporations *key* 918(1).

64 C.J.S. Municipal Corporations §1920.

7-7-4225. Presentation of petition to city or town clerk — clerk's certificate.

Collateral References

Municipal Corporations *key* 918(1).

64 C.J.S. Municipal Corporations §1920.

7-7-4226. Resolution to submit question of issuing bonds to voters.

Compiler's Comments

1997 Amendment: Chapter 234 in (2)(d), near middle after "town election", inserted "at an election that is conducted by mail ballot, as provided in Title 13, chapter 19". Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 in (2)(d) inserted "that is held in conjunction with a regular or primary election"; and made minor changes in style.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§131 through 140.

Effect of inclusion in call for election, or in proposal for bond issue submitted to people, of unauthorized method of payment or retirement. 93 ALR 362.

7-7-4227. Notice of election.

Compiler's Comments

1997 Amendment: Chapter 234 in (1), near middle after "town election", inserted "at an election that is conducted by mail ballot, as provided in Title 13, chapter 19"; and made minor changes in style. Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 in (1) inserted "held in conjunction with a regular or primary election"; deleted former (2)(a)(ii) that read: "(ii) the hours between which the polls will be open"; and made minor changes in style.

1989 Amendment: In (3) inserted language to make optional requirement that notice be posted in voting precinct; and made minor changes in form.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§141 through 150.

Inclusion or exclusion of first and last days in computing time for giving notice of bond issue election, which must be given a certain number of days before a known future date. 98 ALR 2d 1390.

7-7-4235. Percentage of electors required to authorize issuing of bonds.

Compiler's Comments

1999 Amendment: Chapter 190 at end of section substituted "by a majority of the votes cast on the issue" for former language regarding procedure for determination on bond approval or rejection that read: "(1) determine the total number of electors who were qualified to vote in the bond election;

(2) determine the total number of qualified electors who voted in the bond election from the tally sheet or sheets for the election;

(3) calculate the percentage of qualified electors voting at the bond election by dividing the number determined in subsection (2) by the number determined in subsection (1); and

(4) when the calculated percentage in subsection (3) is 40% or more, the bond proposition is considered approved and adopted if a majority of the votes cast were in favor of the proposition, otherwise it is considered rejected; or

(5) when the calculated percentage in subsection (3) is more than 30% but less than 40%, the bond proposition is considered approved and adopted if 60% or more of the votes cast were in favor of the proposition, otherwise it is considered rejected; or

(6) when the calculated percentage in subsection (3) is 30% or less, the bond proposition is considered rejected"; and made minor changes in style. Amendment effective March 26, 1999.

1997 Amendment: Chapter 234 in introductory clause, near middle after "general election", inserted "at an election that is conducted by mail ballot, as provided in Title 13, chapter 19"; and made minor changes in style. Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 in (1) inserted "held in conjunction with a regular or primary election"; and made minor changes in style.

1989 Amendment: Near beginning, after "special election", inserted "the determination of the approval or rejection of the bond proposition is made in the following manner"; and substituted (1) through (6) relating to method of determining election results (see 1989 Session Law for text) for remainder of former section that read: "not less than 40% of the registered electors entitled to vote on the proposition or question must vote thereon; otherwise, the proposition shall be considered to have been rejected.

(2) If 40% or more of the registered electors do vote on the proposition or question at the election and a majority of the votes are cast in favor of the question or proposition, then the proposition or question shall be considered to have been adopted and approved."

Source: The process for determining the approval or rejection of a bond proposition parallels the process described in 20-9-428 that is used in school bond elections. The 1989 amendment adopted the school bond process for county bond elections.

7-7-4236. Resolution to sell bonds.

Compiler's Comments

1995 Amendment: Chapter 423 substituted (1) concerning approval and calling for sale of bonds for former text that read: "(1) If a sufficient percentage of the qualified electors of the city or town entitled to vote on the question of issuing bonds voted thereon and a sufficient percentage of the votes were cast in favor of the issuing of the bonds as provided in 7-7-4235, the city or town council shall, at a regular or special meeting held within 30 days thereafter, pass a resolution providing for the issuance of the bonds"; in (2) substituted "must state" for "shall recite"; substituted (2)(c) concerning minimum purchase price for former text that read: "the maximum rate of interest the bonds may bear"; inserted (1)(f) concerning optional redemption provisions; inserted (1)(h) concerning form of notice of sale; in (3), in first sentence after "resolution", deleted "shall provide for the manner of execution of the bonds" and after "bonds" deleted "preference shall be given amortization bonds"; substituted (4) concerning minimum price for bonds for former text that read: "The resolution shall adopt a form of notice of the sale of the bonds"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1989 Amendments: Chapter 336 at beginning of (1), after "If", substituted "a sufficient percentage of" for "40% or more of", near middle substituted "sufficient percentage" for "majority", and after "issuing of the bonds" inserted "as provided in 7-7-4235".

Chapter 511 in second sentence of (3) inserted "except in a bond issue of citizen bonds". Amendment effective April 12, 1989.

7-7-4251. Form of notice of sale of bonds.

Compiler's Comments

1997 Amendment: Chapter 459 in form, in first paragraph, substituted "general obligation bonds" for "either amortization or serial bonds"; deleted former second and third paragraphs that read: "Amortization bonds will be the first choice and serial bonds will be the second choice of the council.

If amortization bonds are sold and issued, the entire issue may be put into one single bond or divided into several bonds as the council may determine at the time of sale, both principal and interest to be payable in semiannual installments during a period of.... years from the date of issue"; in second paragraph, at beginning before "bonds", deleted "If serial" and before "amount" inserted "aggregate principal"; in third paragraph, after "bonds", deleted "whether amortization or serial bonds", before "date" inserted "an original issue", and after "interest" deleted "at a rate not exceeding ...% per annum"; in fourth paragraph substituted "$...." for "their par value", after "interest" inserted "on the principal amount of the bonds", after "rate" inserted "or rates", and after "bonds at" substituted "the purchase price specified for the bonds. (An interest rate may not exceed ....% a year.)" for "par"; in fifth paragraph, near beginning, substituted "must be accompanied by (insert appropriate bid security as permitted by 18-1-203)" for "other than by or on behalf of the board of investments of the state of Montana must be accompanied by a certified check"; and made minor changes in style.

1989 Amendment: Inserted (2) regarding form of notice upon issuance of citizen bonds. Amendment effective April 12, 1989.

1983 Amendments — Composite: Chapter 11 made permanent 1981 amendment that allowed political subdivisions to set the interest rates on bonds. (Amendment was to terminate July 1, 1983—sec. 21, Ch. 500, L. 1981.) The 1981 amendment was made permanent on February 4, 1983.

Chapter 631 in fourth paragraph of "Notice of Sale" substituted provisions for serial bonds and provided for the amount and for a maturity schedule for "If serial bonds are issued and sold, they will be in the amount of .... dollars ($....) each, except the last bond which will be in the amount of .... dollars ($....); the sum of .... dollars ($....) of said serial bonds will become due and payable on the .... day of ...., 19.., and a like amount on the same day each year thereafter until all such bonds are paid, except that the last installment will be in the amount of .... dollars ($....)."; and in fifth paragraph of "Notice" after "per annum" inserted "commencing on the ... day of ... (month), 19.., and" and after "each year" inserted "thereafter". Chapter 631 amended the version of the section which set the interest rate at 6% per annum. The Code Commissioner has made the amendments contained in Ch. 631 to the version of the section made permanent by Ch. 11. Chapter 631 is effective October 1, 1983.

1981 Amendment: Changed "6%" to "....%" in the sixth paragraph.

Collateral References

Municipal Corporations *key* 921(1).

64 C.J.S. Municipal Corporations §1930.

64 Am. Jur. 2d Public Securities and Obligations §§143 through 150.

7-7-4252. Publication of notice of sale.

Compiler's Comments

1987 Amendment: Near beginning of first sentence, after "published", substituted "as provided in 17-5-106" for "once in each calendar week in each of the 4 successive calendar weeks (four publications) immediately preceding the week which contains the date of sale".

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §150.

7-7-4254. Procedure for sale of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in (2), in first sentence after "less than", substituted "the minimum bid specified for their sale" for "par", after "specify" deleted "the form of bonds to be issued, whether amortization or serial", and after "interest" inserted "and the purchase price", deleted former second and third sentences that read: "A bid for amortization bonds shall have preference over a bid for serial bonds, all other things being equal. In determining the kind of bonds to be issued, the council shall take into consideration not only the rate of interest demanded on each kind but also all other known elements affecting the interests of the city or town", and at end of last sentence deleted "provided, however, that the bonds may not be sold at less than par with accrued interest to date of delivery"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1983 Amendment: Near beginning and end of (2), after "par" substituted "with" for "and"; and at beginning of (3), substituted "Consultants' fees and attorneys' fees may be paid" for "No attorneys' fees or brokerage or other fees or commissions of any kind may be paid".

Case Notes

Private Sale of Bonds: Under this section, authorizing the City Council to reject all bids for municipal bonds and to sell them at private sale when it considers it best for the interests of the city, a city may contract to exchange such bonds at their face value for work incident to the construction of a water system at an agreed valuation, the price of the work being determined by a bid which is accepted, such an arrangement being tantamount to a "sale" of the bonds. Commonwealth Pub. Serv. Co. v. Deer Lodge, 96 M 48, 29 P2d 667 (1934).

Attorney General's Opinions

Paying a Consultant Prohibited: Prior to 1983 amendment, 7-7-4254(3) prohibited a municipality from paying a consultant for assistance or advice in any of the matters set forth in Title 7, ch. 7, part 42, relating to the issuance and sale of specific general obligation bonds, but it did not prohibit paying a consultant for assistance in matters involving the overall financial operation of the municipality, so long as the consultation was not limited to a simple bond issuance and sale and did not involve participation in specific bond proceedings. The prohibition was not limited to payment from the actual bond proceeds but included all funds of the municipality. 38 A.G. Op. 34 (1979).

Law Review Articles

SEC Registration Requirements for Taxable Municipal Securities, Lyons, 21 Urb. Law. 223 (1989).

Collateral References

Sale of municipal or other public bonds at less than par or face value. 162 ALR 396; 91 ALR 7.

Bid for municipal bond issue, rights and obligations arising out of. 139 ALR 1047.

Effect of delay after authorization by voters on power of governmental unit to issue bonds. 135 ALR 768.

7-7-4255. Form and execution of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in (1), after "shall", inserted "adopt a resolution providing for the issuance of the bonds" and at end substituted "providing the manner of execution of the

bonds" for "of the coupons to be attached thereto"; in (2), in first sentence after "signed by", inserted "or bear the facsimile signatures of" and at end inserted proviso for one manual signature and at end of second sentence substituted "or its facsimile imprinted on the bond" for "affixed thereto"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

7-7-4256. Printing of bonds.

Collateral References

Municipal Corporations *key* 929.

64 C.J.S. Municipal Corporations §1948.

7-7-4257. Registration of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in (1), after "clerk", deleted "in a book provided for that purpose"; deleted former (2)(a) that read: "(a) the number and amount of each bond"; in (2)(a) substituted "the maturities of the bonds subject to early redemption, the redemption dates" for "date redeemable" and substituted "principal and interest on the bonds" for "same"; deleted (2)(d) that read: "(d) the name and address of the purchaser"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

7-7-4259. Delivery of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 deleted (1) that read: "(1) If the board of investments is the purchaser of the bonds, the city treasurer or town clerk shall forward the registered bonds to the department of commerce. The department shall deliver them to the state treasurer, and payment therefor shall be made in the manner provided by law"; at beginning deleted "If the bonds are purchased by other investors"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1987 Amendment: In (1), at end of first sentence, changed "department of administration" to "department of commerce".

7-7-4261. Maintenance of accounts for bond issues.

Compiler's Comments

1989 Amendment: In first sentence of (1) inserted "including citizen bonds as provided in 7-7-4211 through 7-7-4214". Amendment effective April 12, 1989.

Collateral References

Municipal Corporations *key* 887, 951.

64 C.J.S. Municipal Corporations §§1884, 1954.

7-7-4262. Payment of principal and interest.

Compiler's Comments

1995 Amendment: Chapter 423 deleted former last sentence that read: "If the bonds are held by the state, then all such payments shall be made at the office of the state treasurer, who shall cancel the coupons or bonds and return the same to the city treasurer or town clerk, together with his receipt therefor"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Collateral References

Municipal Corporations *key* 953, 954.

64 C.J.S. Municipal Corporations §1955.

7-7-4263. Interest on late payments of principal and interest.

Law Review Articles

Tenth Amendment—Intergovernmental Tax Immunity—Federal Taxation of State and Municipal Bond Interest—The United States Supreme Court Has Held That the Federal

Government May Tax the Interest From State and Municipal Bonds, South Carolina v. Baker, 108 S. Ct. 1355, 27 Duq. L. Rev. 355 (1989).

Collateral References

Municipal Corporations *key* 953, 954.
64 C.J.S. Municipal Corporations §1955.

7-7-4264. Statement as to amount of principal and interest due and payable on bonds.

Collateral References

Municipal Corporations *key* 953.
64 C.J.S. Municipal Corporations §1955.

7-7-4265. Tax levy for payment of bonds.

Compiler's Comments

1989 Amendment: At beginning of (2) inserted exception clause; and inserted (3) regarding adequacy of annual levies sufficient to redeem citizen bonds. Amendment effective April 12, 1989.

Collateral References

Municipal Corporations *key* 964, 965.
64 C.J.S. Municipal Corporations §§1997, 1998.
64 Am. Jur. 2d Public Securities and Obligations §414.

7-7-4266. Procedure in case of insufficient tax levy — individual liability of council members.

Collateral References

Mandamus *key* 115.
55 C.J.S. Mandamus §182.

7-7-4268. Redemption of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in (2), near end of first sentence, increased time of notice from 15 days to 30 days, at end of second sentence inserted "or principal installment not affected by the defect or failure", in fourth sentence substituted "once, not less than 30 days prior to the redemption date" for "once a week for 2 successive weeks immediately preceding the interest payment date", and in fifth sentence substituted "received" for "given through a different means for its redemption"; in (3), in first sentence before "institution", inserted "financial" and at end of second sentence inserted "if the funds have been deposited in the bank or financial institution"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1993 Amendment: Chapter 453 near middle of (1), after "outstanding", deleted "optional", after "redeemable on" inserted "or before", after "payment date" deleted "and whenever such bonds are not held by the state", after "money in" deleted "payment and", and at end, after "redeem", inserted "to a redemption date on or before the next interest payment date, as fixed by the city treasurer or town clerk"; in first sentence of (2), near beginning after "if", inserted "ownership of the bonds is registered or is otherwise", after "the treasurer" inserted "to the registered owners at their addresses as they appear in the bond registration books", near middle, after "payable", inserted "by mail sent", and before "date" substituted "redemption" for "next interest payment", inserted second sentence clarifying that certain defects do not affect validity of redemption proceedings, at beginning of third sentence inserted "If the ownership of the bonds is not registered" and at end, before "date", substituted "redemption" for "interest payment", and inserted last sentence regarding waiver of notice; near middle of first sentence of (3), before "date", substituted "the redemption" for "such interest payment" and in second sentence, before "date", substituted "the redemption" for "such interest payment"; and made minor changes in style.

Collateral References

Municipal Corporations *key* 951.
64 C.J.S. Municipal Corporations §1954.
Right to call governmental bonds in advance of their maturity. 109 ALR 988.

7-7-4269. Order of redemption of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 deleted reference to 7-7-4267; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1993 Amendment: Chapter 453 near beginning substituted "bonds to be" for "bonds paid and", after "7-7-4268" substituted "may" for "must", before "redeemed" deleted "paid and", and at end substituted "order the city treasurer or city clerk selects, consistent with the provisions of the resolution authorizing the issuance of the bonds" for "numerical order in which the same were issued".

Case Notes

No Mandamus to Compel Payment Out of Order: When a town ordinance directed that water bonds be issued and be absolutely due and payable in series set forth in a schedule showing on what day each should be payable, and the holder of bond No. 13 sought by Writ of Mandate to compel payment thereof when bonds numbered 1 to 12 also were due and unpaid, the Supreme Court held that purchasers of municipal bonds are charged with notice of the contents of ordinances under which they were issued, as well as by those of the bonds themselves and that all such bonds were required to be paid in the order of their serial numbers, and such holder was not entitled to prevail. (See 1993 amendment.) State ex rel. Mueller v. Todd, 114 M 35, 132 P2d 154 (1942).

Collateral References

Municipal Corporations *key* 951.

64 C.J.S. Municipal Corporations §1954.

Right to call governmental bonds in advance of their maturity. 109 ALR 988.

Permissive or mandatory character of legislation in relation to payment of public debts. 103 ALR 812.

7-7-4270. Authority to buy outstanding bonds.

Collateral References

Municipal Corporations *key* 884, 951.

64 C.J.S. Municipal Corporations §§1881, 1955.

7-7-4274. Closing of accounts and transfer of money to other funds.

Collateral References

Municipal Corporations *key* 887, 951.

64 C.J.S. Municipal Corporations §§1884, 1954.

7-7-4275. Refunding of bond issue held by state by exchange for amortization bonds.

Compiler's Comments

1983 Amendment: Made 1981 amendment permanent. (Amendment was to terminate July 1, 1983—sec. 21, Ch. 500, L. 1981.)

1981 Amendment: Substituted "pursuant to 17-5-102" for "but the interest shall not exceed 6% per annum" at the end of the first sentence in (2).

Collateral References

Municipal Corporations *key* 913.

64 C.J.S. Municipal Corporations §1910.

Part 43
Municipal Refunding General Obligation Bonds

Part Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§261 through 269.

7-7-4301. Authorization to issue refunding general obligation bonds.

Compiler's Comments

1995 Amendment: Chapter 423 at end inserted "when there are not sufficient funds available to pay the outstanding warrants or maturing bonds or when there is a reduction in debt service as a result of refunding pursuant to 7-7-4304"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Case Notes

Recital by City — All Conditions Precedent Fulfilled: As against innocent purchasers of city bonds, the authority on the part of its officers having power to issue them will be implied to extend to the making of recitals therein essential to their validity, i.e., that all conditions precedent to their issuance have been fulfilled; and where they recite that the City Council has caused the corporate seal to be affixed to them and the signatures of the Mayor and the Clerk attached, the city is estopped to contend that they were signed by those officers without authority. Edmunds v. Glasgow, 89 M 596, 300 P 203 (1931).

Collateral References

Municipal Corporations *key* 858, 863, 864.

64 C.J.S. Municipal Corporations §§1833, 1846, 1848.

7-7-4302. Applicability of certain other bond provisions.

Compiler's Comments

1995 Amendment: Chapter 423 in (1) deleted reference to 7-7-4267; and inserted (2) concerning unrefunded portion of outstanding bond issue. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1993 Amendment: Chapter 6 near end deleted reference to 7-7-4253.

1987 Amendment: At beginning of section deleted references to 7-7-4207 and 7-7-4271.

1983 Amendment: After "7-7-4210 and" changed "7-7-4251" to "7-7-4255"; and at end of section inserted "however" clause allowing city or town council to sell bonds at its option.

7-7-4303. Term of refunding general obligation bonds.

Collateral References

Municipal Corporations *key* 923, 926.

64 C.J.S. Municipal Corporations §1935.

7-7-4304. Interest rate on refunding general obligation bonds.

Compiler's Comments

2003 Amendment: Chapter 277 in (1) at end inserted second sentence concerning savings requirement; inserted (1)(a) and (1)(b) concerning the determination of whether refunding bonds satisfy the savings requirement of this section; and made minor changes in style. Amendment effective July 1, 2003.

1995 Amendment: Chapter 423 inserted (3) concerning amount of refunding bonds. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1989 Amendment: At beginning of (1) inserted exception clause; inserted (2) allowing issuance of refunding bonds at an interest rate in excess of the rate on refunded bonds if issuance results in a reduction of total debt service cost; and made minor changes in style and phraseology. Amendment effective March 8, 1989.

Collateral References

Municipal Corporations *key* 867, 918.

64 C.J.S. Municipal Corporations §§1859, 1920.

7-7-4311. Procedure to issue refunding general obligation bonds.

Compiler's Comments

1983 Amendment: At end of section after "thereof" substituted "including whether the bonds will be sold at a private negotiated sale or public sale" for "giving notice of sale thereof in the same manner that notice is required to be given of sale of bonds authorized at an election and then following the procedure in part 42 for the sale and issuance of such bonds".

Collateral References

Municipal Corporations *key* 867, 918.

64 C.J.S. Municipal Corporations §§1859, 1920.

7-7-4316. Advance refunding bonds.

Compiler's Comments

2003 Amendment: Chapter 277 in (2) at beginning inserted exception clause; inserted (3) allowing funds to be invested if they are sufficient when initially deposited in escrow; and made minor changes in style. Amendment effective July 1, 2003.

Part 44
Municipal Revenue Bonds

Part Collateral References

64 Am. Jur. 2d Public Securities and Obligations §13.

7-7-4402. Definitions.

Compiler's Comments

1991 Amendment: In definition of undertaking, in (e), inserted "solid waste management systems". Amendment effective July 1, 1991.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

Collateral References

Municipal Corporations *key* 911.

64 C.J.S. Municipal Corporations §1907.

7-7-4404. Authority to acquire, construct, maintain, and operate various undertakings.

Compiler's Comments

2001 Amendment: Chapter 125 near beginning of (1) after "construct" deleted "acquire by gift, purchase, or the exercise of the right of eminent domain" and after "eminent domain" inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

System Development Fees Allowable Form of Financing Future Expansion of City Water and Sewer System: When liberally construed, it is within the power of a self-governing municipality, as well as a reasonable extension of a city's express statutory authority, to implement the collection and accumulation of system development fees to fund a portion of the cost of future expansion of municipal water and sewer systems. The fees are proper as long as they are based on reasonably anticipated future costs of the city and the revenue generated from the fees is used solely to fund facility expansion or to pay for bonds sold for that purpose. Lechner v. Billings, 244 M 195, 797 P2d 191, 47 St. Rep. 1512 (1990).

Public Service Commission Jurisdiction Over Municipally Owned Utility: The ratesetting authority of a municipality under the Municipal Revenue Bond Act of 1939 does not preclude Public Service Commission (P.S.C.) jurisdiction over municipally owned utilities. Municipalities do establish rates for their services as required by 7-7-4404 and 7-7-4424 when they comply with the P.S.C. reporting requirements set forth in 69-3-301 and 69-3-302. The regulatory authority of the P.S.C. does not diminish a municipality's ability to establish an initial rate schedule, and nothing in the Municipal Revenue Bond Act precludes a review of such rate determinations. The Legislature intended such a review process by the very creation of such a regulatory and supervisory body. Helena v. Dept. of Public Service Regulation, 194 M 173, 634 P2d 192, 38 St. Rep. 1560 (1981).

Jurisdiction of City and Public Service Commission Overlapping: Although under the Municipal Revenue Bond Act the petitioner (city of Billings) has the power to prescribe fees for the services, facilities, and commodities furnished by a project financed pursuant to the Act, this authority is not exclusive. The rates which the city sets are subject to modification by the Public Service Commission when such rates are unjust or unreasonable. Billings v. P.S.C., 193 M 358, 631 P2d 1295, 38 St. Rep. 1162 (1981).

Collateral References

Municipal Corporations *key* 57, 911.

62 C.J.S. Municipal Corporations §106; 64 C.J.S. Municipal Corporations §1907.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves. 35 ALR 3d 1293.

7-7-4405. Pollution abatement.

Collateral References

62 C.J.S. Municipal Corporations §106; 64 C.J.S. Municipal Corporations §1907.

7-7-4406. Cooperation among municipalities.

Collateral References

Municipal Corporations *key* 57, 277, 911.

63 C.J.S. Municipal Corporations §1059; 64 C.J.S. Municipal Corporations §1907.

7-7-4407. Role of state agencies.

Compiler's Comments

1995 Amendment: Chapter 418 in last sentence substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Collateral References

Municipal Corporations *key* 917(1).

64 C.J.S. Municipal Corporations §1915.

7-7-4421. Authority to issue revenue bonds.

Attorney General's Opinions

Street Construction Projects Prohibited: Although gasoline tax revenue is earmarked for construction and maintenance of city streets, a street project does not qualify under this section because streets are not "revenue-producing facilities". The connection between street paving and gasoline tax revenue is not direct enough to render the "other revenue-producing facilities" exception applicable. Cities and towns are prohibited from issuing revenue bonds, which are to be retired by gasoline tax revenue, to finance street construction projects. 42 A.G. Op. 120 (1988).

Law Review Articles

SEC Registration Requirements for Taxable Municipal Securities. Lyons, 21 Urb. Law. 223 (1989).

Collateral References

Municipal Corporations *key* 57, 911.

62 C.J.S. Municipal Corporations §106; 64 C.J.S. Municipal Corporations §1907.

7-7-4422. Determination of cost.

Compiler's Comments

1995 Amendment: Chapter 423 at end of (1) inserted "including a permissible underwriter's discount, if any"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Attorney General's Opinions

Reimbursement of Financial Consultant for Bond Issuance: A financial consultant may not receive a commission based on the value of bonds purchased by it for services performed in connection with a municipal revenue bond offering and sale to the extent the commission, when subtracted from the purchase price of the bonds, reduces the bonds' effective selling price below par value. (See 1995 amendment.) 41 A.G. Op. 4 (1985).

Collateral References

Municipal Corporations *key* 57, 911.

62 C.J.S. Municipal Corporations §106; 64 C.J.S. Municipal Corporations §1907.

7-7-4423. Nature of revenue bonds.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §13.

Pledge or appropriation of revenue from utility or other property in payment therefor, as indebtedness within constitutional or statutory limitation of indebtedness of municipality. 146 ALR 328; 96 ALR 1385; 72 ALR 687.

Funding or refunding obligations as subject to conditions respecting limitation of indebtedness or approval by voters. 97 ALR 442.

7-7-4424. Undertakings to be self-supporting.

Compiler's Comments

1995 Amendment: Chapter 423 in (1) inserted second sentence concerning taxes constituting revenue of the undertaking; in (2), after "prescribed", inserted "along with any appropriated property or resort tax collections"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Case Notes

System Development Fees Allowable Form of Financing Future Expansion of City Water and Sewer System: When liberally construed, it is within the power of a self-governing municipality, as well as a reasonable extension of a city's express statutory authority, to implement the collection and accumulation of system development fees to fund a portion of the cost of future expansion of municipal water and sewer systems. The fees are proper as long as they are based on reasonably anticipated future costs of the city and the revenue generated from the fees is used solely to fund facility expansion or to pay for bonds sold for that purpose. Lechner v. Billings, 244 M 195, 797 P2d 191, 47 St. Rep. 1512 (1990).

Public Service Commission Jurisdiction Over Municipally Owned Utility: The ratesetting authority of a municipality under the Municipal Revenue Bond Act of 1939 does not preclude Public Service Commission (P.S.C.) jurisdiction over municipally owned utilities. Municipalities do establish rates for their services as required by 7-7-4404 and 7-7-4424 when they comply with the P.S.C. reporting requirements set forth in 69-3-301 and 69-3-302. The regulatory authority of the P.S.C. does not diminish a municipality's ability to establish an initial rate schedule, and nothing in the Municipal Revenue Bond Act precludes a review of such rate determinations. The Legislature intended such a review process by the very creation of such a regulatory and supervisory body. Helena v. Dept. of Public Service Regulation, 194 M 173, 634 P2d 192, 38 St. Rep. 1560 (1981).

Jurisdiction of City and Public Service Commission Overlapping: Although under the Municipal Revenue Bond Act the petitioner (city of Billings) has the power to prescribe fees for the services, facilities, and commodities furnished by a project financed pursuant to the Act, this authority is not exclusive. The rates which the city sets are subject to modification by the Public Service Commission when such rates are unjust or unreasonable. Billings v. P.S.C., 193 M 358, 631 P2d 1295, 38 St. Rep. 1162 (1981).

Collateral References

Disposition of revenues from operation of revenue-producing enterprise owned by municipal corporation. 165 ALR 854; 103 ALR 579.

7-7-4426. Authorization for undertaking and issuance of bonds.

Compiler's Comments

1997 Amendment: Chapter 234 in (2)(b), near middle, inserted "that is conducted by mail ballot, as provided in Title 13, chapter 19, or that is". Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 in (2)(b) inserted "held in conjunction with a regular or primary election"; and made miner changes in style.

Collateral References

Municipal Corporations *key* 918(1), 921(1), 923, 926(1).

64 C.J.S. Municipal Corporations §§1920, 1930, 1935, 1940.

7-7-4427. Special election on question of issuing bonds.

Compiler's Comments

1997 Amendment: Chapter 234 in (1), near middle, inserted "conducted by mail ballot, as provided in Title 13, chapter 19, or must be"; and made minor changes in style. Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 in (1) inserted "held in conjunction with a regular or primary election"; and made minor changes in style.

1981 Amendment: In (1), substituted "for municipal general obligation bonds in chapter 7, part 42" for "in [7-7-4227 through 7-7-4233]"; made minor changes in grammar.

Collateral References

Municipal Corporations *key* 918, 921, 923, 926.
64 C.J.S. Municipal Corporations §§1920, 1930, 1935, 1940.

7-7-4428. Covenants in resolution authorizing issuance of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in (2), at end, inserted "and including the pledge or appropriation of all or a portion of the property and resort tax revenue referred to in 7-7-4424"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Collateral References

Municipal Corporations *key* 917(1).
64 C.J.S. Municipal Corporations §1915.

7-7-4429. Remedies.

Collateral References

Municipal Corporations *key* 917.
64 C.J.S. Municipal Corporations §1915.

7-7-4430. Presumptions of validity of bonds.

Collateral References

Municipal Corporations *key* 931.
64 C.J.S. Municipal Corporations §1942.
64 Am. Jur. 2d Public Securities and Obligations §§381 through 384.

7-7-4431. Liens arising from bonds.

Collateral References

Municipal Corporations *key* 950.
64 C.J.S. Municipal Corporations §1957.

7-7-4432. Details relating to revenue bonds.

Compiler's Comments

1995 Amendment: Chapter 423 at end of (1)(a) deleted "payable semiannually"; inserted (2) concerning minimum price for bonds; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1983 Amendment: Made 1981 amendment permanent. (Amendment was to terminate July 1, 1983—sec. 21, Ch. 500, L. 1981.)

1981 Amendment: Substituted "the limitation of 17-5-102" for "9% per annum" near the beginning of the section.

Collateral References

Municipal Corporations *key* 918, 921, 923, 926.
64 C.J.S. Municipal Corporations §§1920, 1930, 1935, 1940.

7-7-4433. Sale of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 at end of (1) substituted "a price not less than that prescribed by the governing body, plus interest to the date of delivery of the bonds" for "not less than par"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1983 Amendment: In (2)(a) and (b), after "United States" inserted "or the state of Montana".

Attorney General's Opinions

Reimbursement of Financial Consultant for Bond Issuance: A financial consultant may not receive a commission based on the value of bonds purchased by it for services performed in connection with a municipal revenue bond offering and sale to the extent the commission, when

subtracted from the purchase price of the bonds, reduces the bonds' effective selling price below par value. (See 1995 amendment to 7-7-4422.) 41 A.G. Op. 4 (1985).

Law Review Articles

Full Liability Under Section 10(b) for Municipal Officers and Issuers, Ostrin, 21 Urb. Law. 197 (1989).

Collateral References

Municipal Corporations *key* 918, 921, 923, 926.
64 C.J.S. Municipal Corporations §§1920, 1930, 1935, 1940.
64 Am. Jur. 2d Public Securities and Obligations §218.

7-7-4434. Notice of sale of bonds.

Compiler's Comments

1995 Amendment: Chapter 423 at beginning deleted exception clause referring to subsection (2) and substituted "newspaper of general circulation in the state and the governing body may publish the notice or summary of the notice" for "newspaper circulating in the municipality"; deleted (2) that read: "(2) In the event the bond issue is in an amount of less than $150,000, the bond issue shall be advertised at least 5 days prior to such sale:

(a) in daily newspapers circulating in Montana cities of 10,000 population or over, in lieu of advertising in a financial newspaper in New York, Chicago, or San Francisco; and

(b) also in a newspaper as specified in part 24 of chapter 5 if that newspaper is different from the daily newspapers circulating in Montana cities of 10,000 population or over"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

Collateral References

Municipal Corporations *key* 918, 921, 923, 926.
64 C.J.S. Municipal Corporations §§1920, 1930, 1935, 1940.
64 Am. Jur. 2d Public Securities and Obligations §225.

7-7-4435. Interim receipts or certificates.

Collateral References

Municipal Corporations *key* 918, 921, 923, 926.
64 C.J.S. Municipal Corporations §§1920, 1930, 1935, 1940.

Part 45
Municipal Refunding Revenue Bonds
Option 1

7-7-4501. Authority to issue refunding revenue bonds.

Compiler's Comments

1983 Amendment: In (2), after "part 44" inserted "except 7-7-4433 and 7-7-4434".

Collateral References

Municipal Corporations *key* 57, 911.
62 C.J.S. Municipal Corporations §106; 64 C.J.S. Municipal Corporations §1907.
64 Am. Jur. 2d Public Securities and Obligations §261.

7-7-4502. Interest rates on refunding revenue bonds.

Compiler's Comments

2003 Amendment: Chapter 277 in (1) at end inserted second sentence concerning savings requirement; inserted (1)(a) and (1)(b) concerning the determination of whether refunding bonds satisfy the savings requirement of this section; and made minor changes in style. Amendment effective July 1, 2003.

1989 Amendment: Inserted (2)(c) allowing issuance of refunding bonds at an interest rate higher or lower than on refunded bonds if issuance results in a reduction of total debt service cost; and made minor changes in style and phraseology. Amendment effective March 8, 1989.

7-7-4503. Exchange or sale of refunding revenue bonds.

Compiler's Comments

1983 Amendment: In (1) after "may be sold", inserted "at a private negotiated sale or at a public sale conducted pursuant to the provisions of 7-7-4433 and 7-7-4434".

Part 46
Municipal Refunding Revenue Bonds
Option 2

7-7-4602. Definitions.

Compiler's Comments

1997 Amendment: Chapter 42 deleted former definition of federal agency that read: ""Federal agency" means the United States, the president of the United States, the federal emergency administrator of public works, or any agency, instrumentality, or corporation of the United States designated or created by or pursuant to any act or joint resolution of the congress of the United States or directly or indirectly owned or controlled by the United States"; and made minor changes in style. Amendment effective March 12, 1997.

Section Not Codified: Section 79-1902, R.C.M. 1947, providing that the singular shall include the plural and vice versa and words importing persons include firms and corporations, was not codified in the MCA because it is redundant with 1-2-105. This subsection has not been repealed and is still valid law. Citation may be made to sec. 2, Ch. 121, L. 1937. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

7-7-4603. Scope of part.

Collateral References

Municipal Corporations *key* 913.

64 C.J.S. Municipal Corporations §1910.

7-7-4604. Interpretation of part.

Collateral References

Municipal Corporations *key* 950.

64 C.J.S. Municipal Corporations §1957.

7-7-4605. Authorization for refinancing and refunding revenue bonds.

Collateral References

Municipal Corporations *key* 913.

64 C.J.S. Municipal Corporations §1910.

64 Am. Jur. 2d Public Securities and Obligations §261.

Power of governmental unit to issue bonds as implying power to refund them. 1 ALR 2d 134.

Power of municipality or other governmental body to issue refunding bonds to retire obligation in respect of which the creation and maintenance of a sinking fund by taxation is required by constitutional or statutory provision. 157 ALR 794.

Power of municipal corporation to refund special assessment bonds. 102 ALR 202.

7-7-4606. Nature of refunding revenue bonds.

Collateral References

Municipal Corporations *key* 950.

64 C.J.S. Municipal Corporations §1957.

64 Am. Jur. 2d Public Securities and Obligations §261.

Income Tax: recognition of gain or loss on receipt of public refunding bonds for old bonds. 1 ALR 2d 415.

Pledge or appropriation of revenue from utility or other property in payment therefor, as indebtedness within constitutional or statutory limitation of indebtedness of municipality. 146 ALR 328; 96 ALR 1385; 72 ALR 687.

Funding or refunding obligations as subject to conditions respecting limitation of indebtedness or approval by voters. 97 ALR 442.

7-7-4607. Exemption from certain taxes for refunding revenue bonds.

Compiler's Comments

2000 Amendment by Referendum: Chapter 9 near end deleted references to inheritance taxes and transfer taxes; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

Collateral References

Taxation *key* 218.

84 C.J.S. Taxation §260.

7-7-4608. Refunding revenue bonds to be fully negotiable.

Collateral References

Municipal Corporations *key* 923 through 926.
64 C.J.S. Municipal Corporations §§1935 through 1941.

7-7-4609. Presumptions of validity of refunding revenue bonds.

Collateral References

Municipal Corporations *key* 931.
64 C.J.S. Municipal Corporations §1942.
64 Am. Jur. 2d Public Securities and Obligations §381.

7-7-4610. Details relating to refunding revenue bonds.

Compiler's Comments

1989 Amendment: Near middle of (2) inserted exception clause relating to issuance of refunding bonds at an interest rate in excess of the rate on refunded bonds if issuance results in a reduction of total debt service cost. Amendment effective March 8, 1989.

Collateral References

Municipal Corporations *key* 923 through 926.
64 C.J.S. Municipal Corporations §§1935 through 1941.
64 Am. Jur. 2d Public Securities and Obligations §261.

7-7-4621. Resolution for issuance of refunding revenue bonds.

Collateral References

Municipal Corporations *key* 917.
64 C.J.S. Municipal Corporations §1915.

7-7-4622. Permissible covenants for refunding revenue bonds.

Collateral References

Municipal Corporations *key* 917.
64 C.J.S. Municipal Corporations §1915.

7-7-4623. Security for refunding revenue bonds.

Collateral References

Municipal Corporations *key* 950.
64 C.J.S. Municipal Corporations §1957.
64 Am. Jur. 2d Public Securities and Obligations §261.

7-7-4624. Use of fiscal agent.

Collateral References

Municipal Corporations *key* 214(1).
62 C.J.S. Municipal Corporations §702.

7-7-4625. Sale or exchange of refunding revenue bonds.

Collateral References

Municipal Corporations *key* 921(1).
64 C.J.S. Municipal Corporations §§1930 through 1933.

7-7-4626. Details relating to sales of refunding revenue bonds.

Compiler's Comments

1997 Amendment: Chapter 459 near middle substituted "at less than 97% of the face value and must be sold" for "at not less than par"; and made minor changes in style.

Collateral References

Municipal Corporations *key* 921.
64 C.J.S. Municipal Corporations §§1930 through 1933.

7-7-4627. Details relating to exchanges of refunding revenue bonds.

Collateral References

Municipal Corporations *key* 921.
64 C.J.S. Municipal Corporations §§1930 through 1933.

7-7-4628. Payment of bonds.

Collateral References
Municipal Corporations *key* 950.
64 C.J.S. Municipal Corporations §1957.

7-7-4629. Management of enterprise.

Collateral References
Municipal Corporations *key* 950.
64 C.J.S. Municipal Corporations §1957.

7-7-4630. Right to receivership upon default.

Collateral References
Municipal Corporations *key* 939; Receivers *key* 21, 82.
64 C.J.S. Municipal Corporations §1956; 75 C.J.S. Receivers §§9, 150.

7-7-4631. Role of receiver.

Collateral References
Municipal Corporations *key* 939.
64 C.J.S. Municipal Corporations §1956.

7-7-4632. Procedure to return enterprise from receiver to municipality.

Collateral References
Municipal Corporations *key* 939.
64 C.J.S. Municipal Corporations §1956.

7-7-4633. Remedies of holders of refunding revenue bonds.

Collateral References
Mandamus *key* 110; Municipal Corporations *key* 955(1).
55 C.J.S. Mandamus §148; 64 C.J.S. Municipal Corporations §1972.

CHAPTER 8
ACQUISITION, TRANSFER, AND MANAGEMENT OF PROPERTY AND BUILDINGS

Chapter Collateral References
56 Am. Jur. 2d Municipal Corporations §§532 through 559.

Part 1
General Provisions Related to Local Government

7-8-101. Authorization to transfer property between certain governmental entities.

Compiler's Comments
2001 Amendment: Chapter 354 in (2) in first sentence substituted "as provided in 7-1-4127" for "once a week for 3 weeks in a newspaper published in such city or town or county in which located"; and made minor changes in style. Amendment effective October 1, 2001.
1985 Amendment: In (1) substituted "as provided in 7-1-2121" for "once a week for 3 weeks in a newspaper published in such city, town, or county in which located".

Collateral References
56 Am. Jur. 2d Municipal Corporations §§549 through 554.
Power of municipal corporation to exchange its real property. 60 ALR 2d 220.
Necessity and sufficiency of environmental impact statements under §102(2)(C) of National Environmental Policy Act of 1969 (42 USCS §4332(2)(C)), in cases involving projects relating to acquisition, construction, alteration, or disposition of government facilities. 76 ALR Fed. 279.

7-8-102. Authorization to deed county land to other governmental entities.

Collateral References
Counties *key* 108.
20 C.J.S. Counties §172.

7-8-103. Authorization for governmental and public entities to take property by gift or devise.

Case Notes

Lease to Private Club: Where property was conveyed to city in trust for use for park, recreational ground, and golf course purposes, a part of it could not be leased to private club so as to interfere with the public's use of the property. Hames v. Polson, 123 M 469, 215 P2d 950 (1950).

Grantor — Removal of Restrictions by Waiver: Lands deeded to a city for park purposes by deeds providing for reversion to the grantors if used for any other purpose may be used for some other purpose upon obtaining waiver, quitclaim deed, or unconditional deed from the owner of the reversionary interest, removing the restriction, whereupon the city will own the fee and use the property as it sees fit. Lloyd v. Great Falls, 107 M 442, 86 P2d 395 (1938).

Acceptance of Trust: Where at the time of the death of a testator who bequeathed property to a town for library purposes the law did not provide a method by which the municipality could accept the donation but later, after the estate had been distributed and the decree of distribution had become final by failure of appeal therefrom and the trust created thereby became effective, the Legislature enacted a statute under which a town could accept, the trust was not subject to attack on the ground of the town's former incapacity to accept. Cascade v. Cascade County, 75 M 304, 243 P 806 (1926).

Construction of Section: This section conferring the right upon cities to accept, by gift, deed, or devise, land for a public park does not by implication clothe it with power to condemn land for a public road leading thereto. State ex rel. McLeod v. District Court, 67 M 164, 215 P 240 (1923).

Collateral References

Municipal Corporations *key* 224; Towns *key* 35(1).

63 C.J.S. Municipal Corporations §957; 87 C.J.S. Towns §92.

Part 21
County Buildings and Equipment

7-8-2101. Provision of rooms for county purposes.

Case Notes

Failure to Provide Suitable Rooms: The office of County Auditor is an important one with many duties, and its proper fulfillment requires proper housing, help, and equipment. The act of the County Commissioners in furnishing the County Auditor as an office an 8- by 22-foot partitioned space, with no windows, insufficient ventilation, and only artificial lighting, was an abuse of discretion and an arbitrary act. State ex rel. Taylor v. Bd. of County Comm'rs, 128 M 102, 270 P2d 994 (1954). (Dissenting opinion, 128 M 102, 270 P2d 994 (1954).)

Provision of Suitable Rooms for County Purposes:

The matter of leasing privately owned property under power granted the Board of County Commissioners by this section is one addressed to the sound judgment and discretion of the Board. Bennett v. Petroleum County, 87 M 436, 288 P 1018 (1930).

The provision of this section, granting power to the Board of County Commissioners to provide suitable rooms "when there are no necessary county buildings", refers to a present proprietorship of such buildings by a county and not to property temporarily held and used under lease for county purposes. Bennett v. Petroleum County, 87 M 436, 288 P 1018 (1930).

Attorney General's Opinions

Provision of Office Space and Equipment by County for Part-Time County Attorney: A county governing body may satisfy its obligation to provide office space for a part-time County Attorney by providing space in a county building or, if no suitable space is available, by renting office space. Use of the space for the County Attorney's private practice is allowed only through a written agreement between the county and the County Attorney leasing the use of the space for private business purposes. Alternatively, the governing body may allow a claim by the County Attorney for the rental of office space needed to conduct the county's business if suitable office space is not available in county buildings. A county governing body may satisfy its obligation to provide necessary equipment for a part-time County Attorney by providing the use of the equipment owned by the county or, if no suitable equipment is available, by renting equipment. Use of the equipment for the County Attorney's private practice is allowed only through a written agreement between the county and the County Attorney leasing the use of the equipment for private business purposes. 46 A.G. Op. 10 (1995), followed in 46 A.G. Op. 20 (1996).

Collateral References

Counties *key* 104.

20 C.J.S. Counties §166.

56 Am. Jur. 2d Municipal Corporations §540.

Validity of municipality's ban on construction until public facilities comply with specific standards. 92 ALR 3d 1073.

7-8-2102. Erection and maintenance of county buildings.

Compiler's Comments

1995 Amendment: Chapter 520 near middle substituted "health care facility" for "hospital"; and made minor changes in style. Amendment effective April 25, 1995.

Case Notes

Contract Beyond Term of Office: The Board of County Commissioners has authority under this statute to build a recreation center and pursuant to this authority may enter into a construction contract that extends beyond the terms of office of the individual members of the Board. Yovetich v. McClintock, 165 M 80, 526 P2d 999 (1974).

Attorney General's Opinions

No County Authority to Provide Housing to Low-Income Elderly: A county with general government powers does not have the authority under Art. XI, sec. 4, Mont. Const., or this section to construct or maintain an apartment complex for elderly low-income citizens that does not otherwise constitute a boarding or nursing home under 7-34-2301 and that does not constitute a public building under this section. Instead, a county or municipal housing authority should be created under Title 7, ch. 15, parts 21 or 44, to provide such housing. 42 A.G. Op. 20 (1987).

Collateral References

Counties *key* 105(1).

20 C.J.S. Counties §167.

56 Am. Jur. 2d Municipal Corporations §541.

Municipal property as subject to mechanic's lien. 51 ALR 3d 657.

Maintenance of auditorium, community recreational center building, or the like, by municipal corporation as governmental or proprietary function for purposes of tort liability. 47 ALR 2d 544.

7-8-2103. Authorization to create county building commission.

Compiler's Comments

1995 Amendments — Composite Section: Chapter 520 in (1), in first sentence, substituted "health care facilities" for "hospitals"; and made minor changes in style. Amendment effective April 25, 1995. The amendment by Ch. 543 rendered the amendment in (1) void.

Chapter 543 near beginning, after "create a", inserted "building" and after "commission" substituted "subject to the provisions of 7-1-201 through 7-1-203" for remainder of section that read: "for the management of such civic center, youth center, park buildings, museums, county parks, recreation centers, hospitals, or any combination of two or more thereof. Such commission shall be composed of the chairman of the board of county commissioners and five lay members to be appointed by the board. In cases where a commission has been appointed, the commission, together with the board, shall have the power to employ a manager.

(2) The terms of office for the first lay members of the commission shall be, respectively, one for 1 year, two for 2 years, and two for 3 years. On the expiration of such terms of figures 1, 2, and 3 years, their successors shall hold for 3 years each.

(3) All of the above persons shall serve without compensation"; and made minor changes in style.

Case Notes

Park Board Not Legislative Body or Agent for Legislative Body: The trial court dismissed the plaintiffs' wrongful termination case on the basis that the park board was a legislative body immune from suit. The Supreme Court reversed the decision, stating that the board performed statutory executive functions and therefore was not a legislative body. The Supreme Court also ruled that the board was not an agent of the County Commissioners with respect to the employment of the plaintiffs and was not immune from suit on that basis. Koch v. Yellowstone County, 243 M 447, 795 P2d 454, 47 St. Rep. 1312 (1990).

Collateral References
Counties *key* 105(1).
20 C.J.S. Counties §167.

7-8-2104. Insurance of county buildings.

Collateral References
Counties *key* 107.
20 C.J.S. Counties §169.
56 Am. Jur. 2d Municipal Corporations §548.
Reformation of property insurance policy to correctly identify property insured. 25 ALR 3d 1232.
Property insurance, or public liability insurance, as covering, in absence of express provision, after-acquired premises or realty, or subsequent additions to described realty. 18 ALR 3d 795.
Liability or indemnity insurance carried by government or political subdivision thereof, or by charitable institution, in respect of injury or damage as to which it is otherwise immune from liability. 68 ALR 2d 1437.
Right or duty to carry insurance on public property. 100 ALR 600.

7-8-2111. Inventory of county tools and equipment.

Compiler's Comments
1997 Amendment: Chapter 128 at beginning substituted "The board of county commissioners shall biennially prepare" for "It shall be the duty of the board of county commissioners to prepare" and before "inventory" deleted "annual".

7-8-2112. Written agreements for loan or lease of county tools and equipment.

Attorney General's Opinions
Provision of Office Space and Equipment by County for Part-Time County Attorney: A county governing body may satisfy its obligation to provide office space for a part-time County Attorney by providing space in a county building or, if no suitable space is available, by renting office space. Use of the space for the County Attorney's private practice is allowed only through a written agreement between the county and the County Attorney leasing the use of the space for private business purposes. Alternatively, the governing body may allow a claim by the County Attorney for the rental of office space needed to conduct the county's business if suitable office space is not available in county buildings. A county governing body may satisfy its obligation to provide necessary equipment for a part-time County Attorney by providing the use of the equipment owned by the county or, if no suitable equipment is available, by renting equipment. Use of the equipment for the County Attorney's private practice is allowed only through a written agreement between the county and the County Attorney leasing the use of the equipment for private business purposes. 46 A.G. Op. 10 (1995), followed in 46 A.G. Op. 20 (1996).

Part 22
Acquisition, Transfer, and Management of County Property

Part Case Notes
Sale of County Property: The contention that this part, providing the method to be pursued in selling county property, applies only to a sale of property obtained for purely public purposes but no longer needed for such purposes, and that therefore a ranch held by it in its proprietary capacity and not acquired for a public purpose does not fall within its purview, cannot be sustained. Franzke v. Fergus County, 76 M 150, 245 P 962 (1926).

7-8-2201. Authorization for county to obtain property.

Case Notes
Application of Section:
This section refers to an outright purchase of property for county purposes, but it has no application to the acquisition of a right-of-way under the general highway law. Flynn v. Beaverhead County, 54 M 309, 170 P 13 (1917).
This section, relative to the manner of purchasing real estate, applies to a bridge. State ex rel. Donlan v. Bd. of Comm'rs, 49 M 517, 143 P 984 (1914).

Attorney General's Opinions

Authority of County to Issue General Obligation Bonds for Demolition of Abandoned County Building: Under its general duty to care for and maintain its property, a county, through its Board of County Commissioners, may issue general obligation bonds to fund demolition of a county-owned building that has been abandoned and poses a threat to the public safety and welfare. 44 A.G. Op. 31 (1992).

County Buildings — Use of Rent for Costs: If no sale of the building is being attempted, a Board of County Commissioners may use money obtained from tenants of a county building to defray the operational and maintenance costs of the building. 40 A.G. Op. 33 (1984).

Collateral References

Counties *key* 103.
20 C.J.S. Counties §165.
56 Am. Jur. 2d Municipal Corporations §532.
Municipal property as subject to mechanic's lien. 51 ALR 3d 657.

7-8-2202. Appraisal required for certain purchases of real property or conservation easements.

Compiler's Comments

2003 Amendment: Chapter 430 in two places inserted reference to conservation easement; in first sentence increased property value from $2,500 to $10,000, inserted clause concerning conservation easement in excess of $40,000, and at end substituted "a disinterested certified general real estate appraiser selected by the county commission, county attorney, and landowner" for "three disinterested citizens of the county appointed by the district judge"; and made minor changes in style. Amendment effective April 21, 2003.

1983 Amendment: Substituted "$2,500 may" for "$100 must".

Collateral References

Counties *key* 103.
20 C.J.S. Counties §165.

7-8-2211. Authorization to sell and exchange county property.

Compiler's Comments

1999 Amendments — Composite Sections: Chapter 202 inserted (4) authorizing county to sell or give certain property to nonprofit organizations or groups and specifying terms of transfer contract; and made minor changes in style. Amendment effective March 29, 1999.

Chapter 239 in (2) substituted "7-5-2301 and 7-5-2303 through 7-5-2308" for "7-5-2301 through 7-5-2308"; and made minor changes in style. Amendment effective April 5, 1999.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

1983 Amendment: In (1), after "sell" inserted "trade, or exchange" and made minor changes in phraseology; and inserted (3) relating to appraisals and values upon exchange.

Case Notes

Tax Sales: Board of County Commissioners has the power and the authority to dispose of and convey real estate acquired through tax deeds. Flom v. Unknown Heirs of Conrad, 132 M 574, 319 P2d 499 (1957).

Power to Sell Property: A county is merely a subdivision of the state for governmental purposes and as such is subject to legislative regulation and control. The Legislature may, within the limitations prescribed by the Constitution, circumscribe or extend the powers to be exercised by a county, and legislative authority to regulate or control the disposition of county property not having been limited by the Constitution, it could properly declare, as it did by this section, that such property may be sold only under the restrictions and in the manner therein indicated. Franzke v. Fergus County, 76 M 150, 245 P 962 (1926).

Collateral References

Counties *key* 110.
20 C.J.S. Counties §172.
56 Am. Jur. 2d Municipal Corporations §549.

7-8-2212. Notice of sale and public auction required for certain sales.

Compiler's Comments

1999 Amendment: Chapter 202 inserted last sentence providing that property described in 7-8-2211(4) is not subject to application of section. Amendment effective March 29, 1999.

1995 Amendment: Chapter 74 after "public auction at" substituted "a site determined by the board of county commissioners" for "the courthouse door"; and made minor changes in style.

1985 Amendment: Substituted "as provided in 7-1-2121" for "in a newspaper published in said county. The notice shall be published once a week for 4 successive weeks and posted in five public places in the county".

1983 Amendment: Substituted "value in excess of $2,500" for "value in excess of $100 for real property or $2,500 for personal property".

Collateral References

Counties *key* 110.

20 C.J.S. Counties §172.

7-8-2213. Terms of sale.

Compiler's Comments

1999 Amendment: Chapter 202 in (1) at beginning inserted exception clause; in (2) and (3) at beginning inserted "Subject to 7-8-2211(4)"; and made minor changes in style. Amendment effective March 29, 1999.

Case Notes

When Payment on Installments on Purchase Price of Land Not Completed During Five-Year Period: The court held that this section, providing that deferred payments on contracts of county-owned lands may not extend over a period of more than 5 years, does not mean that at the end of the 5-year period the property rights of the vendee shall be lost if the purchase price has not all been paid, but that if there still remains a part of the purchase price unpaid and the vendee offers payment, the county may accept it without violating the provisions of this section. Yellowstone County v. Wight, 115 M 411, 145 P2d 516 (1943).

Collateral References

Counties *key* 110.

20 C.J.S. Counties §172.

7-8-2214. Appraisal required for certain sales.

Compiler's Comments

1983 Amendment: In (1), substituted "value in excess of $2,500" for "value in excess of $100 for real property and $2,500 for personal property".

Collateral References

Counties *key* 110.

20 C.J.S. Counties §172.

56 Am. Jur. 2d Municipal Corporations §552.

7-8-2215. Procedure to challenge appraised value.

Collateral References

Counties *key* 110.

20 C.J.S. Counties §172.

7-8-2216. Sale of county property to school district.

Compiler's Comments

1985 Amendment: In (2) substituted "as provided in 7-1-2121" for "in a newspaper in said county. The notice shall be published once a week for 4 successive weeks and posted in five public places in the county".

1983 Amendment: In (2), substituted "value in excess of $2,500" for "value in excess of $100 for real property and $2,500 for personal property".

Collateral References

Counties *key* 110.

20 C.J.S. Counties §172.

7-8-2217. Procedure for sale of property of lesser value.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) substituted "valued at" for "reasonably of a value of"; in (2) substituted "as provided in 7-1-2121" for "by posting in five public places in the county at least 5 days before the date of sale"; and made minor changes in style. Amendment effective October 1, 2001.

1983 Amendment: In (1), substituted "value in excess of $2,500" for "value in excess of $100 for real property and $2,500 for personal property".

Collateral References

Counties *key* 110.

20 C.J.S. Counties §172.

7-8-2218. Procedure if property not sold at public auction.

Compiler's Comments

1995 Amendment: Chapter 18 at beginning inserted "After notice and appraisal are given as provided in 7-8-2212 and 7-8-2214" and near middle, after "public auction", deleted "after notice and appraisal given as provided in 7-8-2212 and 7-8-2214"; and made minor changes in style.

1983 Amendment: Near end of section after "not less than" changed "90%" to "70%".

Collateral References

Counties *key* 110.

20 C.J.S. Counties §172.

7-8-2219. Exchange of county land in case of failure to make sale.

Collateral References

Counties *key* 110.

20 C.J.S. Counties §172.

56 Am. Jur. 2d Municipal Corporations §551.

7-8-2220. Use of proceeds of property disposition.

Compiler's Comments

1983 Amendment: Near beginning of section after "derived from" substituted "property disposed of in accordance with 7-8-2211" for "the sale"; and after "may be credited" substituted "to any account that is in the best interest of the county" for "to a construction reserve account and thereafter used for capital outlay for present or future construction of or an addition to a courthouse or county jail or county hospital".

Collateral References

Counties *key* 110.

20 C.J.S. Counties §172.

56 Am. Jur. 2d Municipal Corporations §556.

7-8-2231. Authorization to lease county property.

Case Notes

Leasing of Fairground Property Controlled by Specific Versus General Statute: The Supreme Court held that an obvious conflict existed between general statutes concerning the leasing of county property and the specific statute dealing with the leasing of fairground property. The court stated that in interpreting conflicting statutes, the specific controls over the general to the extent of any inconsistency. Gallatin Saddle & Harness Club v. White, 246 M 273, 805 P2d 1299, 47 St. Rep. 2012 (1990).

Special Purpose Leases: The Industrial Development Projects Act (Title 90, ch. 5, part 1) is designed for special purpose and is not limited by the provision in this section that a county not make a lease longer than 10 years. Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

Collateral References

Counties *key* 110; Mines and Minerals *key* 5.

20 C.J.S. Counties §170; 58 C.J.S. Mines and Minerals §129.

56 Am. Jur. 2d Municipal Corporations §556.

Applicability of zoning regulation to nongovernmental lessee of government-owned property. 84 ALR 3d 1187.

Power of municipal corporation to lease or sublet property owned or leased by it. 47 ALR 3d 19.

Constitutional prohibition of municipal corporation lending its credit or making donation as applicable to sale or leasing of its property. 161 ALR 518.

Power of board to make lease extending beyond its own term. 149 ALR 336; 70 ALR 797.

Lease of property by municipality or other political subdivision, with option to purchase same, as evasion of constitutional or statutory limitation of indebtedness. 145 ALR 1362.

Power as to mortgage or pledge of property or income therefrom. 71 ALR 828.

7-8-2232. Distribution of lease revenue.

Compiler's Comments

1997 Amendment: Chapter 78 in (1), after "paid", substituted "to the county treasurer and may be deposited in the county general fund" for "into the county treasury" and deleted second sentence that read: "Upon receipt of funds, the county treasurers shall distribute the revenue as collected to the several county and trust and agency funds on the basis of the tax levy for the current year"; and inserted (2) authorizing lease revenue to be used for any county purpose. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 78, L. 1997, provided: "WHEREAS, the Board of County Commissioners has jurisdiction and power to purchase or receive by donation any real property for the use of the county; and

WHEREAS, the Board of County Commissioners has jurisdiction and power to lease and demise county property, however acquired, that is not necessary to the conduct of the county's business or the preservation of county property; and

WHEREAS, counties must preserve, take care of, manage, and control these properties."

1993 Amendment: Chapter 15 at beginning of second sentence substituted "Upon receipt of funds" for "On January 10 and July 10 in each year", after "revenue" inserted "as collected", and at end substituted reference to current year for reference to preceding calendar year; and made minor changes in style.

Attorney General's Opinions

County Buildings — Use of Rent for Costs: If no sale of the building is being attempted, a Board of County Commissioners may use money obtained from tenants of a county building to defray the operational and maintenance costs of the building. (See 1997 amendment.) 40 A.G. Op. 33 (1984).

Collateral References

Counties *key* 110.

20 C.J.S. Counties §170.

7-8-2233. Special provisions relating to coal leases.

Collateral References

Counties *key* 110.

20 C.J.S. Counties §170.

Part 23
Sale of Tax-Deed Land

7-8-2301. Disposal of county tax-deed land.

Compiler's Comments

1999 Amendment: Chapter 248 inserted (3)(c)(iii) allowing county commissioners to donate land county acquired by tax deed to nonprofit corporation to enable construction or repair improvements for lease, rent, or other use to further purposes of corporation; and made minor changes in style. Amendment effective October 1, 1999.

Severability: Section 2, Ch. 248, L. 1999, was a severability clause.

1995 Amendment: Chapter 280 in (1)(a), at end, deleted "at the front door of the courthouse"; inserted (1)(d) regarding retention of the land for the county; in (2), at beginning of first sentence, inserted "When tax-deed land is to be sold" and near middle substituted "sales price" for "fair market value of the land" and substituted second sentence regarding establishment of sales price for former language that read: "In determining fair market value, the board shall subtract the amount of outstanding assessments that are a lien on the land from the unencumbered value of the land, but the minimum sale price for a parcel of land may not be less than $10"; inserted (3) setting out Board options upon expiration of a repurchase period; in (4), in two places, substituted "sales price" for "fair market value"; in (6), near beginning, substituted "sales price" for "fair market value" and at end substituted "the taxes, assessments, penalties, and interest

due on the land at the time of taking the tax deed plus interest on the full amount at the rate provided for in 15-16-102 from the date of the tax deed to the date of the repurchase as well as the costs of the county in taking the tax deed and additional taxes or assessments due, if any, at the time of repurchase" for "all county costs of conducting the sale, delinquent taxes, assessments, and all interest and penalties"; deleted (6) that read: "(6) A board of county commissioners may, upon expiration of the redemption period provided for in 15-18-111, donate the land to a municipality with the consent of the municipality"; deleted (7) that read: "(7) A board of county commissioners may, upon expiration of the redemption period provided for in 15-18-111, donate the land to a nonprofit corporation for the purpose of constructing:

(a) a multifamily housing development operated by the corporation; or

(b) single-family houses. Upon completion of a house, the nonprofit corporation shall sell the property to a low-income person who meets the eligibility requirements of the corporation. Once the sale is completed, the property becomes subject to taxation"; adjusted subsection references; and made minor changes in style.

1993 Amendments: Chapter 316 inserted (1)(b) authorizing a Board of County Commissioners to donate land to a municipality; inserted (6) allowing donation of the land to a municipality upon expiration of the redemption period; and made minor changes in style.

Chapter 369 inserted (1)(c) creating option for County Commissioners to donate land acquired by tax deed to a nonprofit corporation; inserted (7) allowing County Commissioners to donate tax deed land to nonprofit corporation for purpose of constructing multifamily or single-family housing and requiring property to be subject to taxation upon sale of property to qualified buyer; and made minor changes in style. Amendment effective April 16, 1993.

1991 Amendments: Chapter 185 in (3) inserted second sentence allowing sale of land by negotiated sale at not less than the fair market value fixed for the original auction. Amendment effective March 26, 1991.

Chapter 496 inserted (5) requiring that purchase price not be less than amount needed to pay costs, taxes, assessments, interest, and penalties when successful bidder is delinquent taxpayer or his successor, agent, or immediate family member. Amendment effective April 20, 1991.

1989 Amendment: Inserted (4) relating to disposal of land not bid on; and made minor changes in phraseology. Amendment effective May 22, 1989.

1987 Amendment: In (2) inserted second sentence concerning determination of fair market value; and inserted (3) relating to lack of bids on tax-deed sale.

Applicability: Section 16, Ch. 617, L. 1987, provided: "This act applies to the enforcement of all outstanding and future tax and assessment liens except those installments of outstanding special assessments that are delinquent and have been the subject of a sale for delinquent taxes or assessments before the effective date of this act." Effective April 27, 1987.

Severability: Section 15, Ch. 617, L. 1987, was a severability section.

Subsections Not Codified: Subsections (a) and (b) of section 84-4190, R.C.M. 1947, were not codified in the MCA because they were temporary. They have not been repealed and are still valid law. Citation may be made to sec. 1, Ch. 171, L. 1941, as amended by sec. 1, Ch. 144, L. 1945.

Case Notes

Reservation of Interest by County: A county may reserve such interests in tax deed land as it may have acquired by purchase or as may have been reserved by a private seller, including the right to take roadbuilding material from the land for authorized public use. Helena Gun Club v. Lewis & Clark County, 141 M 490, 379 P2d 436 (1963).

7-8-2302. Notice of disposal of tax-deed lands.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) at end deleted "and must also be posted in at least three public places in the county"; and in (2) in first sentence after "The" deleted "posted and published" and after "county clerk and" deleted "the published notice". Amendment effective October 1, 2001.

1995 Amendment: Chapter 280 in (1), near beginning after "sale", inserted "donation, or retention of tax-deed lands"; in (2), near beginning of first sentence, substituted "the published notice must" for "one notice may", after "sold" substituted "donated, or retained, the fair market value of the lands as determined and fixed by the department of revenue" for "the appraised value of the same", and at end, after "sale", inserted "donation, or retention" and in second sentence, at beginning, substituted "If the land is to be sold, the sales price" for "The fair market value" and near end, before "notice", inserted "published"; and made minor changes in style.

1985 Amendment: In (1) at beginning, deleted "Thirty days'", and substituted "as provided in 7-1-2121" for "in a newspaper printed in the county. Such notice shall be published once a week for 3 consecutive weeks".

7-8-2303. Repurchase rights of taxpayer or successors.

Compiler's Comments

1995 Amendment: Chapter 280 near beginning of first sentence, after "time", inserted "up to 24 hours" and after "sale" inserted "or the time fixed for the donation or retention of the property" and in second sentence, near middle after "taxes", inserted "assessments" and at end inserted "as well as the costs of the county in taking the tax deed and additional taxes or assessments due, if any, at the time of repurchase".

1993 Amendment: Chapter 97 in first sentence, after "7-8-2301", deleted "notice of which has been given as provided in 7-8-2302" and after "representative" substituted "repurchase the property from the county" for "whose property shall hereafter be deeded to the county may purchase such property", at beginning of second sentence inserted "The property may be repurchased", near middle substituted reference to 7-8-2305 for "hereinafter provided", and at end inserted "plus interest on the full amount at the rate provided for in 15-16-102 from the date of the tax deed to the date of repurchase", and at end of third sentence substituted reference to 7-8-2304 for "hereinafter provided"; and made minor changes in style.

Case Notes

Preferential Right of Purchase: The preferential right to purchase from the county for only the amount of the taxes, penalties, and interest is purely statutory and, if claimed, must be exercised in the manner and within the time provided by statute or the right becomes lost. Beckman Bros., Inc. v. Weir, 120 M 305, 184 P2d 347 (1947).

Purchase From County Not Redemption: The purchase of tax-acquired property from the county by the former owner is not a redemption. Beckman Bros., Inc. v. Weir, 120 M 305, 184 P2d 347 (1947).

Owner's Right to Redeem: In mandamus proceedings where defendant county acquired land of plaintiff delinquent taxpayer by tax deed and the latter offered to pay the delinquent taxes, penalty, and interest the second time the land was offered for sale, but the Commissioners refused the taxes and sold the land to another on the ground that the owner lost his preferential right for failure to exercise it on the first sale, District Court did not err in finding for plaintiff. The general policy of the law is to preserve the owner's right to redeem regardless of prior failure and without any proviso that it be deemed lost for prior failure to exercise it. State ex rel. Johnson v. Garfield County, 116 M 300, 151 P2d 481 (1944), distinguished in Beckman Bros., Inc. v. Weir, 120 M 305, 184 P2d 347 (1947).

7-8-2304. Terms for sale of tax-deed land.

Compiler's Comments

1991 Amendment: In (2)(a), in second sentence after "bear interest at", substituted a rate to be established by County Commissioners not exceeding by more than 4 percentage points the prime rate of major New York banks as published in the Wall Street Journal within 7 days prior to date of sale for a rate of 8% per annum. Amendment effective July 1, 1991.

1989 Amendment: In (2)(b), before "contract", deleted "uniform" and substituted "approved" for "prescribed"; and made minor changes in phraseology. Amendment effective May 22, 1989.

7-8-2305. Deed of conveyance — reservation of mineral royalty.

Compiler's Comments

Sections Not Codified: Sections 16-1122 and 16-1122.1, R.C.M. 1947, were not codified in the MCA. They provided:

"16-1122. Validation of mineral reservations heretofore made by counties. All mineral reservations and all royalty reservations heretofore made by counties in this state in conveyances of real property whether the same are of a less or greater percentage or are different than was authorized or required by law at the time such reservations were made, and all agreements in connection with such reservations, heretofore made, are hereby ratified, confirmed and validated.

16-1122.1. Validation of mineral reservations made before 1965. All mineral reservations and all royalty reservations heretofore made by counties in this state in conveyances of real property whether the same are of a less or greater percentage or are different than was authorized or required by law at the time such reservations were made, and all agreements in

connection with such reservations, heretofore made, are hereby ratified, confirmed and validated, provided no action is now pending to set aside any such reservation."

These sections have not been repealed and are still valid law. Citation to section 16-1122 may be made to sec. 4, Ch. 154, L. 1935, as amended by sec. 1, Ch. 179, L. 1951. Citation to section 16-1122.1 may be made to sec. 1, Ch. 179, L. 1951.

Case Notes

Tax Deed and Sale Proceedings Invalid for Lack of Jurisdiction — County's Reversionary Interest Relinquished by Settlement to Heirs of Pretax Deed Owner: Rosebud County applied for and received a tax deed pursuant to law (now repealed) and subsequently quitclaimed all but a royalty interest in the property. The Stanfords brought an action in District Court, alleging the invalidity of the tax deed and alleging that they were the owners of a royalty interest in the property. The county settled its interest in the action by relinquishing all its interests in the property. The District Court held that the tax deed was invalid but awarded the property to another party. The Supreme Court found that the tax deed was invalid under the former law because the proceedings on tax sales are in invitum. Citing King v. Rosebud County, 193 M 268, 631 P2d 711, 38 St. Rep. 1145 (1981), the court held that the failure to file an affidavit of notice of application for the tax deed, the fact that there was a recitation in the notice for application of a tax deed that the time for redemption had "long since expired" (contrary to the law), and the failure of the record to include an "affidavit of notice of tax sale" resulted in a lack of jurisdiction in the County Treasurer to issue the tax deed. The reservation of the royalty interest by the county survived the defective tax sale, and when the county relinquished all rights to its royalty interest as part of the settlement agreement, that interest reverted to the pretax sale owner. The heirs of that owner thus had a prima facie claim to the royalty interest. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

Deed Reserving Mineral Interest to County — No Mutual Mistake: A 1944 deed reserved a mineral interest to the county. The deed did not on its face indicate mutual mistake; the parties agreed in 1977 that the 1944 deed reserved a royalty, and not one of the interested parties claimed mutual mistake. Plaintiff did not overcome the presumption that the 1944 deed contained the final agreement of the parties. McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981).

Mineral Interest as Distinguished From Royalty Interest — No Unconstitutional Gift: Where a contract for deed contained a reservation of a mineral interest to the county but a later deed reserved only a royalty interest, the District Court held that this amounted to an unconstitutional gift to a private individual. The Supreme Court reversed, saying that the agreed statement of facts did not show the comparative values of royalty and mineral interests in this particular land. McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981).

Quiet Title Action Not Res Judicata Where Deed Executed After Action: A quiet title action as to mineral interests reserved by the county was not res judicata because the quiet title action occurred before the deed in question was executed, delivered, and accepted. McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981), distinguishing Smith v. Musselshell County, 155 M 376, 472 P2d 878 (1970).

Mineral Rights Reservation:

County has implied power under proviso of this section to make mineral reservation in deeds to tax-title lands sold by it. Smith v. Musselshell County, 155 M 376, 472 P2d 878 (1970).

In action to determine rights under deed, evidence that all parties to county's deed regarded reservation in deed as royalty interest and not mineral interest and language in deeds that "all minerals contained in and hereafter mined, produced, extracted, or otherwise taken" supported finding that such reservation was royalty interest. Superior Oil Co. v. Vanderhoof, 307 F. Supp. 84 (D.C. Mont. 1969).

Power to Reserve Mineral Rights: In the sale of land acquired by tax deed, the county has such powers as may be exercised by a private seller of land, and these powers include the waiver of forfeiture provisions in a contract after a forfeiture has been declared and the right to reserve the right to take roadbuilding material from the land for authorized public use. Helena Gun Club v. Lewis & Clark County, 141 M 490, 379 P2d 436 (1963).

Collateral References

Prohibiting or regulating removal or exploitation of oil and gas, minerals, soil, or other natural products within municipal limits. 10 ALR 3d 1226.

7-8-2306. Distribution of sale and lease proceeds.

Compiler's Comments

1991 Amendment: In (1)(a), near beginning after "proceeds of each sale", deleted "up to the amount of $10"; and made minor changes in style. Amendment effective July 1, 1991.

Attorney General's Opinions

Application of Sale Proceeds to Delinquent Special Improvement District Assessments: A County Treasurer may not require delinquent special improvement district assessments to be paid in addition to the sale price of tax deed land because when a tax deed is issued, special assessment liens that were due and payable at that time are extinguished. However, the County Treasurer must apply the sale proceeds of the land to delinquent assessments, as provided in this section. 45 A.G. Op. 24 (1994).

City Assessments to Be Included and Prorated as Part of Allocation Received From Tax Sale: There is no correlation between the method of distribution of tax sale proceeds outlined in this section and the effect of a tax deed in 15-18-214. When a city has not requested and received assignment of a county's right to tax sale property, the city assessments must be included and prorated as part of the allocation of money received from a sale of county tax deed land under this section. 45 A.G. Op. 2 (1993).

Part 25
Classification and Alternative Management of County Lands

Part Law Review Articles

Municipally-Owned Cable Television: Why Cable Operators Should Not Choose the Channels, Bearby, 45 Fed. Comm. L.J. 563 (1993).

7-8-2502. Application of part.

Compiler's Comments

1995 Amendment: Chapter 280 in (1), near beginning after "sale", inserted "any lands classified for retention by the county"; and made minor changes in style.

7-8-2507. Land management alternatives.

Compiler's Comments

1995 Amendment: Chapter 418 at end of (2) substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

7-8-2511. Procedure for sale of county lands.

Compiler's Comments

1985 Amendment: In (2) substituted "as provided in 7-1-2121" for "in a newspaper published in the county once a week for 3 consecutive weeks preceding the date fixed for the sale. The first publication of the notice shall be made not more than 30 days prior to the sale date. If there is no newspaper published in the county, the notice shall be given by posting copies at three of the most public places in the county at least 20 days but not more than 30 days preceding the sale date".

7-8-2513. Appraisal of land required — exception.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (1), near end, substituted "employee" for "agent"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1983 Amendment: Inserted (3) authorizing lease of mineral interests without appraisal.

Section 2, Ch. 391, L. 1983, provided that the amendment applies retroactively to July 1, 1975.

7-8-2514. Reservations of interest by county.

Case Notes

Tax Deed and Sale Proceedings Invalid for Lack of Jurisdiction — County's Reversionary Interest Relinquished by Settlement to Heirs of Pretax Deed Owner: Rosebud County applied for and received a tax deed pursuant to law (now repealed) and subsequently quitclaimed all but a royalty interest in the property. The Stanfords brought an action in District Court, alleging the invalidity of the tax deed and alleging that they were the owners of a royalty interest in the property. The county settled its interest in the action by relinquishing all its interests in the property. The District Court held that the tax deed was invalid but awarded the property to another party. The Supreme Court found that the tax deed was invalid under the former law because the proceedings on tax sales are in invitum. Citing King v. Rosebud County, 193 M 268, 631 P2d 711, 38 St. Rep. 1145 (1981), the court held that the failure to file an affidavit of notice of application for the tax deed, the fact that there was a recitation in the notice for application of a tax deed that the time for redemption had "long since expired" (contrary to the law), and the failure of the record to include an "affidavit of notice of tax sale" resulted in a lack of jurisdiction in the County Treasurer to issue the tax deed. The reservation of the royalty interest by the county survived the defective tax sale, and when the county relinquished all rights to its royalty interest as part of the settlement agreement, that interest reverted to the pretax sale owner. The heirs of that owner thus had a prima facie claim to the royalty interest. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

Deed Reserving Mineral Interest to County — No Mutual Mistake: A 1944 deed reserved a mineral interest to the county. The deed did not on its face indicate mutual mistake; the parties agreed in 1977 that the 1944 deed reserved a royalty, and not one of the interested parties claimed mutual mistake. Plaintiff did not overcome the presumption that the 1944 deed contained the final agreement of the parties. McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981).

Mineral Interest as Distinguished From Royalty Interest — No Unconstitutional Gift: Where a contract for deed contained a reservation of a mineral interest to the county but a later deed reserved only a royalty interest, the District Court held that this amounted to an unconstitutional gift to a private individual. The Supreme Court reversed, saying that the agreed statement of facts did not show the comparative values of royalty and mineral interests in this particular land. McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981).

Quiet Title Action Not Res Judicata Where Deed Executed After Action: A quiet title action as to mineral interests reserved by the county was not res judicata because the quiet title action occurred before the deed in question was executed, delivered, and accepted. McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981), distinguishing Smith v. Musselshell County, 155 M 376, 472 P2d 878 (1970).

Collateral References

Judicial review of Interior Department decisions affecting claims of mineral interests in public lands. 5 ALR Fed. 566.

Part 26
County Forests

7-8-2601. Protection of forests.

Collateral References

Woods and Forests *key* 5.

98 C.J.S. Woods and Forests §§3 through 7.

7-8-2602. Authorization to create county forests.

Law Review Articles

Chrome on the Range: Off-Road Vehicles on Public Lands, 15 Ecology L.Q. 159 (1988).

The "Public" in Public Land Appeals: A Case Study in "Reformed" Administrative Law and Proposal for Orderly Participation, Mansfield, 12 Harv. Envtl. L. Rev. 465 (1988).

Collateral References

Woods and Forests *key* 8.

98 C.J.S. Woods and Forests §14.

Constitutionality of reforestation or forest conservation legislation. 13 ALR 2d 1095.

Part 27
County Land Advisory Boards

7-8-2702. Definitions.

Collateral References
Counties *key* 106.
20 C.J.S. Counties §169.

7-8-2703. Creation of county land advisory boards.

Collateral References
Counties *key* 61.
20 C.J.S. Counties §100.

7-8-2704. Membership of land advisory board.

Collateral References
Counties *key* 62, 65, 106.
20 C.J.S. Counties §§101, 106, 169.

7-8-2705. Term of office of board members.

Collateral References
Counties *key* 62, 65, 106.
20 C.J.S. Counties §§101, 106, 169.

7-8-2706. Compensation of board members.

Collateral References
Counties *key* 62, 65, 106.
20 C.J.S. Counties §§101, 106, 169.

7-8-2707. Organization of board — conduct of business.

Collateral References
Counties *key* 88.
20 C.J.S. Counties §139.

7-8-2708. Function of land advisory board.

Collateral References
Counties *key* 62, 65, 106, 110.
20 C.J.S. Counties §§101, 106, 169, 172.

Part 41
Municipal Buildings

7-8-4101. Construction, lease, and management of municipal buildings.

Case Notes
Installment Contracts: City can finance construction of municipal buildings by installment contract under Title 7, ch. 5, part 43, as well as by bond issue or borrowing under 7-7-4101. Greener v. Great Falls, 157 M 376, 485 P2d 932 (1971).

Collateral References
Municipal Corporations *key* 221.
63 C.J.S. Municipal Corporations §951.
Municipal property as subject to mechanic's lien. 51 ALR 3d 657.

Part 42
Disposal and Lease of Municipal Property

7-8-4201. Disposal or lease of municipal property.

Compiler's Comments
1999 Amendment: Chapter 202 in (2)(a) at beginning inserted exception clause; in (2)(b) in first sentence inserted "or property described in subsection (3)"; inserted (3) authorizing city or town to sell or give certain property to nonprofit organizations or groups and specifying terms of transfer contract; and made minor changes in style. Amendment effective March 29, 1999.

1995 Amendment: Chapter 387 in (2)(b) inserted "The election must be held in conjunction with a regular or primary election."

1993 Amendment: Chapter 305 at beginning of (2)(b) inserted "Except for property acquired by tax deed"; and made minor changes in style.

Case Notes

City Land Donated for Park — Election Required Prior to Lease for Rifle Club: In a 1901 conveyance of land to the city of Whitefish, the deed stated that the land was to be used for public park purposes and that if not so used, the land was to revert to grantor. The Supreme Court held that this section requires that the city receive voter approval in a special election prior to leasing the park to a rifle club. Prezeau v. Whitefish, 198 M 416, 646 P2d 1186, 39 St. Rep. 1090 (1982). Overruling Colwell v. Great Falls, 117 M 126, 157 P2d 1013 (1945), and Hames v. Polson, 123 M 469, 215 P2d 950 (1950), to the extent that they conflict with this opinion and this section.

No Exception to Election Requirement — Contrary Purpose Unnecessary: This section requires that an election be held to approve any sale or lease of municipal property that is held in trust for a specific purpose. The statute does not limit the requirement of a special election to only those instances in which the sale or lease would be for a purpose that is contrary to the specific trust purpose. Prezeau v. Whitefish, 198 M 416, 646 P2d 1186, 39 St. Rep. 1090 (1982). Overruling Colwell v. Great Falls, 117 M 126, 157 P2d 1013 (1945), and Hames v. Polson, 123 M 469, 215 P2d 950 (1950), to the extent that they conflict with this opinion and this section.

Lease to Private Club: Lease of a golf course and part of clubhouse to private club, which contained no provisions safeguarding the rights of the inhabitants of the city and which was not submitted to the voters for approval at a special election, is void. Hames v. Polson, 123 M 469, 215 P2d 950 (1950); overruled by Prezeau v. Whitefish, 198 M 416, 646 P2d 1186, 39 St. Rep. 1090 (1982), to the extent that it conflicts with the opinion in Prezeau and 7-8-4201(2)(b).

When Leasing Not Required to Be Submitted to Vote: Even if the municipal auditorium was held in trust for specific purposes, question of leasing of the auditorium to a private individual for the purpose of exhibiting moving pictures was not required to be submitted to the taxpayers at an election, where it did not appear that the lease would interfere with the use of property for the purposes for which it was being held in trust. Colwell v. Great Falls, 117 M 126, 157 P2d 1013 (1945), distinguished in Hames v. Polson, 123 M 469, 215 P2d 950 (1950); overruled by Prezeau v. Whitefish, 198 M 416, 646 P2d 1186, 39 St. Rep. 1090 (1982), to the extent that it conflicts with the opinion in Prezeau and 7-8-4201(2)(b).

Attorney General's Opinions

Sale of City Land by City With Self-Government Powers — Vote Required: Although subsection (2)(a) of this section requires a two-thirds vote of the city commission to sell city land, a city with self-governing powers may enact a superseding ordinance allowing the sale of city land by a simple majority vote. 43 A.G. Op. 41 (1989). After analyzing subsection (2)(b) of this section, the Attorney General applied the same analysis and conclusion to allow the governing body of a local government unit with self-governing powers to enact an ordinance providing for the disposition by majority vote of the council of property held in trust for a specific purpose. 43 A.G. Op. 55 (1990).

Dedication of Lands to Use of Public Forever — Trust for Specific Purpose: Park dedication language in a subdivision plat dedicating certain lands "to the use of the public forever" creates a trust for a specific purpose. Under the terms of this section, a municipal election must be held before the city can dispose of the property. 41 A.G. Op. 42 (1986).

Collateral References

56 Am. Jur. 2d Municipal Corporations §550.

Prohibiting or regulating removal or exploitation of oil and gas, minerals, soil, or other natural products within municipal limits. 10 ALR 3d 1226.

Power of municipality to sell, lease, or mortgage public utility plant, or interest therein. 61 ALR 2d 595.

Power of municipal corporation to exchange its real property. 60 ALR 2d 220.

Sufficiency of compliance with condition of sale or lease by municipality of public utility plants. 52 ALR 1052.

CHAPTER 11
GENERAL PROVISIONS RELATED TO SERVICES

Chapter Collateral References

56 Am. Jur. 2d Municipal Corporations §217.

Part 1
Interlocal Agreements

Part Compiler's Comments

Severability Clause: Section 5, Ch. 82, L. 1967, was a severability clause.

Part Attorney General's Opinions

County Commission Generally Obligated to Fund Library Budget — County Allowed to Bind Itself to Fund Library Budget Through Interlocal Agreement: The Board of County Commissioners is generally obligated to fund the county library budget, as submitted by the library board pursuant to 22-1-309, within the limits set in 15-10-420. The 2001 statutory changes did not delete a library board's authority to determine the amount of financial support required by the library, nor did the changes confer on the Board of County Commissioners the authority to modify a library budget submitted by the library board. Further, nothing in the 2001 tax and budget amendments prevents a county from voluntarily entering an interlocal agreement to provide that the county would accept a library board's budget proposal and levy the necessary mills to fund it. 49 A.G. Op. 16 (2002). See also 41 A.G. Op. 91 (1986), and 48 A.G. Op. 3 (1999).

State Financial Responsibility for Sentenced Inmate Upon Oral Pronouncement of Sentence: A sentencing hearing represents the only common date by which the criminal justice system can definitely measure when legal and financial responsibility for an inmate shifts from a county to the state. Oral pronouncement of sentence from the bench in the presence of a defendant constitutes final judgment (see St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998)). Once sentenced, an inmate is considered to be in the legal custody of the Department of Corrections, even though a local or regional detention center may serve as a place of temporary detention until the inmate can be placed by the Department. Therefore, upon oral pronouncement of sentence that transfers legal custody of an inmate to the Department, the financial responsibility for the inmate transfers to the Department as well. 49 A.G. Op. 13 (2001).

No County Obligation to Provide Waste Disposal and Landfill Services to Towns: Under 7-11-104 and 7-13-203, a county has no legal obligation to provide solid waste disposal and landfill services to towns that have used the county landfill on a charge-per-load basis if there is no refuse disposal district or interlocal agreement between the towns and county to provide those services. 43 A.G. Op. 1 (1989).

Interlocal Agreements for County Jail Use: State law does not preclude a county and a city or town from entering into an interlocal agreement wherein the county may charge a city or town for maintaining prisoners committed to the county jail at the request of municipal authorities for violating either state laws or municipal ordinances. 42 A.G. Op. 70 (1988).

Part Law Review Articles

Questions and Answers About Intergovernmental Agreements, Flood & Velick, 85 Ill. B.J. 112 (1997).

Special Districts: The "Other" Local Governments—Definition, Creation, and Dissolution, Falconer, 18 Stetson L. Rev. 583 (1989).

7-11-103. Definition.

Attorney General's Opinions

General Government Power County — Interlocal Agreement With Municipal Housing Authority: If a city has created a municipal housing authority, the municipal housing authority and county may enter an interlocal agreement under which the county may administer the Community Development Block Grant project for the rehabilitation of privately owned housing within 10 miles of the city limits. 40 A.G. Op. 17 (1983).

Municipal Housing Authority — Public Agency: A municipal housing authority is a public agency or political subdivision that may enter into interlocal agreements. 39 A.G. Op. 37 (1981).

7-11-104. Authorization to create interlocal agreements — issuance of bonds for joint construction — hiring of teacher, specialist, or superintendent.

Compiler's Comments

2001 Amendment: Chapter 318 near end of first sentence inserted clause referring to the hiring of a teacher or specialist, a superintendent, or other professional person. Amendment effective April 21, 2001.

1999 Amendment: Chapter 86 in first sentence after "undertaking" inserted "or to participate in the provision or maintenance of any public infrastructure facility, project, or service". Amendment effective March 16, 1999.

1997 Amendment: Chapter 397 in first sentence inserted "including the issuance of bonds for the joint construction of a facility under 20-9-404"; and made minor changes in style.

Applicability: Section 4, Ch. 397, L. 1997, provided: "[This act] applies to contracts entered into after [the effective date of this act]." Effective October 1, 1997.

Attorney General's Opinions

Merger of Fire Services Between City and County With General Government Powers Not Allowed: A proposed city initiative would have merged a city fire department and a rural county fire district into a new fire protection district with an urban and a rural division. However, both the city and county were local government units with general government powers and had not been consolidated as allowed by law. Under the provisions of the initiative, neither fire department would maintain its own identity; therefore, the proposed merger would abrogate the city fire department as a separate entity and would be an invalid exercise of general government powers. This opinion does not preclude the provision of fire protection services in a cooperative fashion through an interlocal agreement that city voters may, by initiative, require the city governing body to pursue. 43 A.G. Op. 56 (1990).

No County Obligation to Provide Waste Disposal and Landfill Services to Towns: Under 7-13-203 and this section, a county has no legal obligation to provide solid waste disposal and landfill services to towns that have used the county landfill on a charge-per-load basis if there is no refuse disposal district or interlocal agreement between the towns and county to provide those services. 43 A.G. Op. 1 (1989).

County Power to Grant Franchises — Interlocal Agreements Not Precluded: Article XI, sec. 4, Mont. Const.; 7-3-144; 7-4-2611; and 7-5-2129, as well as applicable case law, imply that a county vested with general government powers may exercise the power to grant franchises. Under this section, a city-county interlocal franchise agreement is possible. 42 A.G. Op. 87 (1988).

Act Allowing Private Parties to Contract for Jails Not in Conflict With Local Government Regulatory Statutes: The act allowing counties to contract with private parties for the building, maintenance, and operation of jails, enacted as Chapter 447, L. 1985, does not directly conflict with other Montana statutes regulating the indebtedness, contracts, jail facilities, or interlocal agreements of local governments. However, Chapter 447 is subject to the various applicable limitations contained in those statutes. 42 A.G. Op. 81 (1988).

General Government Power County — Interlocal Agreement With Municipal Housing Authority: If a city has created a municipal housing authority, the municipal housing authority and county may enter an interlocal agreement under which the county may administer the Community Development Block Grant project for the rehabilitation of privately owned housing within 10 miles of the city limits. 40 A.G. Op. 17 (1983).

General Government Power County — Not to Enter Agreement With City to Rehabilitate Rural Dwellings: A county with general government powers and a city generally may not enter into an interlocal agreement under which the county could administer the Community Development Block Grant project for the rehabilitation of privately owned housing because neither is statutorily authorized to rehabilitate dwellings outside the city limits. 40 A.G. Op. 17 (1983).

Municipal Housing Authority — Public Agency: A municipal housing authority is a public agency or political subdivision that may enter into interlocal agreements. 39 A.G. Op. 37 (1981).

Joint Self-Insurance Programs: Montana counties may procure insurance separately or jointly and may use a deductible or self-insurance plan. Therefore, it is permissible for counties to enter into a joint self-insurance program. 38 A.G. Op. 75 (1980).

Nonexclusive Means of Establishing Insurance Program: An interlocal agreement pursuant to 7-11-104 is not the exclusive means by which counties might establish a joint self-insurance program, provided that the method selected is not specifically prohibited by law. 38 A.G. Op. 75 (1980).

7-11-105. Detailed contents of interlocal agreements.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 99 inserted (8) requiring specification of the responsible contracting party; and made minor changes in style. Amendment effective March 21, 2001.

Chapter 318 in (5) after "the agreement and" inserted "if applicable"; in (7) at beginning inserted "if applicable"; inserted (9) relating to sharing employment of a teacher or specialist, a superintendent, or other professional person; and made minor changes in style. Amendment effective April 21, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

7-11-107. Filing of interlocal agreement.

Compiler's Comments

1991 Amendment: At beginning deleted requirements that interlocal agreements be approved by Attorney General and be filed prior to commencement of performance; and made minor changes in style.

7-11-108. Authorization to appropriate funds for purpose of interlocal agreement.

Attorney General's Opinions

Expenses of Valid Interlocal Agreement Includable in Annual Mill Levy: A county may include the expenses of participation in a valid interlocal agreement in its annual county mill levy. 38 A.G. Op. 51 (1979).

Part 2
Interlocal Cooperation Commission

Part Compiler's Comments

Severability Clause: Section 17, Ch. 129, L. 1969, was a severability clause.

7-11-228. Public hearings on proposed program — notice.

Compiler's Comments

1985 Amendment: Substituted "as provided in 7-1-2121" for "once each week for at least 2 weeks preceding a hearing, in at least one newspaper of general circulation in the county. The notice shall state the time and place of the hearing".

7-11-230. Procedure for making recommendations.

Compiler's Comments

1981 Amendment: Inserted (2) relating to referenda on service delivery changes.

Severability: Section 12, Ch. 314, L. 1981, was a severability section.

Part 3
Consolidation and Transfer of Services

Part Compiler's Comments

Severability: Section 12, Ch. 314, L. 1981, was a severability section.

Part Attorney General's Opinions

Law Enforcement Commission Not Required for Consolidated City-County Agency: A consolidated city-county law enforcement agency governed by Title 7, ch. 11, part 3, does not require a law enforcement commission established under 7-32-4151. 42 A.G. Op. 58 (1988).

7-11-305. Availability of petition or recommendation and service plan.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), at end, inserted "If the election is held, it must be held in conjunction with a regular or primary election"; and made minor changes in style.

7-11-307. Election on service consolidation or transfer.

Compiler's Comments

1995 Amendment: Chapter 387 in first sentence of (1), after "held", substituted "in conjunction with a regular or primary election" for "no less than 75 or more than 120 days of the date of the filing of the petition under 7-11-303 or no less than 75 or more than 120 days of the receipt by the local government of the interlocal cooperation commission recommendation" and

deleted former second sentence that read: "The special election may be held in conjunction with any other election"; and made minor changes in style.

1985 Amendment: In (1) in two places, substituted "no less than 75 or more than 120 days" for "within 120 days".

Part 11
Multijurisdictional Service Districts

Part Attorney General's Opinions

Formation of Multijurisdictional Library Service Districts — Statutory Requirements — Equalization of Tax Burden Among Users: A city and a county may form a multijurisdictional library service district if they meet the statutory requirements of Title 15, ch. 10, part 4, and this part and if any existing contract for providing library services involving residents of one or more of the participating jurisdictions has expired. A multijurisdictional service district may not be formed for the sole purpose of equalizing the tax burden among those currently using the service; however, one increased service of the district may be to equalize the tax burden among users as long as the district provides services in the manner required by 7-11-1101. 46 A.G. Op. 23 (1996), distinguishing 44 A.G. Op. 11 (1991).

7-11-1101. Authority to form multijurisdictional service district.

Attorney General's Opinions

Formation of Multijurisdictional Library Service Districts — Statutory Requirements — Equalization of Tax Burden Among Users: A city and a county may form a multijurisdictional library service district if they meet the statutory requirements of Title 7, ch. 11, part 11, and Title 15, ch. 10, part 4, and if any existing contract for providing library services involving residents of one or more of the participating jurisdictions has expired. A multijurisdictional service district may not be formed for the sole purpose of equalizing the tax burden among those currently using the service; however, one increased service of the district may be to equalize the tax burden among users as long as the district provides services in the manner required by this section. 46 A.G. Op. 23 (1996), distinguishing 44 A.G. Op. 11 (1991).

Creation of Multijurisdictional Service District Within Existing Library District to Increase Allowable Mill Levy Improper: A multijurisdictional service district within an existing service district may not be created for the purpose of increasing the total mill levy within the existing district when the proposed service district would not increase the existing service area, serve people not currently receiving the service, or equalize the tax burden among those who would use the service. 44 A.G. Op. 11 (1991).

7-11-1102. Services that may be provided.

Compiler's Comments

1999 Amendment: Chapter 86 inserted (2)(j) allowing for the maintenance or provision of public infrastructure facilities, projects, or services; and made minor changes in style. Amendment effective March 16, 1999.

1997 Amendments: Chapter 114 inserted (2)(i) concerning health services and health department functions; and made minor changes in style.

Chapter 459 inserted (2)(h) concerning protection of health and the environment; and made minor changes in style. Amendment effective April 30, 1997.

1993 Amendment: Chapter 116 inserted (2)(g) allowing provision of dispatch services. Amendment effective March 18, 1993.

1991 Amendment: Inserted (2)(f) allowing provision of ambulance service.

7-11-1105. Creation of district.

Attorney General's Opinions

Tax Freeze Limitations Applicable to Pre-1986 Library Services: A county that offered library services prior to 1986 may not form a new taxing unit to avoid the limitations on property taxes imposed under Initiative Measure No. 105 by establishing a public library pursuant to 22-1-303 or by forming a multijurisdictional service district to provide library services pursuant to this section. 46 A.G. Op. 19 (1996).

7-11-1106. Ordinance and petition requirements.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of (7) inserted reference to 15-10-420. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.
Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-11-1112. Financing.

Compiler's Comments
1999 Amendment: Chapter 584 in two places in (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.
Severability: Section 172, Ch. 584, L. 1999, was a severability clause.
Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

CHAPTER 12
IMPROVEMENT DISTRICTS

Part 11
Business Improvement Districts

7-12-1103. Definitions.

Compiler's Comments
1987 Amendment: In (2) changed "7-12-1112" to "7-12-1121".

7-12-1111. Establishment or expansion of district.

Compiler's Comments
1991 Amendment: In (1), in two places after "district", inserted language referring to expansion of a district.

7-12-1112. Resolution of intention to create or expand district — notice.

Compiler's Comments
2001 Amendment: Chapter 354 in (2) in first sentence substituted "as provided in 7-1-2121" for "for 5 days in a daily newspaper or in one issue of a weekly paper published in the municipality or county or, in case no newspaper is published in the municipality or county, then by posting for 5 days in three public places in the municipality or county"; and made minor changes in style. Amendment effective October 1, 2001.
1991 Amendment: Near beginning of (1), after "creating", inserted "or expanding"; in second sentence of (2), after "proposed district", inserted "or within the proposed area of expansion"; near beginning of first sentence of (3), after "district", inserted "or the general reason for the expansion" and at end inserted "or the expansion of the existing district"; inserted (4) providing that an existing district does not have to be reestablished; and made minor change in style.

7-12-1114. Hearing on protest — sufficient protest to bar proceedings.

Compiler's Comments
1991 Amendment: In (3), in six places, inserted reference to the area of a proposed expansion.

7-12-1115. Resolution creating or expanding district.

Compiler's Comments
1991 Amendment: In three places inserted reference to expansion of a district.

7-12-1133. Assessment of costs — area, lot, taxable valuation, and square footage options.

Compiler's Comments
1991 Amendment: Inserted (3) regarding assessment of land when a district is expanded.
1989 Amendment: Inserted (2)(d) relating to area above first floor; and in (2)(e) included reference to subsection (2)(d).

7-12-1151. Water user entities exempt from special assessments.

Compiler's Comments
Applicability: Section 5, Ch. 276, L. 1987, provided in part: ". . . This act applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1986. . . . This act does not apply to any special assessments for the repayment of bonded

indebtedness incurred before the effective date of this act if the bonds were issued on representations that the property exempted from special assessments by this act would be liable for repayment of the bonded indebtedness."

Part 21
Rural Improvement Districts

Part Case Notes

Statutory Framework for Creation of Rural Improvement District Properly Followed: The Supreme Court approved the procedure followed by the Lewis and Clark Board of County Commissioners after examining whether each step in the nine-part process for creation of a rural improvement district was addressed. Buckley v. Wordal, 262 M 306, 865 P2d 240, 50 St. Rep. 1570 (1993).

Part Attorney General's Opinions

Formation of New Improvement District Required for Substantial Expansion of Existing One: A sewer district constituting a rural special improvement district could be significantly expanded and the district's service area doubled in size only by the creation of a new special improvement district. The provisions of 7-12-2161(4) contemplate only maintenance of an existing system for which notice has previously been given and upon which a hearing has been previously held. A substantial addition to an existing district with notice or comment by the affected property owners would conflict with the notice procedures applicable to property owners not yet taxed for the improvement of their property. 40 A.G. Op. 44 (1984).

Rural Improvement Districts — County Attorney Not Legal Advisor: Except for legal work required by the Board of County Commissioners in connection with the creation of a rural improvement district, it is not the duty of a County Attorney to represent rural improvement districts formed under Title 7, ch. 12, part 21. 40 A.G. Op. 27 (1983).

Part Collateral References

Damages resulting from temporary conditions incident to public improvements or repairs as compensable taking. 23 ALR 4th 674.

7-12-2101. Definitions.

Compiler's Comments

1985 Amendment: In (6), after "engineer" deleted "designated in the petition", substituted "who" for "whose name", after "is designated" deleted "and approved", and before "for the improvement" deleted "in the original petition asking"; in (7)(a) after "engineer" deleted "selected as hereinbefore provided"; in (7)(b) after "part" deleted "the expenses of making the assessment for any work authorized by this part"; inserted (7)(c) through (7)(e) concerning interest on warrants, costs of bond issuance, and an administrative fee, respectively; and made minor changes in phraseology.

Attorney General's Opinions

Creation of Special Improvement District to Improve County Road: A Board of County Commissioners has authority to order the creation of a rural special improvement district to improve a county road established by the county road petition process. 41 A.G. Op. 61 (1986).

7-12-2102. Authorization to create rural improvement districts.

Compiler's Comments

1985 Amendment: In (1), after "require" deleted "and upon the petition of 60% of the freeholders affected thereby", before "outside" deleted "in thickly populated localities", and after "purchase" substituted "one or more of the improvements of the kind described in 7-12-4102, in or for the benefit of the special improvement district" for "devices intended to protect the safety of the public from open ditches carrying irrigation or other water and maintaining sanitary and storm sewers, light systems, waterworks plants, water systems, sidewalks, and such other special improvements as may be petitioned for"; in (2), in first sentence, after "may", deleted "upon compliance with subsection (1)" and in second sentence substituted "may not be included in the rural special improvement district if 40% of those property owners protest the creation" for "may be included in the rural special improvement district only if 60% of those property owners approve".

1981 Amendment: Inserted (2) relating to districts abutting or within a city.

Case Notes

Maintenance Distinguished From Reconstruction — Rural Improvement District: Yellowstone County replaced a 4-inch water main serving a rural special improvement district with a 12-inch main and assessed costs as "maintenance" costs against the property owners in the district. The court determined that the replacement costs were "reconstruction" costs as set forth in 7-12-4102, rather than "maintenance" costs under 7-12-2120 or 7-12-2162, and must be funded by creating a special improvement district under this section after notice and opportunity to object as provided in 7-12-2105 and 7-12-2109, respectively. Miller v. Yellowstone County, 234 M 193, 761 P2d 829, 45 St. Rep. 1836 (1988).

Action Challenging Sufficiency of Petition Moot: Under the former version of this section before its amendment in 1985, a petition of 60% of the freeholders affected was required for the establishment of a rural special improvement district (RSID). Appellants filed an application for a Writ of Prohibition under the former law to prohibit the County Commissioners from building a swimming pool pursuant to creation of an RSID, alleging that the petition to create the RSID was not in compliance with the law. The District Court denied their application. The Supreme Court affirmed the denial, ruling the question moot because of the 1985 amendment. Porch v. Powder River Bd. of County Comm'rs, 219 M 179, 710 P2d 1364, 42 St. Rep. 1936 (1985).

Attorney General's Opinions

Establishment of Rural Improvement District for Weed Control — Preemption: A Board of County Commissioners may not use this section or 7-12-4102 to authorize a rural improvement district to provide weed control because those statutes are subordinate to and preempted by the specific statutory scheme of weed control in Title 7, ch. 22, part 21. 42 A.G. Op. 90 (1988).

Creation of Special Improvement District to Improve County Road: A Board of County Commissioners has authority to order the creation of a rural special improvement district to improve a county road established by the county road petition process. 41 A.G. Op. 61 (1986).

Swimming Pool: The creation of a rural improvement district for the purpose of constructing and maintaining a public swimming pool is proper if the facility will specially benefit the property subject to the assessments associated with the district. 41 A.G. Op. 15 (1985).

Collateral References

Counties *key* 22.

20 C.J.S. Counties §50.

Validity, construction, and effect of statutes providing for urban redevelopment by private enterprise. 44 ALR 2d 1414.

7-12-2103. Resolution of intention to create rural improvement district.

Compiler's Comments

1985 Amendment: Inserted (2)(e) requiring specification of assessment method.

Subsection (3), allowing multiple improvements, was enacted as a separate section by sec. 6, Ch. 665, L. 1985, but is codified in this section for logic and convenience.

Case Notes

County Allowed Choice Whether to Issue Bonds Secured by Revolving Fund — County Not Relieved of Obligation to Make Loans to Deficient Rural Special Improvement Districts: The plain meaning of statutes regarding revolving funds, as well as the legislative history, supports the legislative intent to allow counties to choose whether to finance a rural special improvement district by issuing bonds secured by the revolving fund. Nothing in the statutes voids the commitment to loan from the revolving fund if the district becomes deficient. In this case, County Commissioners agreed to a revolving fund obligation and issued bonds secured by the revolving fund. The District Court reasoned that this was a violation of the constitutional prohibition against indebtedness beyond a certain percent, holding that the county was thus relieved of its obligation to make such loans. However, special improvement bond obligations are limited to the district funds and, if necessary, receive loans from the revolving fund. If both funds are insufficient to meet bond payments, there is no other source to pay the bonds. Under 7-12-2182, revolving fund levies are limited to an amount that would increase the balance in the fund to no more than 5% of the principal amount of the outstanding bonds. The District Court erred in its decision that the county was not obligated to make loans to the special improvement districts. Having exercised the discretion to institute a revolving fund and freely enter into an agreement with the bondholders and the underwriters, under both the terms of the agreement and applicable statutes, a county is obliged to carry out that contractual obligation. Loans from the revolving fund and subsequent tax levies are within the constitutional mandates of Art. VIII, sec. 1, Mont. Const., which requires that state funds be used for public purposes. Further, a

county's obligation to make such loans and levy taxes to fund the revolving fund is mandatory, rather than discretionary, and is not an unconstitutional pledge of credit. Carbon County v. Dain Bosworth, Inc., 265 M 75, 874 P2d 718, 51 St. Rep. 436 (1994), distinguishing Stanley v. Jeffries, 86 M 114, 284 P 134 (1929), and Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

Inclusion of Same Amount of Each Lot in Assessment and District: In fixing the boundaries of a rural improvement district, a Board of County Commissioners may include less than the entire amount of a lot so as to equalize costs borne by each lot. Here a district relating to roads and entrance lights was created and for each lot only the 2,000 square feet closest to the road was included in the district, although the lots varied greatly in size. The duty under 7-12-2103 to describe the boundaries of the district is not affected by lot size, and the boundaries may be fixed so that the same amount of each lot is included in the district. Warner v. Gallatin County Comm'rs, 220 M 430, 715 P2d 1068, 43 St. Rep. 502 (1986).

Collateral References

Counties *key* 49.
20 C.J.S. Counties §87.
70A Am. Jur. 2d Special or Local Assessments §123.

7-12-2105. Notice of resolution of intention to create district — hearing.

Compiler's Comments

1995 Amendment: Chapter 229 in (2) deleted former first sentence that read: "The board shall also cause a copy of such notice to be posted in three public places within the boundaries of such special improvement district"; inserted (3)(b) concerning pledge of revolving fund and general fund loans or tax levy for revolving fund; and made minor changes in style. Amendment effective March 24, 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

1985 Amendments: Chapter 349 in (1) substituted "publish notice" for "give notice" and inserted "as provided in 7-1-2121"; and in (2) deleted first sentence that read: "The notice must be published for 10 consecutive days in a daily newspaper or in two issues of a weekly newspaper published nearest to the place where such improvement district is to be created", inserted "as provided in 7-1-2122", and at end deleted "at his last known place of residence, upon the same day such notice is first published or posted".

Chapter 665 in first sentence of (3) inserted "describe generally the method or methods by which the costs of the improvements will be assessed".

Case Notes

Maintenance Distinguished From Reconstruction — Rural Improvement District: Yellowstone County replaced a 4-inch water main serving a rural special improvement district with a 12-inch main and assessed costs as "maintenance" costs against the property owners in the district. The court determined that the replacement costs were "reconstruction" costs as set forth in 7-12-4102, rather than "maintenance" costs under 7-12-2120 or 7-12-2162, and must be funded by creating a special improvement district under 7-12-2102 after notice and opportunity to object as provided in this section and 7-12-2109, respectively. Miller v. Yellowstone County, 234 M 193, 761 P2d 829, 45 St. Rep. 1836 (1988).

Failure to Give Notice: Failure to give the notice required by Ch. 156, L. 1917, as amended by Ch. 67, L. 1919, in the attempted creation of a rural improvement district deprived the county of jurisdiction to proceed, and a property owner, in his action to enjoin the collection of the tax against his property to pay for the improvement, was not estopped to deny the validity of the assessment by his omission to object to the creation of the district prior to its completion. Billings Bench Water Ass'n v. Yellowstone County, 70 M 401, 225 P 996 (1924), distinguished in Wood v. Kalispell, 131 M 390, 310 P2d 1058 (1957).

Collateral References

Counties *key* 49.
20 C.J.S. Counties §87.
70A Am. Jur. 2d Special or Local Assessments §145.

7-12-2108. Extension of proposed district.

Compiler's Comments

1985 Amendment: Substituted "the engineer" for "an engineer approved by the board and designated in the petition", substituted "chargeable upon the lots and lands fronting upon such proposed improvement and upon other lots" for "chargeable upon the extended district, which may include other lots", and substituted "property benefited" for "district benefited".

Collateral References

Counties *key* 192.
20 C.J.S. Counties §§281, 283.
70A Am. Jur. 2d Special or Local Assessments §145.

7-12-2109. Right to protest creation or extension of district.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 198 in (1) at beginning of first sentence extended protest time from 15 days to 30 days; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 277 inserted (2) defining owner for purposes of this section; and made minor changes in style. Amendment effective July 1, 2003.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

1985 Amendment: In last two sentences substituted "be in writing, identify the property in the district owned by the protestor, and be signed by all owners of the property. The protest must be delivered" for "be in writing and be delivered".

Case Notes

Maintenance Distinguished From Reconstruction — Rural Improvement District: Yellowstone County replaced a 4-inch water main serving a rural special improvement district with a 12-inch main and assessed costs as "maintenance" costs against the property owners in the district. The court determined that the replacement costs were "reconstruction" costs as set forth in 7-12-4102, rather than "maintenance" costs under 7-12-2120 or 7-12-2162, and must be funded by creating a special improvement district under 7-12-2102 after notice and opportunity to object as provided in 7-12-2105 and this section, respectively. Miller v. Yellowstone County, 234 M 193, 761 P2d 829, 45 St. Rep. 1836 (1988).

Collateral References

Counties *key* 196(1), (2).
20 C.J.S. Counties §286.
70A Am. Jur. 2d Special or Local Assessments §§145 through 168.

7-12-2111. Hearing on protest.

Case Notes

Rescission of Protests After Filing Deadline but Before Final Action: On the question of whether a Board of County Commissioners can accept a rescission of a written protest after the filing deadline has passed, the Supreme Court adopted the rationale of Ford v. Mitchell, 103 M 99, 61 P2d 815 (1936), that any person signing an initiative petition has an absolute right to withdraw the signature at any time before the person or body created by law to determine the matter submitted by the petition has finally acted. Buckley v. Wordal, 262 M 306, 865 P2d 240, 50 St. Rep. 1570 (1993).

Collateral References

Counties *key* 96.
20 C.J.S. Counties §286.
70A Am. Jur. 2d Special or Local Assessments §§155 through 160.

7-12-2112. Sufficient protest to bar proceedings — exception.

Compiler's Comments

1985 Amendment: In (1), after "county clerk when", substituted "the board of county commissioners finds that such protest is made by the owners of property in the district to be assessed for more than 50% of the cost of the proposed work, in accordance with the method or methods of assessment described in the resolution of intention" for "(a) the protest is against the proposed work and the cost thereof is to be assessed upon the property fronting thereon and

the board of county commissioners finds that such protest is made by the owners of more than 50% of the area fronting on the proposed work; or

(b) the protest is against the proposed work and the cost thereof is to be assessed upon the property within the extended district and the board finds that such protest is made by the owners of more than one-half of the area of the property to be assessed for such improvements".

Collateral References

Counties *key* 96.
20 C.J.S. Counties §286.
70A Am. Jur. 2d Special or Local Assessments §146.

7-12-2113. Resolution creating district — power to order improvements.

Collateral References

Counties *key* 54.
20 C.J.S. Counties §94.
70A Am. Jur. 2d Special or Local Assessments §138.

7-12-2119. Manner of making demands for incidental expenses.

Compiler's Comments

1985 Amendment: Inserted "except for the administrative fee of the county and interest payable on warrants or bonds of the district".

7-12-2120. Maintenance of improvements.

Compiler's Comments

2003 Amendment: Chapter 277 in (1) at end after "otherwise" deleted "in such way or manner as the board shall deem suitable and proper"; in (2) near middle after "district" substituted "may, in the discretion of the board" for "shall"; and made minor changes in style. Amendment effective July 1, 2003.

Case Notes

Hooking Up to Sewer System Characterized as Improvement Rather Than Maintenance or Repair: Seypar, Inc., argued that the sewer district should have assessed the cost of hookup fees on a districtwide basis rather than against the individual parcels of Seypar, Inc., as they were added to the system. The Supreme Court held that hookup fees were not maintenance, repair, or preservation costs that are required to be assessed districtwide but were improvements that the district had the discretion to assess against the individual parcels if the district so chose. Seypar, Inc. v. Water & Sewer District No. 363, 1998 MT 149, 289 M 263, 960 P2d 311, 55 St. Rep. 578 (1998).

Maintenance Distinguished From Reconstruction — Rural Improvement District: Yellowstone County replaced a 4-inch water main serving a rural special improvement district with a 12-inch main and assessed costs as "maintenance" costs against the property owners in the district. The court determined that the replacement costs were "reconstruction" costs as set forth in 7-12-4102, rather than "maintenance" costs under this section or 7-12-2162, and must be funded by creating a special improvement district under 7-12-2102 after notice and opportunity to object as provided in 7-12-2105 and 7-12-2109, respectively. Miller v. Yellowstone County, 234 M 193, 761 P2d 829, 45 St. Rep. 1836 (1988).

7-12-2123. Powers of multicounty district board of trustees.

Case Notes

Sewer District Not Local Self-Governing Unit: The lower court granted a multicounty sewer district's motion for summary judgment, ruling that the district had the right to impose hookup inspection fees on the appellant, Seypar, Inc. Seypar, Inc., argued that the district did not have the authority to impose the fee against individual property owners and that the cost should have been assessed against the whole district. The Supreme Court ruled that although state law gave the district the same administrative powers as County Commissioners have over a single county sewer district, those powers are not the same as a local self-governing unit and therefore the district did not have the authority to exercise any power not prohibited by Montana law. The Supreme Court stated that since the district was not self-governing, it could not argue that the statutes relating to municipal districts applied to it by analogy. The Supreme Court held that the district did have the power to impose hookup fees under this section. Seypar, Inc. v. Water & Sewer District No. 363, 1998 MT 149, 289 M 263, 960 P2d 311, 55 St. Rep. 578 (1998).

7-12-2131. Bids for district work — exception.

Compiler's Comments

1993 Amendment: Chapter 250 at beginning of (1) inserted exception clause; inserted (3) requiring certain conversion work to be done by the responsible public utility; and made minor changes in style. Amendment effective July 1, 1993.

Collateral References

Counties *key* 115 through 118, 120.
20 C.J.S. Counties §§183 through 186, 189.
64 Am. Jur. 2d Public Works and Contracts §§30 through 81.
Waiver of competitive bidding requirements for state and local public building and construction contracts. 40 ALR 4th 968.

7-12-2132. Advertising for bids.

Compiler's Comments

2001 Amendment: Chapter 354 substituted "as provided in 7-1-2121" for "at least twice in a daily, semiweekly, or weekly newspaper published and circulated nearest to the boundaries of the proposed improvement district. The paper shall be designated by the board of county commissioners for that purpose. A copy of said notice shall be posted in at least three public places within the boundaries of the proposed district"; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

Counties *key* 115 through 118, 120.
20 C.J.S. Counties §§183 through 186, 189.

7-12-2133. Competitive bidding not required for purchase of existing improvement.

Collateral References

Counties *key* 115 through 118, 120.
20 C.J.S. Counties §§183 through 186, 189.

7-12-2134. Opening of bids.

Collateral References

Counties *key* 115 through 118, 120.
20 C.J.S. Counties §§183 through 186, 189.

7-12-2135. Decision on award of contract.

Collateral References

Counties *key* 115 through 118, 120.
20 C.J.S. Counties §§183 through 186, 189.
64 Am. Jur. 2d Public Works and Contracts §§63 through 66.

7-12-2136. Procedure if all bids rejected or no bids received.

Collateral References

Counties *key* 115 through 118, 120.
20 C.J.S. Counties §§183 through 186, 189.
64 Am. Jur. 2d Public Works and Contracts §§75 through 78.
Validity of state statute prohibiting award of government contract to person or business entity previously convicted of bribery or attempting to bribe state public employee. 7 ALR 4th 1202.

7-12-2137. Procedure for dealing with bid securities.

Collateral References

64 Am. Jur. 2d Public Works and Contracts §60.

7-12-2138. Contractor's bond for successful completion of work.

Collateral References

Counties *key* 123.
20 C.J.S. Counties §201.
64 Am. Jur. 2d Public Works and Contracts §§99 through 104.
What constitutes "public work" within statute relating to contractor's bond. 48 ALR 4th 1170.

7-12-2139. Procedure if person entering contract defaults on work.

Collateral References

Counties *key* 130.
20 C.J.S. Counties §203.
64 Am. Jur. 2d Public Works and Contracts §§105 through 136.

7-12-2140. Procedure for objection to proceedings.

Collateral References

Counties *key* 209, 210, 212.
20 C.J.S. Counties §322.
Allowance of attorneys' fees in mandamus proceedings. 34 ALR 4th 457.

7-12-2141. Protest procedures for property created as condominium.

Compiler's Comments

Effective Date: Section 24, Ch. 277, L. 2003, provided: "[This act] is effective July 1, 2003."

7-12-2151. Assessment of costs.

Compiler's Comments

1993 Amendment: Chapter 269 inserted (1)(d) allowing each piece of land to be assessed an equal amount of the cost of the improvement; and made minor changes in style.

1985 Amendment: Substituted language of (1) lead-in, (1)(a), and (1)(b) (see 1985 Session Law for text) for "To defray the cost of making any of the improvements provided for in this part, the board of county commissioners shall adopt the following method of assessment:

(1) The board shall assess the entire cost of such improvements against the entire district. Each lot or parcel of land assessed in such district shall be assessed with that part of the whole cost which its area bears to the area of the entire district, exclusive of streets, avenues, alleys, and public places.

(2) Where said rural improvement district is located more than 5 miles from the boundary of an incorporated city or town, said assessment may, at the option of the board, be based upon the assessed value of the lots or pieces of land within said district"; inserted (1)(c), (1)(d), and (2) (see 1985 Session Law for text); and near end of (3), inserted "benefited" before "property".

Case Notes

Hooking Up to Sewer System Characterized as Improvement Rather Than Maintenance or Repair: Seypar, Inc., argued that the sewer district should have assessed the cost of hookup fees on a districtwide basis rather than against the individual parcels of Seypar, Inc., as they were added to the system. The Supreme Court held that hookup fees were not maintenance, repair, or preservation costs that are required to be assessed districtwide but were improvements that the district had the discretion to assess against the individual parcels if the district so chose. Seypar, Inc. v. Water & Sewer District No. 363, 1998 MT 149, 289 M 263, 960 P2d 311, 55 St. Rep. 578 (1998).

No Presumption That Hookup Fees Reasonable: Seypar, Inc., argued that the sewer district's $500 hookup fee assessed against each of Seypar, Inc.'s, 70 lots was unreasonable. The Supreme Court held that the District Court was wrong in finding that the district was a local self-governing unit and that therefore there was no presumption that the district's fees were reasonable. However, the Supreme Court found that the district had introduced evidence that the fees were reasonable and Seypar, Inc., had presented no contrary evidence. Therefore, Seypar, Inc., it had not met its burden of proof to show that the fees were unreasonable. Seypar, Inc. v. Water & Sewer District No. 363, 1998 MT 149, 289 M 263, 960 P2d 311, 55 St. Rep. 578 (1998).

Sewer District Not Local Self-Governing Unit: The lower court granted a multicounty sewer district's motion for summary judgment, ruling that the district had the right to impose hookup inspection fees on the appellant, Seypar, Inc. Seypar, Inc., argued that the district did not have the authority to impose the fee against individual property owners and that the cost should have been assessed against the whole district. The Supreme Court ruled that although state law gave the district the same administrative powers as County Commissioners have over a single county sewer district, those powers are not the same as a local self-governing unit and therefore the district did not have the authority to exercise any power not prohibited by Montana law. The Supreme Court stated that since the district was not self-governing, it could not argue that the statutes relating to municipal districts applied to it by analogy. The Supreme Court held that the

district did have the power to impose hookup fees under this section. Seypar, Inc. v. Water & Sewer District No. 363, 1998 MT 149, 289 M 263, 960 P2d 311, 55 St. Rep. 578 (1998).

Inclusion of Same Amount of Each Lot in Assessment and District: In fixing the boundaries of a rural improvement district, a Board of County Commissioners may include less than the entire amount of a lot so as to equalize costs borne by each lot. Here a district relating to roads and entrance lights was created and for each lot only the 2,000 square feet closest to the road was included in the district, although the lots varied greatly in size. The duty under 7-12-2103 to describe the boundaries of the district is not affected by lot size, and the boundaries may be fixed so that the same amount of each lot is included in the district. Warner v. Gallatin County Comm'rs, 220 M 430, 715 P2d 1068, 43 St. Rep. 502 (1986).

Attorney General's Opinions

Assessed Valuation Option — Oil and Gas Net Proceeds: Oil and gas net proceeds and royalty interests should not be included within the assessed value of land benefited from a rural special improvement district for purposes of assessment of costs under this section. 42 A.G. Op. 5 (1987).

Assessment Area Smaller Than District — Partial Inclusion in District of Larger Lots: In a rural subdivision containing lots from 2 to 20 acres in size, a decision to include the entirety of each lot in a rural special improvement district but to assess only an equal portion of each lot was at odds with the assessment method mandated by this section, prior to 1985 amendment. To deal with the problem of equalizing burdens and benefits only part of the larger lots should be included within the district. 39 A.G. Op. 48 (1982).

Collateral References

Counties *key* 193.

20 C.J.S. Counties §284.

70A Am. Jur. 2d Special or Local Assessments §§91 through 108.

Widening of city street as local improvement justifying special assessment of adjacent property. 46 ALR 3d 127.

Exemption of public school property from assessments for local improvements. 15 ALR 3d 847.

7-12-2152. Exception for owners of water ditches under certain circumstances.

Compiler's Comments

1985 Amendment: In first sentence substituted "protective devices intended to protect the safety of the public from open ditches carrying irrigation or other water" for "protective devices referred to in 7-12-2102".

Collateral References

Counties *key* 22.

20 C.J.S. Counties §50.

7-12-2153. Incidental expenses considered as cost of improvements — costs for bonds or warrants secured by revolving fund — district reserve account.

Compiler's Comments

1995 Amendment: Chapter 229 in (1), at beginning, substituted "Incidental expenses" for "The cost and expense" and near end, after "cost", deleted "and expenses"; in (2), at beginning, inserted clause concerning revolving fund pursuant to 7-12-2185, after "improvement" substituted "must" for "may, at the option of the board of county commissioners", and substituted "amount equal to 5%" for "amount not to exceed 5%"; inserted (3) concerning district reserve account; inserted (4) concerning additional security from real property owners; and made minor changes in style. Amendment effective March 24, 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

1985 Amendment: In (1) inserted "and the other incidental expenses described in 7-12-2101(7)"; and in (2), substituted "board of county commissioners" for "local governing body", increased deposit from "3%" to "5%", and after "7-12-2181" deleted "or deposited in the county general fund".

1983 Amendment: Inserted (2) relating to revolving fund deposit.

Collateral References
70A Am. Jur. 2d Special or Local Assessments §86.

7-12-2154. Payment of damages incurred as a result of improvements.

Collateral References
Counties *key* 192.
20 C.J.S. Counties §§281, 284.

7-12-2155. Apportionment of costs between corner lots and inside lots.

Collateral References
Counties *key* 193.
20 C.J.S. Counties §284.
70A Am. Jur. 2d Special or Local Assessments §111.

7-12-2156. Responsibility for costs for improvements close to street railway.

Collateral References
Counties *key* 193.
20 C.J.S. Counties §284.

7-12-2157. Status of federal property within improvement district.

Case Notes
Exemption From Assessment: An irrigation company engaged in the reclamation of arid lands under the Carey Act is not a mandatory of the federal government within Ch. 156, L. 1917, and therefore not exempt from assessments for special improvements. Billings Bench Water Ass'n v. Yellowstone County, 70 M 401, 225 P 996 (1924).

Recovery of Assessment Paid Under Protest: In an action by the receiver of a national bank to recover an assessment paid under protest for improvements in a rural improvement district under Ch. 156, L. 1917, on the ground that the bank was a "mandatory" of the government and therefore exempt, complaint was insufficient for failure to allege that the property was excluded from liability in the resolution of intention to create the district or that plaintiff acquired the property prior to the time it was passed by the Board of County Commissioners. Swords v. Simineo, 68 M 164, 216 P 806 (1923).

Law Review Articles
Demise of the Doctrine of Intergovernmental Tax Immunity, Downs & Mumford, 32 Res Gestae 534 (1989).

Collateral References
70A Am. Jur. 2d Special or Local Assessments §§60, 62.
Property tax: exemption of property leased by and used for purposes of otherwise tax-exempt body. 55 ALR 3d 430.
Immunity from state taxation of independent contractors with United States or federal agencies—Supreme Court cases. 2 L. Ed. 2d 1789.

7-12-2158. Resolution for levy and assessment of tax.

Compiler's Comments
1985 Amendment: In (1), before "improvements" inserted "or acquiring", before "property" inserted "benefited", after "method" inserted "or methods", and after "this part" inserted "and described in the resolution of intention".

Collateral References
Counties *key* 54, 192 through 194.
20 C.J.S. Counties §§92, 281, 284, 285.

7-12-2159. Notice of resolution for levy and assessment of tax — protest and hearing.

Compiler's Comments
1985 Amendments: Chapter 349 in (1)(a) substituted "as provided in 7-1-2121" for "at least once in a newspaper published nearest to where the special improvement is to be made"; and in (2) inserted "second" before "publication".

Chapter 665 in (1)(a) made same change as Ch. 349; inserted (1)(b) and (1)(c) regarding mailing notice to owner and to those with known ownership interest; and in second sentence of (2) substituted "after the second publication or less than 10 days after the mailing of the notice" for "after the publication of the notice".

Collateral References
Counties *key* 54.
20 C.J.S. Counties §92.

7-12-2160. Hearing on protest.

Collateral References
Counties *key* 54.
20 C.J.S. Counties §92.

7-12-2161. Payment of maintenance costs — resolution for assessment and for change of boundaries — assessment for administrative costs.

Compiler's Comments
2003 Amendment: Chapter 277 in (2) at beginning of first sentence inserted "The board may" and after "year" deleted "the board shall", in second sentence after "assessment" inserted "authorized by the board", and inserted third sentence requiring the board to provide for the cost of maintaining, preserving, or repairing district improvements in lieu of an assessment; and made minor changes in style. Amendment effective July 1, 2003.

1997 Amendment: Chapter 175 in (1), after "board", inserted "of county commissioners"; inserted (5) establishing that the costs to a county of administering a rural special improvement district maintenance fund are a cost of maintaining the district; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 175, L. 1997, provided: "WHEREAS, the administrative time involved with rural special improvement districts' maintenance districts can be substantial; and

WHEREAS, these districts benefit only the property owners within the districts' boundaries and not the county as a whole; and

WHEREAS, many of the rural special improvement districts rely on the county to make the maintenance decisions for the district; and

WHEREAS, the county receives no revenue for the administration and other costs involved with operating rural special improvement maintenance districts."

Attorney General's Opinions
Payment of Fire Hydrant Fee From Rural Improvement District Maintenance Fund: Counties have the power to create rural improvement districts outside of incorporated cities and towns for the purpose of acquiring and constructing certain improvements in the public interest, including the construction of water mains and hydrants. Maintenance, preservation, and repair of those improvements are paid for from the rural improvement district maintenance fund. Therefore, payment of a fire hydrant fee charged to a rural improvement district for provision of water to hydrants owned by the district may be made from the district's maintenance fund. 45 A.G. Op. 4 (1993).

Responsibility for Costs of Maintenance and Repair of County Road Established by Petition: If a rural special improvement district is created to improve a county road established by the county road petition process, the district is responsible for the costs of maintenance and repair of the road. 41 A.G. Op. 61 (1986).

Formation of New Improvement District Required for Substantial Expansion of Existing One: A sewer district constituting a rural special improvement district could be significantly expanded and the district's service area doubled in size only by the creation of a new special improvement district. The provisions of 7-12-2161(4) contemplate only maintenance of an existing system for which notice has previously been given and upon which a hearing has been previously held. A substantial addition to an existing district with notice or comment by the affected property owners would conflict with the notice procedures applicable to property owners not yet taxed for the improvement of their property. 40 A.G. Op. 44 (1984).

Law Review Articles
Financing America's Public Infrastructure: Issues for Local Governments, 22 Akron L. Rev. 381 (1989).

Collateral References
64 Am. Jur. 2d Public Securities and Obligations §§403 through 425.

7-12-2162. Improvement district maintenance fund.

Case Notes

Maintenance Distinguished From Reconstruction — Rural Improvement District: Yellowstone County replaced a 4-inch water main serving a rural special improvement district with a 12-inch main and assessed costs as "maintenance" costs against the property owners in the district. The court determined that the replacement costs were "reconstruction" costs as set forth in 7-12-4102, rather than "maintenance" costs under 7-12-2120 or this section, and must be funded by creating a special improvement district under 7-12-2102 after notice and opportunity to object as provided in 7-12-2105 and 7-12-2109, respectively. Miller v. Yellowstone County, 234 M 193, 761 P2d 829, 45 St. Rep. 1836 (1988).

Attorney General's Opinions

Payment of Fire Hydrant Fee From Rural Improvement District Maintenance Fund: Counties have the power to create rural improvement districts outside of incorporated cities and towns for the purpose of acquiring and constructing certain improvements in the public interest, including the construction of water mains and hydrants. Maintenance, preservation, and repair of those improvements are paid for from the rural improvement district maintenance fund. Therefore, payment of a fire hydrant fee charged to a rural improvement district for provision of water to hydrants owned by the district may be made from the district's maintenance fund. 45 A.G. Op. 4 (1993).

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§403 through 425.

7-12-2163. Collection of district assessments by county treasurer — delinquencies.

Compiler's Comments

1987 Amendment: Inserted (2) relating to delinquencies.

Applicability: Section 16, Ch. 617, L. 1987, provided: "This act applies to the enforcement of all outstanding and future tax and assessment liens except those installments of outstanding special assessments that are delinquent and have been the subject of a sale for delinquent taxes or assessments before the effective date of this act." Effective April 27, 1987.

Severability: Section 15, Ch. 617, L. 1987, was a severability section.

Collateral References

Counties *key* 194.

20 C.J.S. Counties §285.

70A Am. Jur. 2d Special or Local Assessments §§187 through 198.

7-12-2164. Payment of tax under protest — action to recover.

Law Review Articles

The Justification for Taxation: A Forgotten Question, Vogel, 33 Am. J. Juris. 19 (1988).

Collateral References

Counties *key* 196(1).

20 C.J.S. Counties §§286 through 288.

70A Am. Jur. 2d Special or Local Assessments §§227 through 230.

Estoppel of state or local government in tax matters. 21 ALR 4th 573.

Allowance of counsel fees in taxpayer's action in state court. 89 ALR 3d 690.

7-12-2165. Procedure to correct assessment and relevy and collect tax.

Compiler's Comments

Section Not Codified: Part of section 16-1623, R.C.M. 1947, a validation clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 23, Ch. 147, L. 1921.

7-12-2167. Term of payment of assessments.

Compiler's Comments

1987 Amendment: In (3), at beginning, substituted "The assessments are payable" for "If the bonds of the special improvement district are issued as serial bonds, the assessments must be payable", in two places, before "installments", substituted "semiannual" for "annual", and after first "installments" substituted reference to principal with interest on unpaid installments and resolution of board of county commissioners authorizing issuance of special improvement

district bonds for "If the bonds are issued as amortization bonds, the assessments must be payable".

1985 Amendment: In (1) after "30 years", deleted "payment to be made in equal annual installments"; inserted (3) relating to semiannual installments; and inserted (4) relating to prepayment.

Collateral References

Counties *key* 192 through 194.

20 C.J.S. Counties §§281, 284, 285.

7-12-2168. Assessments and certain other charges as liens.

Compiler's Comments

2003 Amendment: Chapter 277 inserted (3) concerning assessment of condominium units; and made minor changes in style. Amendment effective July 1, 2003.

Attorney General's Opinions

Portion of Lot Within District — Delinquent Assessment: If only a portion of a lot is included in a rural special improvement district and the owner defaults in paying the assessment, only the portion of the lot within the district may be sold to satisfy the delinquency. 39 A.G. Op. 48 (1982).

Collateral References

70A Am. Jur. 2d Special or Local Assessments §§187 through 198.

7-12-2169. Use of bonds and warrants.

Compiler's Comments

1985 Amendment: In first sentence inserted "acquisition" and "or incurred in the issuance of bonds or warrants of the district, including incidental expenses".

7-12-2171. Details relating to rural improvement district bonds and warrants.

Compiler's Comments

2003 Amendment: Chapter 277 deleted former (3) that read: "(3) As used in this part, unless the context clearly indicates otherwise, the following definitions apply:

(a) "Amortization bonds" means the form of bonds that bear interest at a fixed rate and on which:

(i) a part of the principal must be paid each time that interest becomes payable;

(ii) the part payment of principal increases at each installment in the same amount that the interest decreases;

(iii) the combined interest and principal due on each due date remains the same until the bonds are paid;

(iv) the final payment may vary from prior payments in the amount resulting from disregarding fractional costs in prior payments; and

(v) the initial payment may be larger than subsequent payments if the increase represents interest accrued over an additional period not greater than 6 months.

(b) "Serial bonds" means a bond issue payable in semiannual or annual installments commencing not more than 2 years from the date of issue, any one installment consisting of one or more bonds, with the principal amount of bonds maturing in each installment not exceeding five times the principal amount of the bonds maturing in the immediately preceding installment"; and made minor changes in style. Amendment effective July 1, 2003.

2001 Amendment: Chapter 162 in (1)(a) inserted last two sentences providing that bonds or warrants sold at a private, negotiated sale may bear interest at a rate varying at times and on terms determined by the board of county commissioners and allowing the terms to include a maximum interest rate or convertibility to a fixed rate; inserted (1)(b) stating when variable rate bonds may be sold at a private, negotiated sale; in (1)(c) in second sentence substituted "may bear the corporate seal" for "must bear the corporate seal"; in (3) in definition of amortization bonds in introductory clause inserted "that bear interest at a fixed rate and" and in definition of serial bonds near beginning substituted "semiannual or annual" for "annual"; and made minor changes in style. Amendment effective March 28, 2001.

1997 Amendment: Chapter 459 deleted former (3) that read: "(3) All special improvement district bonds must be amortization bonds unless, in the judgment of the board, serial bonds will be more advantageous to the district and can be sold at a comparatively reasonable rate or rates of interest"; and made minor changes in style.

1989 Amendments: Chapter 256 in (2) inserted last sentence relating to when the term of a bond commences; in (4)(b) substituted definition of serial bonds for former language that read: ""Serial bonds" means the form of bonds that are payable in annual installments and on which the amount maturing each year may not be more than three times the principal amount of bonds maturing in any previous year"; and made minor changes in phraseology. Amendment effective March 23, 1989.

Chapter 449 in (4)(b) increased the annual maturity amount to five times from three times the principal amount from the previous year; and made minor changes in phraseology. Amendment effective April 5, 1989.

Saving Clauses: Section 9, Ch. 256, L. 1989, and sec. 17, Ch. 449, L. 1989, were saving clauses.

Severability: Section 18, Ch. 449, L. 1989, was a severability clause.

1985 Amendment: In (1), in second sentence, after "annually", substituted "or semiannually, at the discretion of the board of county commissioners, on such dates as the board prescribes" for "on January 1 of each year unless the board of county commissioners prescribes another date", and made minor changes in punctuation; inserted (3) relating to preference for amortization bonds. Subsection (4), defining amortization and serial bonds, was enacted as a separate section by sec. 20, Ch. 665, L. 1985, but is codified here for convenience.

7-12-2172. Procedure to issue bonds and warrants.

Compiler's Comments

1993 Amendment: Chapter 6 near beginning of (3) deleted reference to 7-7-4253.

1989 Amendment: In (1), near beginning, deleted reference to 7-12-2170; and made minor changes in phraseology. Amendment effective April 5, 1989.

Saving Clause: Section 17, Ch. 449, L. 1989, was a saving clause.

Severability: Section 18, Ch. 449, L. 1989, was a severability clause.

1985 Amendment: In (1), before "property" inserted "benefited", after "cash" substituted "at a price, including interest thereon to date of delivery, not less than that prescribed by the board in the resolution calling for the sale of the bonds or warrants. The board may fix the minimum price for the bonds or warrants in an amount less than the face value thereof if it determines that such sale is in the best interests of the district and the county" for "and for not less than the face value of such bonds or warrants, including interest thereon", and made minor changes in phraseology; inserted (2) relating to type of sale; and in (3) inserted "In all other cases".

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§206 through 217.

7-12-2173. Disposition of bond or warrant proceeds.

Compiler's Comments

1985 Amendment: In (1) substituted "payment for the cost of the improvements. Payments to contractors" for "payment to the contractor or contractors. Such payment"; in (2) inserted "during the construction of improvements" and "construction account of the"; and inserted (3) relating to proceeds transferred to sinking fund.

1983 Amendment: Inserted (2) relating to allocation of interest earned.

7-12-2174. Redemption of bonds and warrants.

Compiler's Comments

1995 Amendment: Chapter 423 at end of (1) substituted "order specified in the resolution authorizing the issuance of the bonds" for "order of their registration as provided in subsection (2)"; near end of (2) substituted "as provided in the resolution" for "at the option of the county"; in (3), in first sentence, extended redemption date from 10 days after notice to 30 days after notice and near end of third sentence substituted "newspaper of general circulation" for "newspaper published"; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1985 Amendment: In (1), substituted "on each interest payment date" for "annually", inserted "or otherwise then payable" and "the principal, if any, then payable on the warrants or bonds", after "applied to", deleted "the payment of the principal and", and inserted "as provided in subsection (2)"; in (2) substituted "Special improvement district warrants or bonds shall be redeemed on any interest payment date from the proceeds of the bonds or warrants remaining after payment of all costs of the improvements, as provided in 7-12-2173, or from the prepayment of assessments levied in the district. Special improvement district bonds or warrants are subject

to redemption and prepayment at the option of the county on any interest payment date" for "Such warrants (or bonds) shall be redeemed by the county treasurer when there are funds available therefor in the special improvement district fund against which said warrants (or bonds) are issued. Whenever there are any funds in any special improvement district fund after paying the interest on such warrants (or bonds) drawn against said fund, the county treasurer shall call in for payment outstanding warrants (or bonds) which, together with the interest thereon to the date of redemption, will equal the amount of said fund on that date"; in (3), in first sentence substituted "mailing of notice" for "service of notice"; in second sentence, after "give", deleted "notice by publication once in a newspaper published in the city or, at the option of the county treasurer, by" and in two places inserted "to be redeemed", and inserted third sentence requiring County Treasurer to publish notice of redemption if addresses of holders of bonds or warrants are not known; and made minor changes in punctuation and phraseology throughout section.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§250 through 269.

7-12-2175. Investment of maintenance, interest, and sinking fund money.

Compiler's Comments

1993 Amendments: Chapter 10 near middle of (1) deleted "federal savings and loan insurance corporation"; and made minor changes in style.

Chapter 101 in (1), near beginning after "improvement district", inserted "or maintenance district", after "invest" inserted "maintenance", near middle, after "corporation", deleted "federal savings and loan insurance corporation", and at end, after "government", deleted "payable within 180 days from the time of investment"; in (2), before "fund", deleted "sinking"; and made minor changes in style. Amendment effective March 17, 1993.

1985 Amendment: Near middle of (1), after "bank", inserted "savings and loan association, or credit union", and after "corporation", inserted "federal savings and loan insurance corporation, or national credit union administration".

1983 Amendment: In (2), after "credited to the" inserted "sinking".

7-12-2176. Interest rate on unpaid assessments.

Compiler's Comments

2001 Amendment: Chapter 162 in (1) at beginning inserted exception clause; in (1)(b) at end inserted "at the time the assessment is levied each fiscal year"; and inserted (3) providing that while any bonds or warrants secured by assessments bear interest at a variable rate, the installments of assessments remaining unpaid must bear simple interest at an annual rate equal to the sum of 1% a year, plus the interest rate payable on the outstanding bonds or warrants of the rural special improvement district at the time the assessment is levied each fiscal year, plus, to the extent that the interest rate on the bonds or warrants is then less than the maximum rate prescribed for them or if there is no prescribed maximum rate, up to an additional 1% a year, as may be prescribed by the board of county commissioners in the resolution authorizing the issuance or sale of the bonds or warrants. Amendment effective March 28, 2001.

1995 Amendment: Chapter 229 in (1)(b), before "special improvement district", inserted "rural"; inserted (1)(c) concerning optional 1/2 of 1%; inserted (2) authorizing reduction or elimination of optional additional interest rate; and made minor changes in style. Amendment effective March 24, 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

7-12-2181. Creation of rural improvement district revolving fund.

Compiler's Comments

1983 Amendment: In the middle of the section, substituted "may" for "shall" following "or district for any purpose"; and inserted last sentence prohibiting elimination of a revolving fund until all bonds and warrants have been paid.

Case Notes

County Allowed Choice Whether to Issue Bonds Secured by Revolving Fund — County Not Relieved of Obligation to Make Loans to Deficient Rural Special Improvement Districts: The

plain meaning of statutes regarding revolving funds, as well as the legislative history, supports the legislative intent to allow counties to choose whether to finance a rural special improvement district by issuing bonds secured by the revolving fund. Nothing in the statutes voids the commitment to loan from the revolving fund if the district becomes deficient. In this case, County Commissioners agreed to a revolving fund obligation and issued bonds secured by the revolving fund. The District Court reasoned that this was a violation of the constitutional prohibition against indebtedness beyond a certain percent, holding that the county was thus relieved of its obligation to make such loans. However, special improvement bond obligations are limited to the district funds and, if necessary, receive loans from the revolving fund. If both funds are insufficient to meet bond payments, there is no other source to pay the bonds. Under 7-12-2182, revolving fund levies are limited to an amount that would increase the balance in the fund to no more than 5% of the principal amount of the outstanding bonds. The District Court erred in its decision that the county was not obligated to make loans to the special improvement districts. Having exercised the discretion to institute a revolving fund and freely enter into an agreement with the bondholders and the underwriters, under both the terms of the agreement and applicable statutes, a county is obliged to carry out that contractual obligation. Loans from the revolving fund and subsequent tax levies are within the constitutional mandates of Art. VIII, sec. 1, Mont. Const., which requires that state funds be used for public purposes. Further, a county's obligation to make such loans and levy taxes to fund the revolving fund is mandatory, rather than discretionary, and is not an unconstitutional pledge of credit. Carbon County v. Dain Bosworth, Inc., 265 M 75, 874 P2d 718, 51 St. Rep. 436 (1994), distinguishing Stanley v. Jeffries, 86 M 114, 284 P 134 (1929), and Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

7-12-2182. Sources of money for revolving fund.

Compiler's Comments

1995 Amendment: Chapter 229 inserted (1)(a) concerning revolving fund; and made minor changes in style. Amendment effective March 24, 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

1985 Amendment: In (2), near end of first sentence inserted "and the balance of such money or, if there is no outstanding loan, so much of such money as the board considers necessary may be transferred to the improvement district's maintenance fund", and at end of subsection inserted "or the improvement district's maintenance fund".

1983 Amendment: In (1)(b), inserted "secured thereby" at the end of second and third sentence; and in (2) inserted "secured by the revolving fund" in first and second sentence.

1981 Amendment: Substituted the last two sentences of (1)(b) relating to the 5% revolving fund limit for "such levy, together with such transfer, not to exceed in any one year 5% of the principal amount of the then-outstanding rural special improvement district bonds and warrants".

Case Notes

County Allowed Choice Whether to Issue Bonds Secured by Revolving Fund — County Not Relieved of Obligation to Make Loans to Deficient Rural Special Improvement Districts: The plain meaning of statutes regarding revolving funds, as well as the legislative history, supports the legislative intent to allow counties to choose whether to finance a rural special improvement district by issuing bonds secured by the revolving fund. Nothing in the statutes voids the commitment to loan from the revolving fund if the district becomes deficient. In this case, County Commissioners agreed to a revolving fund obligation and issued bonds secured by the revolving fund. The District Court reasoned that this was a violation of the constitutional prohibition against indebtedness beyond a certain percent, holding that the county was thus relieved of its obligation to make such loans. However, special improvement bond obligations are limited to the district funds and, if necessary, receive loans from the revolving fund. If both funds are insufficient to meet bond payments, there is no other source to pay the bonds. Under this section, revolving fund levies are limited to an amount that would increase the balance in the fund to no more than 5% of the principal amount of the outstanding bonds. The District Court erred in its decision that the county was not obligated to make loans to the special improvement districts. Having exercised the discretion to institute a revolving fund and freely enter into an agreement with the bondholders and the underwriters, under both the terms of the agreement and

applicable statutes, a county is obliged to carry out that contractual obligation. Loans from the revolving fund and subsequent tax levies are within the constitutional mandates of Art. VIII, sec. 1, Mont. Const., which requires that state funds be used for public purposes. Further, a county's obligation to make such loans and levy taxes to fund the revolving fund is mandatory, rather than discretionary, and is not an unconstitutional pledge of credit. Carbon County v. Dain Bosworth, Inc., 265 M 75, 874 P2d 718, 51 St. Rep. 436 (1994), distinguishing Stanley v. Jeffries, 86 M 114, 284 P 134 (1929), and Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

7-12-2183. Loan from revolving fund to meet payments on bonds and warrants or to make emergency repairs.

Compiler's Comments

2001 Amendment: Chapter 162 in (1) at end inserted sentence providing that the loan must be made even if, in the case of bonds or warrants with a variable interest rate, the interest rate on the special assessments at the time of the loan is less than or later becomes less than the interest rate on the bonds or warrants. Amendment effective March 28, 2001.

1995 Amendment: Chapter 229 at beginning of first sentence of (1) inserted "During the period described in 7-12-2185(2)", near middle, after "fund", inserted "after a transfer from the appropriate district reserve account if established", and after "deficiency" substituted "must" for "may, by order of the board of county commissioners" and in second sentence, after "loaned", substituted "and money available in the district fund" for "or from the money so loaned when added to such insufficient amount, as the case may require"; in (2), in third sentence, substituted "cause a default in" for "interfere with", after "payments of" inserted "the principal of the", and after "warrants" inserted "or the interest on the bonds or warrants" and in fifth sentence, after "without", substituted "causing a default" for "interfering with", after "payment of" inserted "the principal of the", and after "warrants" inserted "or the interest on the bonds or warrants"; and made minor changes in style. Amendment effective March 24, 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

1983 Amendment: At beginning of (1), following "Whenever any rural special improvement district bond or warrant" inserted "secured by the revolving fund"; and near end of (2) following "without interfering with the payment of bonds or warrants" inserted "secured thereby".

1981 Amendment: Inserted (2) relating to loans from the revolving fund to the maintenance fund.

7-12-2184. Lien arising due to loan from revolving fund.

Compiler's Comments

2001 Amendment: Chapter 162 in (1) at end inserted "and that was determined at the time the loan was made, even if the interest rate on the bond or warrant subsequently changes"; and made minor changes in style. Amendment effective March 28, 2001.

7-12-2185. Covenants to use revolving fund — duration of revolving fund obligation — factors to be considered.

Compiler's Comments

1995 Amendment: Chapter 229 in (1)(a) substituted "make" for "issue orders annually authorizing"; in (1)(b), after parenthetical, deleted "as the board may so agree to and undertake"; at end of (2)(a) substituted "until the earlier of" for "so offered or any interest thereon remain unpaid"; inserted (2)(a)(i) and (2)(a)(ii) concerning payment or maturity dates; inserted (2)(b) concerning delinquent assessments; inserted (3) enumerating factors to be considered by County Commissioners; inserted (4) concerning conclusive evidence of consideration; and made minor changes in style. Amendment effective March 24, 1995.

Coordination Instruction: Section 15, Ch. 229, L. 1995, provided: "If Senate Bill No. 8 is approved, then in [section (6)(2)(a)(i) of the first reading copy of this act], amending 7-12-2185, the following language must be inserted following the word "paid": "or discharged in a bankruptcy case in which the special improvement district is the debtor"." Senate Bill No. 8 was approved as Ch. 296, L. 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the

effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

1983 Amendment: Inserted (3) authorizing fund issuance without revolving fund backing.

7-12-2186. Utilization of excess money in revolving fund.

Compiler's Comments

1983 Amendment: Inserted "secured thereby" following "warrants" twice.

1981 Amendment: Substituted "5% of the then-outstanding rural special improvement district bonds and warrants and the board considers any part of the excess to be greater than the amount" for "the amount which the board deems" after "in excess of"; substituted "the amount the board considers greater than the amount necessary" for "such excess" after "board may order".

7-12-2191. Change in outstanding principal of district — relevy of assessments.

Compiler's Comments

1989 Amendment: Inserted next-to-last sentence relating to the term over which the assessments may be relevied; and made minor changes in phraseology. Amendment effective April 5, 1989.

Saving Clause: Section 17, ch. 449, L. 1989, was a saving clause.

Severability: Section 18, Ch. 449, L. 1989, was a severability clause.

7-12-2193. Refunding bonds.

Compiler's Comments

2001 Amendment: Chapter 162 in (4)(a) at end inserted "or, if the bonds to be refunded bear interest at a variable rate, the board determines that the issuance of fixed rate refunding bonds is in the best interest of the owners of property in the district and the county or the board determines that the issuance of variable rate refunding bonds based on a different index or formula than that of the refunded bonds is reasonably expected to result over the remaining term of the bonds to be refunded in an interest rate at least 1/2 of 1% a year less than the rate of interest on the refunded bonds". Amendment effective March 28, 2001.

1989 Amendment: At beginning of introductory clause of (4) deleted "Unless there is, or will be on the next payment date, a default in the payment of bond principal or interest"; inserted (4)(b) relating to an actual default or a default by next payment date; inserted (4)(c) relating to a greater than 50% delinquency rate; in (6)(a) inserted "the proceeds of the refunding bonds do not redeem the outstanding bonds until"; inserted (6)(c) relating to a delinquency rate greater than 50%; and made minor changes in form and phraseology. Amendment effective April 5, 1989.

Saving Clause: Section 17, Ch. 449, L. 1989, was a saving clause.

Severability: Section 18, Ch. 449, L. 1989, was a severability clause.

1987 Amendment: In (4), at beginning of sentence, inserted introductory phrase concerning default.

7-12-2196. Water user entities exempt from special assessments.

Compiler's Comments

Applicability: Section 5, Ch. 276, L. 1987, provided in part: ". . . This act applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1986. . . . This act does not apply to any special assessments for the repayment of bonded indebtedness incurred before the effective date of this act if the bonds were issued on representations that the property exempted from special assessments by this act would be liable for repayment of the bonded indebtedness."

Part 23
Special Provisions for Districts for Sanitary and Storm Sewers

7-12-2301. Rental provisions of municipal public sewer law applicable to rural districts.

Collateral References

Municipal Corporations *key* 270, 712.

63 C.J.S. Municipal Corporations §1049; 64 C.J.S. Municipal Corporations §1802.

Municipality's liability arising from negligence or other wrongful act in carrying out construction or repair of sewers and drains. 61 ALR 2d 874.

Construction or improvement of sewers as a local or district improvement within provisions authorizing or requiring special assessments or other specified means of defraying expense. 134 ALR 895.

Loss of right to contest an assessment in a street or sewer improvement or drainage proceeding. 9 ALR 634, 842.

Part 40
Park Maintenance Districts

7-12-4001. Park maintenance districts.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

Part 41
Special Improvement Districts

Part Case Notes

Failure to Prove Mistake or Fraud in City Determination of Boundary of Special Improvement District — Summary Judgment Proper: The city of Missoula included plaintiffs' property in a storm sewer drainage special improvement district, and plaintiffs filed a complaint, alleging that pursuant to 7-12-4162, they could not be included in the special improvement district absent some benefit to them from the proposed system. The District Court heard contradicting evidence on the question of benefit, but concluded that plaintiffs failed to produce evidence of mistake or fraud as required in Stevens v. Missoula, 205 M 274, 667 P2d 440 (1983), and summarily dismissed plaintiffs' complaint. The Supreme Court affirmed. Under Stevens, a city's determination of benefit and creation of special improvement district boundaries is conclusive absent proof of mistake or fraud that precludes the exercise of sound judgment. Plaintiffs did not satisfy the threshold requirement in Stevens and thus could not prevail even if the facts articulated in the complaint were true. Enger v. Missoula, 2001 MT 142, 306 M 28, 29 P3d 514 (2001).

Boundary of Special Improvement District — How Drawn: A special improvement district's boundary lines should be drawn in such a way that the improvement brings a benefit to the included properties and that the benefit is substantially more intense than that which is realized by the properties outside of the district boundaries. The fact that outside property derives some general benefit should not affect the special benefit afforded the district properties. Stevens v. Missoula, 205 M 274, 667 P2d 440, 40 St. Rep. 1267 (1983).

Sufficiency of Resolution of Intention to Create SID: Plaintiffs unsuccessfully challenged in the District Court the validity of the creation by the City Council of a special improvement district (SID) to expand off-street parking in downtown Missoula. The SID was proposed to the City Council by the Parking Commission. Two alternatives were presented. One involved addition of parking spaces on three surface lots. The other involved addition of parking spaces on two lots and construction of a parking garage on a third lot. Both proposals entailed acquisition of the same parcels of land. The City Council then adopted, pursuant to 7-12-4104, a resolution of intention to create an SID, including both alternative plans in the resolution. Written protests were filed, and opposition to creation of the SID was expressed at a public hearing. The City Council then adopted a resolution creating the SID. In the resolution, the general nature of the improvements was set forth in the alternative. On appeal, the Supreme Court ruled that the alternative structure of the resolution of intention did not deny property owners notice of the cost and nature of the proposed improvement. Nor does 7-12-4104 preclude use of the alternative form. Stevens v. Missoula, 205 M 274, 667 P2d 440, 40 St. Rep. 1267 (1983).

Notice to Be Published Rather Than Posted if Possible: The obvious intent of the Legislature as declared in 7-12-4107 (now repealed) was to permit posting of notice only when publication could not be made in the city, and whenever there is a newspaper published in the city, whether "daily", "semiweekly", or "weekly", publication therein should take precedence over notice by posting. Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

Part Attorney General's Opinions

Acceleration of Future Installments of Special Assessments Upon Delinquency: A city whose taxes are collected by the county has statutory authority to accelerate future installments of special assessments when one installment becomes delinquent. 42 A.G. Op. 82 (1988).

No Referendum on Special Improvement Districts: A resolution creating a special improvement district under 7-12-4102 is not subject to repeal by referendum. 39 A.G. Op. 73 (1982).

Part Collateral References

The Impact of Special Districts on Local Expenditures in Metropolitan Areas: An Institutional Paradox, Park, St. & Loc. Gov't Rev. (1995).

7-12-4101. Definitions.

Compiler's Comments

1985 Amendment: In definition of incidental expenses included expenses of interest on warrants, costs of issuance of bonds or warrants, interest accruing on bonds or warrants, and an administrative fee.

7-12-4102. Authorization for creation of special improvement districts.

Compiler's Comments

2001 Amendment: Chapter 591 inserted (2)(j) concerning districts for alternative energy production facilities; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 28, Ch. 591, L. 2001, was a severability clause.

1993 Amendment: Chapter 250 inserted (2)(i) allowing creation of special improvement districts for conversion of overhead utilities to underground locations; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: Inserted (2)(h) allowing creation of special improvement district to acquire park land.

1989 Amendment: In (1) inserted "or, if refunding bonds are issued pursuant to 7-12-4194, for a period not exceeding 30 years"; and made minor changes in phraseology. Amendment effective April 5, 1989.

Saving Clause: Section 17, Ch. 449, L. 1989, was a saving clause.

Severability: Section 18, Ch. 449, L. 1989, was a severability clause.

1987 Amendment: Inserted (2)(f) relating to extension of gas, electric, and telecommunications services.

1985 Amendment: At end of (1) inserted "or bonds"; in (2)(a) and (2)(b) inserted "acquiring by purchase" and made minor changes in phraseology; in (2)(d) inserted "acquisition"; and in second sentence of (3) substituted "may not be included in the special improvement district if 40% of those property owners protest the creation" for "may be included in the special improvement district only if 60% of those property owners approve".

1981 Amendment: Inserted (3) relating to districts abutting city limits or extending beyond city limits.

Case Notes

Failure to Prove Mistake or Fraud in City Determination of Boundary of Special Improvement District — Summary Judgment Proper: The city of Missoula included plaintiffs' property in a storm sewer drainage special improvement district, and plaintiffs filed a complaint, alleging that pursuant to 7-12-4162, they could not be included in the special improvement district absent some benefit to them from the proposed system. The District Court heard contradicting evidence on the question of benefit, but concluded that plaintiffs failed to produce evidence of mistake or fraud as required in Stevens v. Missoula, 205 M 274, 667 P2d 440 (1983), and summarily dismissed plaintiffs' complaint. The Supreme Court affirmed. Under Stevens, a city's determination of benefit and creation of special improvement district boundaries is conclusive absent proof of mistake or fraud that precludes the exercise of sound judgment. Plaintiffs did not satisfy the threshold requirement in Stevens and thus could not prevail even if the facts articulated in the complaint were true. Enger v. Missoula, 2001 MT 142, 306 M 28, 29 P3d 514 (2001).

Maintenance Distinguished From Reconstruction — Rural Improvement District: Yellowstone County replaced a 4-inch water main serving a rural special improvement district with a 12-inch main and assessed costs as "maintenance" costs against the property owners in the district. The court determined that the replacement costs were "reconstruction" costs as set forth in this section, rather than "maintenance" costs under 7-12-2120 or 7-12-2162, and must be funded by creating a special improvement district under 7-12-2102 after notice and opportunity to object as provided in 7-12-2105 and 7-12-2109, respectively. Miller v. Yellowstone County, 234 M 193, 761 P2d 829, 45 St. Rep. 1836 (1988).

City Ordinance Requiring Developer Surcharge — Valid Exercise of Self-Governing Power: A city ordinance imposing a 5% surcharge on developers of raw land prior to creation of a special improvement district was a valid exercise of the city's self-governing powers. Diefenderfer v. Billings, 223 M 487, 726 P2d 1362, 43 St. Rep. 1934 (1986).

Boundary of Special Improvement District — How Drawn: A special improvement district's boundary lines should be drawn in such a way that the improvement brings a benefit to the included properties and that the benefit is substantially more intense than that which is realized by the properties outside of the district boundaries. The fact that outside property derives some general benefit should not affect the special benefit afforded the district properties. Stevens v. Missoula, 205 M 274, 667 P2d 440, 40 St. Rep. 1267 (1983).

Bond Issues — Payment: Where a special improvement district was established under this section and bonds were issued "payable from the collection of the special tax or assessment which is a lien against the real estate within said improvement district", the bonds were not a general obligation of the town and the town could not be compelled to redeem the bonds from a water fund made up of water rentals from water users, even though the town may have had authority to make payments from such fund. State ex rel. Truax v. Lima, 121 M 152, 193 P2d 1008 (1948).

Assessment Not to Be Predicated on Future Action of Public Authority: A special improvement district was created for the construction of a main trunk line sewer which would not serve plaintiff's lot or a majority of the lots within the district until laterals could be constructed. This would require the creation of local districts within the main trunk line district. As an assessment cannot be predicated on future action of public authorities, plaintiff's land could not be assessed for the main trunk line sewer. Crutchfield v. Nash, 84 M 556, 276 P 938 (1929).

Powers of City Council Limited: The statutes of this state relating to the creation of special improvement districts not only qualify and limit the powers which the City Council may exercise but they define with particularity the mode in which the restricted authority may be used, and compliance with their provisions is the sine qua non to the creation of a special improvement district for making improvements the expense of which is to be a charge against the property included. Johnston v. Hardin, 55 M 574, 179 P 824 (1919); Cooper v. Bozeman, 54 M 277, 169 P 801 (1917); Shapard v. Missoula, 49 M 269, 141 P 544 (1914).

Right to Attack Validity of Creation of District: Where an owner joined in a petition for the creation of a special improvement district and thereafter, in creating it, a large part of the property described therein was excluded by the City Council, the petitioner was not estopped from subsequently attacking the validity of the creation by the fact that he joined in the petition. Lewistown v. Warren, 52 M 356, 157 P 954 (1916).

Construction of Section: The provisions of this section were not repealed by implication by Ch. 89, L. 1913, relating to special improvements in cities and towns. Shapard v. Missoula, 49 M 269, 141 P 544 (1914).

Federal Property: The constitutional provision that a state shall not impose any taxes upon property therein belonging to the United States includes special assessments for street improvements. Ford v. Great Falls, 46 M 292, 127 P 1004 (1912).

Theory of Act:

With respect to special improvements, the "superficial area" rule is the rule of this state; it amounts to a legislative declaration that all property in a proposed district is, presumptively, equally benefited by the improvement contemplated. Mansur v. Polson, 45 M 585, 125 P 1002 (1912).

The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. Power v. Helena, 43 M 336, 116 P 415 (1911).

School District Property: The property of a school district, devoted exclusively to public school purposes, is, in the absence of express constitutional or statutory exemption, liable for the payment of assessments made for special municipal improvements. Kalispell v. School District, 45 M 221, 122 P 742 (1912).

Constitutionality: Laws providing for the creation of special improvement districts and imposing a tax by way of assessment upon the property legislatively determined to be benefited are not open to the objection that they deprive the owner of his property without due process of law. McMillan v. Butte, 30 M 220, 76 P 203 (1904).

Attorney General's Opinions

Special Improvement Districts — Legal Services — City Controls: Because a special improvement district (SID) is a creature of statute, with the power to create it clearly vested in the city, a developer seeking creation of a special improvement district has no authority to

designate a private attorney to perform legal services in connection with the SID or to fix the fee for such legal services. 38 A.G. Op. 29 (1979).

Collateral References

Municipal Corporations *key* 269, 450(1), 451.

63 C.J.S. Municipal Corporations §§1042 through 1047, 1359, 1392.

56 Am. Jur. 2d Municipal Corporations §§226, 560.

Construction or improvement of sewers as a local or district improvement within provisions authorizing or requiring special assessments or other specified means of defraying expense. 134 ALR 895.

Constitutionality of classification of streets as regards source of payment for improvements. 127 ALR 1090.

Power to impose cost of maintenance for operation of street lighting system on local improvement district. 60 ALR 272.

7-12-4103. Formation of district to defray cost of acquiring private property.

Case Notes

Paying for Condemned Property Outside City Limits: In the absence of such a provision as contained in this section, the power of a municipality to create a special improvement district in a city for the construction of a project to protect city property from overflows would be implied on grounds of special necessity, and in such case, as well as where the power is expressly conferred, property in the special improvement district may properly be assessed for the purpose of paying for condemned property lying outside the city limits. Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

Collateral References

Municipal Corporations *key* 269, 450.

63 C.J.S. Municipal Corporations §§1042 through 1047, 1359.

56 Am. Jur. 2d Municipal Corporations §226.

7-12-4104. Resolution of intention to create special improvement district.

Compiler's Comments

1985 Amendment: In (2) inserted (d) requiring specification of assessment method; in (3) substituted "character of it in the resolution" for "character of the same"; and made minor changes in punctuation and phraseology.

Case Notes

Resolution Creating Special Improvement District — Not Subject to Referendum: A resolution creating a municipal special improvement district that encompasses less area than the municipal limits is not subject to referendum because the resolution affects only the people within the improvement district rather than the people of the municipality as a whole. The Supreme Court further held that the resolution creating a special improvement district is part of an administrative procedure, not a legislative action subject to referendum. Shelby v. Sandholm, 208 M 77, 676 P2d 178, 41 St. Rep. 186 (1984), distinguished in The Greens at Fort Missoula, LLC v. Missoula, 271 M 398, 897 P2d 1078, 52 St. Rep. 501 (1995).

Extended District: Besides those requirements enumerated in this section, the City Commission must take two additional steps under 7-12-4109 to have a valid resolution of intention for an "extended" district. Smith v. Bozeman, 144 M 528, 398 P2d 462 (1965).

Construction of Section: The words "approximate estimate" should not be construed liberally. Koich v. Helena, 132 M 194, 315 P2d 811 (1957).

Sufficiency of Resolution:

Plaintiffs unsuccessfully challenged in the District Court the validity of the creation by the City Council of a special improvement district (SID) to expand off-street parking in downtown Missoula. The SID was proposed to the City Council by the Parking Commission. Two alternatives were presented. One involved addition of parking spaces on three surface lots. The other involved addition of parking spaces on two lots and construction of a parking garage on a third lot. Both proposals entailed acquisition of the same parcels of land. The City Council then adopted, pursuant to this section, a resolution of intention to create an SID, including both alternative plans in the resolution. Written protests were filed, and opposition to creation of the SID was expressed at a public hearing. The City Council then adopted a resolution creating the SID. In the resolution, the general nature of the improvements was set forth in the alternative. On appeal, the Supreme Court ruled that the alternative structure of the resolution of intention did not deny property owners notice of the cost and nature of the proposed improvement. Nor

does this section preclude use of the alternative form. Stevens v. Missoula, 205 M 274, 667 P2d 440, 40 St. Rep. 1267 (1983).

Where improvement was amply covered by general description contained in resolution of intention, that waterworks were to be constructed outside of special improvement district for purpose of furnishing water for pipes laid in district, held sufficient, so far as concerns description of work chargeable to district. Lumbermen's Trust Co. v. Ryegate, 61 F2d 14 (9th Cir. 1931).

A resolution of intention to create a special improvement district, the title of which stated that it was a "resolution of intention", etc., and the body of which substantially contained the recitals required by statute and advised the taxpayers of the time and place where their objections to its creation would be heard, was sufficient as against the objection that in it the City Council had not declared its intention to create it. Aiken v. Glendive, 60 M 1, 197 P 1003 (1921).

Boundary: Under this section, a city has the power to fix the boundary of a special improvement district at any distance from the front line of a street and is not required to include the whole platted area of each lot. Ricker v. Helena, 68 M 350, 218 P 1049 (1923).

Discretion of Council:

In an action to set aside the proceedings of a City Council had in the creation of a special street improvement district and to enjoin the carrying out of a paving contract entered into, on the grounds that the city had joined in one district property abutting on several streets, that the character of work to be done on one street was different from that to be done on others, and that property on several streets would not be benefited by the paving on another, proceedings reviewed and held, in view of the power lodged in the City Council by this section to include in one district and in one contract any number of streets, any kind of work, etc., that the Council did not abuse its discretion. Ricker v. Helena, 68 M 350, 218 P 1049 (1923).

The City Council as a special tribunal to conduct the hearing is clothed with limited powers only, and no presumption in favor of its jurisdiction will be indulged. The statute measures its authority, and compliance with the terms of the statute is a condition precedent to the right to act. Johnston v. Hardin, 55 M 574, 179 P 824 (1919).

Departure From Resolution: Under a resolution of intention to create a special improvement district for the purpose of paving streets, with the necessary excavations, cutting, filling, etc., and "incidental work", held that defendant city was properly enjoined from entering into a contract the provisions of which departed substantially from the purposes set forth in the resolution, in that they included reduction in the street widths and the construction of new parking, curbing, and storm sewers, each of which constitutes a distinct city improvement under this section, and none of which was therefore subject to inclusion under the term "incidental work". Evans v. Helena, 60 M 577, 199 P 445 (1921).

Substantial Compliance: A resolution passed by the Town Council reciting the creation of an improvement district and that the resolution should be deemed one of intention to create, and creating it, followed by a description of its boundaries and of the character of the proposed improvements, with an estimate of the cost, etc., and that objections to its creation and the final adoption of the resolution would be heard in a certain place at a given time, held to have been in substantial compliance with statutory provisions. Harvey v. Townsend, 57 M 407, 188 P 897 (1920).

Boundary Description Incorrect: Where a resolution of intention to create a special improvement district described the boundaries of an entirely different district from that referred to in the notice served upon the owner of property affected, the City Council did not acquire jurisdiction to proceed with the improvement. Johnston v. Hardin, 55 M 574, 179 P 824 (1919).

Necessary Steps to Create Districts: The successive steps necessary to be taken by a City Council in the creation of special improvement district are: (1) the adoption of a resolution of intention; (2) the service of the required notice; (3) a hearing and determination against protests; and (4) the passage of a resolution creating the district. The first three of these steps are jurisdictional, and a failure to take any one of them is fatal to the proceedings. Johnston v. Hardin, 55 M 574, 179 P 824 (1919); Shapard v. Missoula, 49 M 269, 141 P 544 (1914).

Creation of District Without Resolution of Intention: Before a special improvement district can be created, the City Council must pass a resolution of intention to do so, give notice of its passage, etc. Where the Council, in an endeavor to create such a district, passed a resolution which proclaimed the creation of the district and an intention to assess the property liable for the cost of the improvement, the proceedings were void in limine for want of a proper resolution of intention. Cooper v. Bozeman, 54 M 277, 169 P 801 (1917).

Description of Boundaries: By a resolution to create a special improvement district described as being bounded by certain lots, such lots were not incorporated in but excluded from the proposed district. Lewistown v. Warr, 52 M 353, 157 P 953 (1916).

Purpose of Boundary Description: Proceedings for the imposition of a special improvement tax are in invitum, and before property can be held subject to the burden, it must be described with sufficient certainty that the owner cannot be misled, it being the intention of the statute that the resolution of intention shall contain a description of the proposed district by a line which marks its exterior boundaries. Lewistown v. Warr, 52 M 353, 157 P 953 (1916).

Resolution of Intention — Primary Step: The resolution of intention is the primary step to be taken in every instance and is the basis of the whole proceeding, the omission of which is fatal and renders all the subsequent proceedings nugatory. Shapard v. Missoula, 49 M 269, 141 P 544 (1914).

Collateral References

70A Am. Jur. 2d Special or Local Assessments §123.

7-12-4106. Notice of passage of resolution of intention.

Compiler's Comments

1995 Amendment: Chapter 229 in (1) substituted "the resolution of intention pursuant to 7-12-4104" for "such resolution"; in (2), at end of first sentence, substituted "as provided in 7-1-2121" for "for 5 days in a daily newspaper or in some one issue of a weekly paper published in the city or town or, in case no newspaper be published in such city, then by posting for 5 days in three public places in the city or town"; inserted (3)(b) concerning revolving fund; and made minor changes in style. Amendment effective March 24, 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

1985 Amendment: In (3), inserted "describe generally the method or methods by which the costs of the improvements will be assessed", before "protests" inserted "written", after "making" inserted "or acquisition", inserted last sentence requiring that notice state exact purchase price if proposal is for purchase of an existing improvement, and made minor changes in punctuation and phraseology.

Case Notes

Notice:

Landowners who appear before the City Council to protest the establishment of an improvement district do not thereby waive their right to restrain its establishment on the ground of defective publication of notice. Guffey v. Helena, 140 M 211, 369 P2d 803 (1962).

Parties who have either received notice or waived it by appearing to protest may not take advantage of the failure of notice to other parties who have neither protested nor appeared as parties to the suit. Shaw v. Kalispell, 135 M 284, 340 P2d 523 (1959), explained in Guffey v. Helena, 140 M 211, 369 P2d 803 (1962).

This section does not require the City Clerk to mail copies of the required notice to persons who are neither record owners nor personally known owners of an interest in property in the district, since they have been careless in failing to record their ownership. Shaw v. Kalispell, 135 M 284, 340 P2d 523 (1959), explained in Guffey v. Helena, 140 M 211, 369 P2d 803 (1962).

Failure of the notice mentioned in this section to refer to the resolution for a description of boundaries is insufficient to vitiate the proceedings. (See 1995 amendment as to notice requirements.) Harvey v. Townsend, 57 M 407, 188 P 897 (1920).

The caption of a notice is not part of the notice itself and cannot be looked to to supply any deficiency in the notice. Johnston v. Hardin, 55 M 574, 179 P 824 (1919).

In the absence of the statutory notice of the City Council's intention to create a special improvement district, plaintiff property owner was not called upon to act, an inference deducible from his complaint that he had actual knowledge that his property was to be included in the proposed district being insufficient. Johnston v. Hardin, 55 M 574, 179 P 824 (1919).

Publication of a notice of intention to create a special improvement district, which contained the proper reference to time and place for hearing objections to its final adoption, was sufficient. Allen v. Butte, 55 M 205, 175 P 595 (1918).

Purpose of Resolution: The essential purpose of a resolution of intention is to: (1) apprise the taxpayers that the city intends to propose a special improvement district; (2) describe the area

that will be encompassed in the district; (3) describe the type and character of improvements that will be included within the district; and (4) state the cost of the improvements to be made. Koich v. Helena, 132 M 194, 315 P2d 811 (1957).

Failure to Mail Notice: A special improvement district for the purpose of raising funds was void where one of the property owners affected was not mailed a notice. Wood v. Kalispell, 131 M 390, 310 P2d 1058 (1957).

Newspaper Publishing Five Days a Week Considered a Daily: The provision "must be published for five days in a daily newspaper" was met by publication for 5 consecutive days in a paper, which 5 days constituted all its publications for a week, it having been held that a newspaper published 5 days in the week is a "daily" in the popular sense. (See 1995 amendment.) Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

Collateral References

70A Am. Jur. 2d Special or Local Assessments §145.

Scope and import of term "owner" with respect to giving notice of making of public improvement. 95 ALR 1085, 1091.

7-12-4108. Responsibility for posting and publication of notice.

Case Notes

Error in Publication of Notice: Under this section, any error in or departure from the mode of publication of any notice incident to the creation of a special improvement district is insufficient to invalidate the proceedings when it appears that the notice was actually published for the time required by the act. Aiken v. Glendive, 60 M 1, 197 P 1003 (1921).

Collateral References

Municipal Corporations *key* 169, 294.

62 C.J.S. Municipal Corporations §544; 63 C.J.S. Municipal Corporations §1094.

7-12-4109. Extension of proposed district.

Compiler's Comments

1985 Amendment: In introduction after "improvement to" deleted "an extended district that may include other" and substituted "declares to be, together with the lots abutting the improvement, the property benefited" for "declares to be the district benefited".

Case Notes

Sufficiency of Resolution: Besides those requirements enumerated in 7-12-4104, the City Commission must take two additional steps under this section to have a valid resolution of intention for an "extended" district. Smith v. Bozeman, 144 M 528, 398 P2d 462 (1965).

Purpose of Assessment: Where a district was created for the purpose of paying for improvements at intersections as authorized by this section and another district was created under 7-12-4167 to defray the cost of the street where it abuts on privately owned property, there was in no sense double taxation. The assessments were for different purposes. One assessment was to raise money to defray the cost of the intersections and the other to defray the cost of the street where it abuts on privately owned property. Bidlingmeyer v. Deer Lodge, 128 M 292, 274 P2d 821 (1954).

Public Benefit: In an action to recover improvement taxes paid under protest, held that, this section not so providing, a resolution of intention to create an extended improvement district including lots not fronting on the improvement, for the purpose of installing water mains and fire protection apparatus, need not recite that the contemplated work was of more than local or ordinary public benefit, the adoption of the resolution being a sufficient finding that in the opinion of the City Council the proposed improvement was of that character. Almas v. Havre, 70 M 33, 223 P 896 (1924).

Collateral References

Municipal Corporations *key* 465.

63 C.J.S. Municipal Corporations §1417.

70A Am. Jur. 2d Special or Local Assessments §145.

7-12-4110. Protest against proposed work or district.

Compiler's Comments

2003 Amendment: Chapter 277 inserted (3) defining owner for purposes of this section; and made minor changes in style. Amendment effective July 1, 2003.

1985 Amendment: In (2) inserted "identify the property in the district owned by the protestor, and be signed by all the owners of the property. The protest must".

Case Notes

Construction of Section: The provision of this section that objections to a proposed special improvement shall be heard at the next regular meeting of the City Council after the expiration of the 15 days in which protest can be made is directory only. Harvey v. Townsend, 57 M 407, 188 P 897 (1920).

Collateral References

Municipal Corporations *key* 297(1), 299, 491.

63 C.J.S. Municipal Corporations §§1097, 1103, 1478.

70A Am. Jur. 2d Special or Local Assessments §§145 through 154.

Failure of property owner to avail himself of remedy provided by statute or ordinance as precluding attack based on improper inclusion of property in, or exclusion of property from, assessment. 100 ALR 1292.

Loss of right to contest an assessment in a street or sewer improvement or drainage proceeding. 9 ALR 634, 842.

7-12-4112. Hearing on protest.

Case Notes

Failure to Object at Hearing: A property owner failed to enter his objections to inclusion of his land in a special improvement district at a hearing held by the city for such purpose. For this reason he was estopped from maintaining an action to determine the question even though his property was so situated as to receive no benefit. Power v. Helena, 43 M 336, 116 P 415 (1911).

Collateral References

Municipal Corporations *key* 297, 299, 491.

63 C.J.S. Municipal Corporations §§1097, 1103, 1478.

70A Am. Jur. 2d Special or Local Assessments §§155 through 160.

7-12-4113. Sufficient protest to bar proceedings — exceptions.

Compiler's Comments

1985 Amendment: In introduction of (1) before "protest shall" deleted "sufficient" and after "commission when" deleted "the protest is against the proposed work and"; in (1)(a), at beginning deleted "the cost thereof is to be assessed against property fronting thereon and", inserted "property in the district to be assessed for", and substituted "cost of the proposed work, in accordance with the method or methods of assessment described in the resolution of intention" for "property fronting on the proposed work"; and in (3), inserted "property in the district to be assessed for", and substituted "cost of the district, in accordance with the methods of assessment described in the resolution of intention" for "property affected, as herein provided".

Case Notes

Determination of Area of Protest: The phrase, "the area of the property to be assessed", as used in this section to describe those persons entitled to protest creation of an improvement district, depends upon the method of assessment used by the city under 7-12-4161. Smith v. Bozeman, 144 M 528, 398 P2d 462 (1965).

Property Owned by City Also to Be Computed: In determining whether a given percentage of the owners of property affected by a proposed special improvement have filed protests against it, the City or Town Council is authorized by this section to take into consideration property owned by it and included in the district, such property being subject to assessment therefor the same as privately owned property. Ricker v. Helena, 68 M 350, 218 P 1049 (1923).

Withdrawal From Protest: A property owner in a city who has signed a protest against the creation of a special improvement district may, within the time allowed for presenting such protest, withdraw therefrom and thus defeat the protest. Hawley v. Butte, 53 M 411, 164 P 305 (1917).

Sufficiency of Protest: An alleged protest to street paving, filed by abutting owners, stating the reasons why they did not desire the paving done during a certain year and stating that they were willing to have the street paved 2 years later and that payment therefor should be required in three annual installments, was not an unqualified protest to the paving. McMillan v. Butte, 30 M 220, 76 P 203 (1904).

Attorney General's Opinions

No Referendum on Special Improvement Districts: A resolution creating a special improvement district under 7-12-4102 is not subject to repeal by referendum. 39 A.G. Op. 73 (1982).

Collateral References

Municipal Corporations *key* 297, 299, 491.
63 C.J.S. Municipal Corporations §§1097, 1103, 1478.
70A Am. Jur. 2d Special or Local Assessments §146.

7-12-4114. Resolution creating special improvement district.

Case Notes

Resolution Creating Special Improvement District — Not Subject to Referendum: A resolution creating a municipal special improvement district that encompasses less area than the municipal limits is not subject to referendum because the resolution affects only the people within the improvement district rather than the people of the municipality as a whole. The Supreme Court further held that the resolution creating a special improvement district is part of an administrative procedure, not a legislative action subject to referendum. Shelby v. Sandholm, 208 M 77, 676 P2d 178, 41 St. Rep. 186 (1984), distinguished in The Greens at Fort Missoula, LLC v. Missoula, 271 M 398, 897 P2d 1078, 52 St. Rep. 501 (1995).

Waiver of Claim for Damages: By failure of an objecting property owner to give notice of defects or irregularities in the proceedings to the Council within 60 days after the contract for the work is let, he waives all claim for damages under this section. Harvey v. Townsend, 57 M 407, 188 P 897 (1920).

Acquisition of Jurisdiction: It is only after the lapse of 15 days from the first publication of notice of intention to create an improvement district and after all protests have been disposed of adversely to objecting property owners that the City Council shall be deemed to have acquired jurisdiction to order the improvement. Shapard v. Missoula, 49 M 269, 141 P 544 (1914).

Attorney General's Opinions

Vacation of Street by Mayor-Council Government — Legal Effect on City's Interest in Street: Under this section, a municipality has the authority to close all or part of a street to through traffic without giving up its legal interest in the street or to vacate all or part of the street and revoke its legal interest in it. A municipality with a mayor-council form of government is bound by the procedures in this section rather than by 7-3-4448, which applies only to commission-manager forms of government, when it seeks to discontinue, close, or vacate a street. The choice between vacating a street and closing a street is a matter for the discretion of the municipal officers of a mayor-council form of government. 46 A.G. Op. 4 (1995), clarifying Wynia v. Great Falls, 183 M 458, 600 P2d 802 (1979).

No Referendum on Special Improvement Districts: A resolution creating a special improvement district under 7-12-4102 is not subject to repeal by referendum. 39 A.G. Op. 73 (1982).

Collateral References

Municipal Corporations *key* 301.
63 C.J.S. Municipal Corporations §1104.
70A Am. Jur. 2d Special or Local Assessments §138.

7-12-4115. Statement of allocation of assessments to improvements, repairs, and maintenance.

Collateral References

Municipal Corporations *key* 887.
64 C.J.S. Municipal Corporations §1884.
70A Am. Jur. 2d Special or Local Assessments §139.

7-12-4116. Designation of nature of improvement district.

Collateral References

Municipal Corporations *key* 887.
64 C.J.S. Municipal Corporations §1884.

7-12-4118. Adjournment of hearings.

Collateral References

Municipal Corporations *key* 298, 402, 455, 491.
63 C.J.S. Municipal Corporations §§1102, 1270, 1399, 1478.

7-12-4119. Appointment of person to serve as city engineer.

Collateral References

Municipal Corporations *key* 265.
63 C.J.S. Municipal Corporations §1036.

7-12-4120. Provision for municipalities not having mayor.

Collateral References

Municipal Corporations *key* 265.
63 C.J.S. Municipal Corporations §1036.

7-12-4121. Record of expenses to be kept by city engineer.

Collateral References

Municipal Corporations *key* 460.
63 C.J.S. Municipal Corporations §§1411, 1412.

7-12-4122. Role of city clerk.

Collateral References

Municipal Corporations *key* 460.
63 C.J.S. Municipal Corporations §§1411, 1412.

Liability of clerk of court, county clerk or prothonotary or surety on bond, for negligent or wrongful acts of deputies or assistants. 71 ALR 2d 1140.

7-12-4123. Manner of making demands for incidental expenses.

Compiler's Comments

1985 Amendment: Inserted "except the administrative fee of the city and interest payable on warrants or bonds of the district".

Collateral References

Municipal Corporations *key* 265.
63 C.J.S. Municipal Corporations §1036.

7-12-4124. Water user entities exempt from special assessments.

Compiler's Comments

Applicability: Section 5, Ch. 276, L. 1987, provided in part: ". . . This act applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1986. . . . This act does not apply to any special assessments for the repayment of bonded indebtedness incurred before the effective date of this act if the bonds were issued on representations that the property exempted from special assessments by this act would be liable for repayment of the bonded indebtedness."

7-12-4131. Modification of trafficways and courts for special improvement districts.

Collateral References

Municipal Corporations *key* 269(3).
63 C.J.S. Municipal Corporations §1046.

7-12-4132. Power to require underground placement of utilities within district.

Compiler's Comments

1993 Amendment: Chapter 250 at beginning of (1) inserted "Unless the purpose of the special improvement district is the conversion of existing overhead utilities to an underground location"; at end of (2) substituted "costs incurred" for "sum of $1.50 per lineal foot plus the cost of the pipe"; and made minor changes in style. Amendment effective July 1, 1993.

Collateral References

Municipal Corporations *key* 269, 450.
63 C.J.S. Municipal Corporations §§1042 through 1047, 1359.

Underground conduits for electric wires as local improvements supporting special assessments. 66 ALR 1389.

7-12-4133. Power to require certain utility connections.

Case Notes

Sewer District Not Local Self-Governing Unit: The lower court granted a multicounty sewer district's motion for summary judgment, ruling that the district had the right to impose hookup

inspection fees on the appellant, Seypar, Inc. Seypar, Inc., argued that the district did not have the authority to impose the fee against individual property owners and that the cost should have been assessed against the whole district. The Supreme Court ruled that although state law gave the district the same administrative powers as County Commissioners have over a single county sewer district, those powers are not the same as a local self-governing unit and therefore the district did not have the authority to exercise any power not prohibited by Montana law. The Supreme Court stated that since the district was not self-governing, it could not argue that the statutes relating to municipal districts applied to it by analogy. The Supreme Court held that the district did have the power to impose hookup fees under 7-12-2151. Seypar, Inc. v. Water & Sewer District No. 363, 1998 MT 149, 289 M 263, 960 P2d 311, 55 St. Rep. 578 (1998).

Collateral References

Municipal Corporations *key* 293.

63 C.J.S. Municipal Corporations §§1092 through 1096.

7-12-4136. Maintenance of improvements.

Compiler's Comments

Section Not Codified: Part of section 11-2224, R.C.M. 1947, concerning the liquidation of floating indebtedness existing on June 30, 1943, was not codified in the MCA. This part has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 124, L. 1943.

Collateral References

Municipal Corporations *key* 449(1) through (3), 678.

63 C.J.S. Municipal Corporations §1391; 64 C.J.S. Municipal Corporations §1693.

7-12-4137. Protest procedures for property created as condominium.

Compiler's Comments

Effective Date: Section 24, Ch. 277, L. 2003, provided: "[This act] is effective July 1, 2003."

7-12-4141. Bid for work — exception.

Compiler's Comments

2001 Amendment: Chapter 354 in (2) at end substituted "as provided in 7-1-4127" for "at least twice in a daily, semiweekly, or weekly newspaper published and circulated in the city and designated by the council for that purpose, and in case there is no newspaper published in the city, then it must be posted in at least three public places". Amendment effective October 1, 2001.

1993 Amendment: Chapter 250 at beginning of (1) inserted exception clause; in first sentence of (3) changed time for opening bids from not less than 10 days to not less than 5 days or more than 12 days and inserted second sentence requiring elapse of 15 days if advertisement is made by posting; inserted (4) requiring that certain conversion work be done by the responsible public utility; and made minor changes in style. Amendment effective July 1, 1993.

Case Notes

Notice for Bids: Contracts for the construction of special street improvements, let without first giving 10 days' notice for bids and more than 9 months after the award, were invalid as in contravention of the provisions of this section. (See 1993 and 2001 amendments.) Cooper v. Bozeman, 54 M 277, 169 P 801 (1917).

Collateral References

Municipal Corporations *key* 331.

63 C.J.S. Municipal Corporations §1147.

64 Am. Jur. 2d Public Works and Contracts §§30 through 81.

Waiver of competitive bidding requirements for state and local public building and construction contracts. 40 ALR 4th 968.

Right of bidder for state or municipal contract to rescind bid on ground that bid was based upon his own mistake or that of his employee. 2 ALR 4th 991.

Liability of municipality on quasi contract for value of property or work furnished without compliance with bidding requirements. 33 ALR 3d 1164.

Statute requiring competitive bidding for public contract as affecting validity of agreement, subsequent to the award of the contract, to allow the contractor additional compensation for extras or additional labor and material not included in the written contract. 135 ALR 1265.

Change in proposals for public contract after submission of bid as justification for withdrawal of bid or refusal to enter into contract. 104 ALR 1149.

Right in submitting proposal for bids on public works to require bid on unit basis, with reservation to public authorities of right to determine amount or extent of work. 79 ALR 225.

Bidder's variation from specifications on bid for public work. 65 ALR 835.

7-12-4142. Opening of bids.

Compiler's Comments

1989 Amendment: At end, following "city council", substituted "in the notice inviting bid proposals made pursuant to 7-12-4141" for "at the previous council meeting".

Collateral References

Municipal Corporations *key* 331.

63 C.J.S. Municipal Corporations §1147.

7-12-4143. Decision on award of contract.

Collateral References

Municipal Corporations *key* 331.

63 C.J.S. Municipal Corporations §1147.

64 Am. Jur. 2d Public Works and Contracts §§63 through 66.

Labor conditions or relations as factor in determining lowest responsible bidder for public contract or as factor in determining whether public contract should be let to lowest bidder. 110 ALR 1406.

Right to award public contract to one other than lowest financial bidder as affected by fact that bidder furnishes bond. 86 ALR 131.

Mandamus to compel consideration, acceptance, or rejection of bids for public contract. 80 ALR 1382.

Evasion of law requiring contract for public work to be let to lowest responsible bidder by subsequent changes in contract after it has been awarded pursuant to that law. 69 ALR 697.

7-12-4144. Procedure if all bids rejected or no bids received.

Collateral References

Municipal Corporations *key* 331.

63 C.J.S. Municipal Corporations §1147.

64 Am. Jur. 2d Public Works and Contracts §§75 through 78.

7-12-4145. Procedure for dealing with bid securities.

Compiler's Comments

1985 Amendment: In (2) increased percentage of frontage owners from 50% to 75%.

Collateral References

Municipal Corporations *key* 331.

63 C.J.S. Municipal Corporations §1147.

64 Am. Jur. 2d Public Works and Contracts §60.

7-12-4146. Retroactive application of bid procedures.

Collateral References

Municipal Corporations *key* 331.

63 C.J.S. Municipal Corporations §1147.

7-12-4147. Procedure for property owners to do improvement work.

Collateral References

Municipal Corporations *key* 281(1).

63 C.J.S. Municipal Corporations §1070.

7-12-4148. Contract with successful bidder.

Collateral References

Municipal Corporations *key* 281.

63 C.J.S. Municipal Corporations §1070.

64 Am. Jur. 2d Public Works and Contracts §§63 through 66.

7-12-4149. Procedure if successful bidder does not enter into contract.

Collateral References

Municipal Corporations *key* 337.

63 C.J.S. Municipal Corporations §1153.

64 Am. Jur. 2d Public Works and Contracts §§79 through 81.

7-12-4150. Effect of failure to enter contract.

Collateral References

Municipal Corporations *key* 337.

63 C.J.S. Municipal Corporations §1153.

7-12-4151. Contractor's bond for successful completion of work.

Collateral References

Municipal Corporations *key* 345, 346.

63 C.J.S. Municipal Corporations §1171.

64 Am. Jur. 2d Public Works and Contracts §§99 through 104.

Validity of municipality's ban on construction until public facilities comply with specific standards. 92 ALR 3d 1073.

Right of person furnishing material or labor to maintain action on contractor's bond. 118 ALR 57; 77 ALR 21.

7-12-4152. Procedure if person entering contract defaults on work.

Collateral References

Municipal Corporations *key* 366, 367.

63 C.J.S. Municipal Corporations §1201.

64 Am. Jur. 2d Public Works and Contracts §§105 through 136.

Validity and and construction of "no damage" clause with respect to delay in building or construction contract. 74 ALR 3d 187.

7-12-4161. Choice in manner of assessing costs.

Compiler's Comments

1985 Amendment: In (1), substituted "of making or acquiring" for "of the making of", inserted "including incidental expenses", and "for each improvement to be made or acquired for the benefit of the district"; and in (2) substituted language allowing city council to use multiple methods of assessment and to have flexibility in assessing for more than one improvement for "The method of assessment provided for in 7-12-4163 shall not apply to assessments in improvement districts created under the provisions of 7-12-4109."

Case Notes

Method of Assessment: Since there is a direct correlation between this section and 7-12-4112, as expressed in the phrase, "the area of the property to be assessed", the method of assessment used by the city governs the basis for determining those persons entitled to protest creation of an improvement district. Smith v. Bozeman, 144 M 528, 398 P2d 462 (1965).

Double Taxation: Where a district was created for the purpose of paying for improvements at intersections as authorized by 7-12-4109 and another district was created to defray the cost of the street under this section, there was in no sense double taxation. The assessments were for different purposes. One assessment was to raise money to defray the cost of the intersections and the other to defray the cost of the street where it abuts on privately owned property. Bidlingmeyer v. Deer Lodge, 128 M 292, 274 P2d 821 (1954).

Collateral References

Municipal Corporations *key* 406(1).

63 C.J.S. Municipal Corporations §1294.

70A Am. Jur. 2d Special or Local Assessments §§102 through 110.

Requirement of full-value real property taxation assessments. 42 ALR 4th 676.

Adjacent property: widening of city street as local improvement justifying special assessment of adjacent property. 46 ALR 3d 1276.

Effect of certificate or statement of treasurer or other public official regarding unpaid taxes or assessments against specific property. 21 ALR 2d 1273.

Personal liability of property owner to pay assessments for local improvements. 167 ALR 1030; 127 ALR 551.

Duration of lien of special assessment and period of limitation of action for its enforcement as affected by adoption of installment plan of payment. 114 ALR 399.

Right of taxpayer to anticipate payment of tax or special improvement assessment for deferred installments thereof. 96 ALR 1475.

7-12-4162. Assessment of costs — area option — assessed valuation option — equal amount option.

Compiler's Comments

1993 Amendment: Chapter 269 inserted (3) allowing each lot or parcel of land to be assessed an equal amount of the cost of the improvement.

1987 Codification: Section 5, Ch. 631, L. 1987, concerning city council or city commission assessment of the cost of an improvement, was codified as subsection (2) of 7-12-4162.

1985 Amendment: In (1), in first sentence substituted "an improvement against benefited property in the district" for "such improvements against the entire district", before "within such district" inserted "assessed", inserted "assessable" in two places, inserted "all benefited lots or parcels in", and inserted second and third sentences defining assessable area and providing size limitations of assessable area; in (2) before "property" inserted "benefited"; and in (3) in two places before "land", inserted "benefited".

Case Notes

Failure to Prove Mistake or Fraud in City Determination of Boundary of Special Improvement District — Summary Judgment Proper: The city of Missoula included plaintiffs' property in a storm sewer drainage special improvement district, and plaintiffs filed a complaint, alleging that pursuant to this section, they could not be included in the special improvement district absent some benefit to them from the proposed system. The District Court heard contradicting evidence on the question of benefit, but concluded that plaintiffs failed to produce evidence of mistake or fraud as required in Stevens v. Missoula, 205 M 274, 667 P2d 440 (1983), and summarily dismissed plaintiffs' complaint. The Supreme Court affirmed. Under Stevens, a city's determination of benefit and creation of special improvement district boundaries is conclusive absent proof of mistake or fraud that precludes the exercise of sound judgment. Plaintiffs did not satisfy the threshold requirement in Stevens and thus could not prevail even if the facts articulated in the complaint were true. Enger v. Missoula, 2001 MT 142, 306 M 28, 29 P3d 514 (2001).

Estoppel to Protest: The question of estoppel under 7-12-4176 does not preclude a property owner from protesting a figure used as the "assessable area" in a resolution of intention for purposes of determining the sufficiency of the protest under 7-12-4113, since it applies only to the actual assessment as stated in the resolution of assessment. Smith v. Bozeman, 144 M 528, 398 P2d 462 (1965).

Collateral References

Municipal Corporations *key* 406.

63 C.J.S. Municipal Corporations §1294.

70A Am. Jur. 2d Special or Local Assessments §§100, 101.

7-12-4163. Assessment of costs — frontage option.

Compiler's Comments

1985 Amendment: In (1) substituted "cost of an improvement against benefited lots or parcels in the district" for "cost of such improvements against the entire district"; and near end of (2), before "property", inserted "benefited".

Collateral References

Municipal Corporations *key* 406.

63 C.J.S. Municipal Corporations §1294.

70A Am. Jur. 2d Special or Local Assessments §§102 through 105.

7-12-4164. Assessment of costs — utility service connections — option.

Compiler's Comments

1985 Amendment: At beginning deleted "Where curbs, gutters, alley approaches, streets, crossings, and utility service connections are an integral part of the creation of storm sewer districts, sanitary sewer districts, or street pavement districts"; after "commission may assess" deleted "a portion of the improvements upon the area basis as set forth under 7-12-4162, other portions of the improvements upon a lineal-feet basis as set forth under 7-12-4163"; substituted "and assess only the lots" for "and assessed only against the lots"; and made minor changes in phraseology.

Collateral References

Municipal Corporations *key* 406.

63 C.J.S. Municipal Corporations §1294.

70A Am. Jur. 2d Special or Local Assessments §§92 through 99.

7-12-4165. Assessment of costs — offstreet parking option.

Compiler's Comments

1985 Amendment: In (1) near end inserted "benefited".

Collateral References

Municipal Corporations *key* 406.
63 C.J.S. Municipal Corporations §1294.
70A Am. Jur. 2d Special or Local Assessments §§92 through 99.

7-12-4167. Provision for grading street by owner of abutting property.

Collateral References

Municipal Corporations *key* 406.
63 C.J.S. Municipal Corporations §1294.

7-12-4169. Incidental expenses considered as cost of improvements — costs for bonds or warrants secured by revolving fund — district reserve account.

Compiler's Comments

1997 Amendment: Chapter 459 substituted (3)(e) concerning use of district reserve for former text that read: "Money remaining in the district reserve account after the principal and interest on all bonds and warrants drawn on the district have been paid or discharged must be transferred to the revolving fund."

1995 Amendment: Chapter 229 in (1), at beginning, substituted "Incidental expenses" for "The costs and expenses connected with and incidental to" and near end, after "cost", deleted "and expenses"; in (2), at beginning, inserted "If the bonds or warrants are secured by the revolving fund under 7-12-4225" and substituted "must include an amount equal to 5%" for "may at the option of the municipal governing body, include an amount not to exceed 5%"; inserted (3) concerning district reserve account; inserted (4) concerning additional security from real property owners; and made minor changes in style. Amendment effective March 24, 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

1985 Amendment: In (1) inserted "and the other incidental expenses described in 7-12-4101(7)".

1981 Amendment: Inserted (2) relating to revolving fund deposit.

Case Notes

City Ordinance Requiring Developer Surcharge — Valid Exercise of Self-Governing Power: A city ordinance imposing a 5% surcharge on developers of raw land prior to creation of a special improvement district was a valid exercise of the city's self-governing powers. Diefenderfer v. Billings, 223 M 487, 726 P2d 1362, 43 St. Rep. 1934 (1986).

Collateral References

Municipal Corporations *key* 460.
63 C.J.S. Municipal Corporations §§1411, 1412.
70A Am. Jur. 2d Special or Local Assessments §86.

7-12-4170. Payment of damages incurred as a result of improvements.

Collateral References

Municipal Corporations *key* 402.
63 C.J.S. Municipal Corporations §1264.

7-12-4171. Treatment of corner lots for purposes of assessment.

Collateral References

70A Am. Jur. 2d Special or Local Assessments §111.

7-12-4173. Status of federal property within improvement district.

Collateral References

Municipal Corporations *key* 406.
63 C.J.S. Municipal Corporations §1294.
70A Am. Jur. 2d Special or Local Assessments §§60, 62.

7-12-4174. Inclusion and assessment of unplatted, undedicated, or unsurveyed land in improvement district — inclusion of condominium property.

Compiler's Comments

2003 Amendment: Chapter 277 inserted (2) concerning assessment of condominium units; and made minor changes in style. Amendment effective July 1, 2003.

Collateral References

Municipal Corporations *key* 450(2).

63 C.J.S. Municipal Corporations §1362.

Enforceability, against undivided tract, of tax or special assessment levied against part of it at one rate and part at another. 112 ALR 73.

7-12-4175. Offstreet parking option — ordinance setting forth method of assessment required — hearing.

Compiler's Comments

1981 Amendment: Inserted "for the establishment or improvement of offstreet parking" in (1); deleted "the provisions of 7-12-4161 through" before "7-12-4165" in (1); substituted "in" for "as set forth in 7-12-4161 through" before "7-12-4165" in (1); deleted "by the council or commission" after "ordinance" in (2); deleted "as set forth above" after "assessment" in (2); made minor changes in grammar and phraseology.

Collateral References

Municipal Corporations *key* 406.

63 C.J.S. Municipal Corporations §1294.

7-12-4176. Resolution for tax levy upon district property.

Compiler's Comments

1985 Amendment: In (1) near beginning inserted "or acquiring", in middle inserted "benefited", substituted "the method or methods" for "one of the methods", and inserted "and described in the resolution of intention".

Law Review Articles

Financing America's Public Infrastructure: Issues for Local Governments, 22 Akron L. Rev. 381 (1989).

Collateral References

Municipal Corporations *key* 406, 455, 449(3).

63 C.J.S. Municipal Corporations §§1294, 1391, 1399.

Liability of municipality in consequence of its inability, refusal, or failure to collect the cost of local improvements from the property benefited. 172 ALR 1030; 51 ALR 973; 38 ALR 1271.

Personal liability of property owner to pay assessments for local improvements. 167 ALR 1030; 127 ALR 551.

Prohibition to prevent levy of assessments. 159 ALR 627; 115 ALR 3, 20.

Right of landowner to recover back benefit assessments, upon ground of abandonment of improvement project. 145 ALR 1129.

Constitutionality of statutes relieving property subject to assessment for improvement from all or part of such assessment. 105 ALR 1169.

Property unit for purposes of assessment for street or other local improvement as affected by owner's disregard of original lot lines or creation of new ones. 104 ALR 1049.

Homestead as subject to assessment for local improvements. 79 ALR 712.

Liability of abutting property to assessment for street paving as affected by character or extent of traffic. 73 ALR 1295.

Cemetery property and cemetery lots as subject to assessment for public improvement, in absence of express exemption. 71 ALR 322.

Assessments for improvements by the front-foot rule. 56 ALR 941.

Validity and effect of condition of dedication that remaining property shall not be subject to assessments for improvements. 37 ALR 1357; 16 ALR 499.

7-12-4177. Notice of resolution for tax levy — protest and hearing.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) after "subject to inspection" deleted "for a period of 10 days"; in (1)(a) substituted "as provided in 7-1-4127" for "at least once in a newspaper published

in the city or town"; in (2) in last sentence before "publication" inserted "final"; and made minor changes in style. Amendment effective October 1, 2001.

1985 Amendment: In (1) increased inspection period from 5 days to 10 days; inserted (1)(b) and (1)(c) relating to mailing notice to owners and to those with an ownership interest; and in (2), increased the hearing period from 5 days to 10 days, and inserted "and mailing".

Collateral References

Municipal Corporations *key* 455.

63 C.J.S. Municipal Corporations §1399.

Failure of property owner to avail himself of remedy provided by statute or ordinance as precluding attack based on improper inclusion of property in, or exclusion of property from, assessment. 100 ALR 1292.

Loss of right to contest an assessment in a street or sewer improvement or drainage proceeding. 9 ALR 634, 842.

7-12-4178. Hearing on resolution for tax levy.

Case Notes

Estoppel to Protest: The question of estoppel under this section does not preclude a property owner from protesting a figure used as the "assessable area" in the resolution of intention for purposes of determining the sufficiency of the protest under 7-12-4113, since it applies only to the actual assessment as stated in the resolution of assessment. Smith v. Bozeman, 144 M 528, 398 P2d 462 (1965).

Collateral References

Municipal Corporations *key* 455.

63 C.J.S. Municipal Corporations §1399.

7-12-4179. Payment of maintenance costs — resolution for assessment.

Compiler's Comments

1985 Amendment: In (1), inserted "each of" and "the benefited properties of", and before "district" deleted "entire".

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§403 through 425.

7-12-4180. Improvement district maintenance fund.

Collateral References

Municipal Corporations *key* 449, 678.

63 C.J.S. Municipal Corporations §1391; 64 C.J.S. Municipal Corporations §1693.

64 Am. Jur. 2d Public Securities and Obligations §§403 through 425.

7-12-4181. Collection of district assessments by county clerk — certification.

Compiler's Comments

2001 Amendment: Chapter 278 in (1) near middle after "collected by the county treasurer" deleted "in accordance with the provisions of 7-6-4407" and near middle after "town clerk to the county clerk" deleted "as required by 7-6-4407"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1993 Special Session Amendment: Chapter 27 in (1), near end, substituted "department of revenue" for "county assessor of the county in which such city or town is situated"; in (2) substituted "The department of revenue shall enter the special assessments and taxes upon the property tax record for the county" for "The county assessor shall thereupon enter same upon the assessment roll of the county"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Case Notes

Collection by City Treasurer: Assessments for special city improvements which under this section the County Treasurer is required to collect, held to fall within the meaning of the words "tax" and "taxes" as employed in 7-6-4413, making it the duty of the County Treasurer to collect city taxes where a city has not imposed that duty upon its own Treasurer. State ex rel. Wolf Point v. McFarlan, 78 M 156, 252 P 805 (1927).

Attorney General's Opinions

Duty of County Treasurer to Break Out Amount Received as Payment for City Special Improvement District Assessments: A County Treasurer, when remitting taxes to a city, must break out the amount received from taxpayers as payment for the city's special improvement district assessments. 43 A.G. Op. 48 (1989).

Collateral References

Municipal Corporations *key* 528.

63 C.J.S. Municipal Corporations §1583.

70A Am. Jur. 2d Special or Local Assessments §§187 through 198.

Tax assessor's civil liability to taxpayer for excessive or improper assessment of real property. 82 ALR 2d 1148.

7-12-4182. Collection of district assessments by city treasurer in cities collecting their own taxes — delinquencies.

Compiler's Comments

1989 Amendment: Inserted last sentence of (2)(a) authorizing withdrawal of accelerated delinquency assessments; and made minor changes in form and phraseology. Amendment effective April 5, 1989.

Saving Clause: Section 17, Ch. 449, L. 1989, was a saving clause.

Severability: Section 18, Ch. 449, L. 1989, was a severability clause.

1987 Amendment: At beginning of (2), after "When", changed "one" to "the", after "payment" inserted "of an installment of a special assessment", after "all payments" substituted "of subsequent installments may" for "shall", before "appropriate" substituted "upon adoption of the" for "by", after "resolutions" deleted "duly adopted", at beginning of second sentence inserted "Upon delinquency in one or all installments", and inserted last sentence concerning lien enforcement.

Applicability: Section 16, Ch. 617, L. 1987, provided: "This act applies to the enforcement of all outstanding and future tax and assessment liens except those installments of outstanding special assessments that are delinquent and have been the subject of a sale for delinquent taxes or assessments before the effective date of this act." Effective April 27, 1987.

Severability: Section 15, Ch. 617, L. 1987, was a severability section.

Attorney General's Opinions

Acceleration of Future Installments of Special Assessments Upon Delinquency: A city whose taxes are collected by the county has statutory authority to accelerate future installments of special assessments when one installment becomes delinquent. 42 A.G. Op. 82 (1988).

Collateral References

Municipal Corporations *key* 530, 548.

63 C.J.S. Municipal Corporations §1585.

70A Am. Jur. 2d Special or Local Assessments §§187 through 198.

Personal liability of property owner to pay assessments for local improvements. 167 ALR 1030; 127 ALR 551.

Applicability of statute of limitations to action to enforce special assessments as affected by question whether imposition or enforcement of the assessment is an exercise of a governmental function. 136 ALR 572.

Right of mortgagor or purchaser of equity of redemption to defeat lien of mortgage by acquisition of title at sale subsequent to mortgage for nonpayment of assessment for local improvement. 134 ALR 289.

When statute of limitation commences to run in actions to recover taxes because of omission of property from tax list. 131 ALR 822, 824.

Duration of lien of special assessment and period of limitation of action for its enforcement as affected by adoption of installment plan of payment. 114 ALR 399.

Forfeiture or sale of land to state or political subdivision for nonpayment of taxes as suspending right to enforce special assessment or improvement lien or running of limitation in that regard. 113 ALR 920.

Power and duty to include in a periodical special assessment the amount of a deficiency for a previous period resulting from delinquent assessments which may eventually be paid. 96 ALR 1275.

Enforcement of assessment by sale of railroad right-of-way. 82 ALR 425, 431.

Prior judgment as precluding reassessment for public improvement. 60 ALR 513.

Power of municipality to transfer or assign its right to enforce assessment or lien for local improvements. 55 ALR 667.

7-12-4183. Collection of district assessments by city treasurer in cities where county collects taxes.

Compiler's Comments

2001 Amendment: Chapter 278 in (1) in first sentence after "by the county treasurer in accordance with the provisions of" deleted "7-6-4407 and"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 64, Ch. 278, L. 2001, provided: "[This act] applies to special purpose districts beginning July 1, 2002."

1989 Amendment: In (2)(a) inserted last sentence authorizing the withdrawal of accelerated assessments; and made minor changes in phraseology. Amendment effective April 5, 1989.

Saving Clause: Section 17, Ch. 449, L. 1989, was a saving clause.

Severability: Section 18, Ch. 449, L. 1989, was a severability clause.

1987 Amendment: In (2) inserted last sentence concerning lien enforcement.

Applicability: Section 16, Ch. 617, L. 1987, provided: "This act applies to the enforcement of all outstanding and future tax and assessment liens except those installments of outstanding special assessments that are delinquent and have been the subject of a sale for delinquent taxes or assessments before the effective date of this act." Effective April 27, 1987.

Severability: Section 15, Ch. 617, L. 1987, was a severability section.

Attorney General's Opinions

Application of Sale Proceeds to Delinquent Special Improvement District Assessments: A County Treasurer may not require delinquent special improvement district assessments to be paid in addition to the sale price of tax deed land because when a tax deed is issued, special assessment liens that were due and payable at that time are extinguished. However, the County Treasurer must apply the sale proceeds of the land to delinquent assessments, as provided in 7-8-2306. 45 A.G. Op. 24 (1994).

Acceleration of Future Installments of Special Assessments Upon Delinquency: A city whose taxes are collected by the county has statutory authority to accelerate future installments of special assessments when one installment becomes delinquent. 42 A.G. Op. 82 (1988).

Payment of Delinquent Taxes, Including Special Assessments, to Effect Assignment of Rights: Under 15-17-303 (since repealed), an assignee must pay the amount for which the property was bid at the tax sale, and no provision is included for an assignment following partial payment of the delinquent general taxes, excluding unpaid special assessments, which are treated the same as general taxes under 7-12-4183. Therefore, a city must pay all delinquent taxes, including special assessments, to a county to effect an assignment of the rights of the county in property struck off following a tax sale. 41 A.G. Op. 77 (1986).

Payment of Special Assessments Due Prior to Deed Issuance: Following the issuance of a tax deed to a county, the county is not responsible for payment of delinquent special assessments, accelerated under authority of 7-12-4183, due prior to issuance of the deed. 41 A.G. Op. 77 (1986).

Collateral References

70A Am. Jur. 2d Special or Local Assessments §§187 through 198.

7-12-4184. Reinstatement of delinquent assessment.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (1), near end, substituted "property tax record" for "assessment book"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Collateral References

Municipal Corporations *key* 522.

63 C.J.S. Municipal Corporations §1573.

7-12-4185. Payment of tax under protest — action to recover.

Case Notes

Recovery of Tax Paid Under Protest: Plaintiff, in an action to recover a special improvement tax paid under protest, need not allege in the complaint that his claim had been presented to the City or Town Council for allowance before action was commenced, this section not contemplating

presentation thereof as a condition precedent to his right to maintain the action. Harvey v. Townsend, 57 M 407, 188 P 897 (1920).

Collateral References

Municipal Corporations *key* 523(4), (5).

63 C.J.S. Municipal Corporations §1575.

70A Am. Jur. 2d Special or Local Assessments §§227 through 230.

Personal liability of tax collector of state or its subdivision for illegal taxes collected. 14 ALR 2d 383.

7-12-4186. Procedure to correct assessment and relevy and collect tax.

Compiler's Comments

Section Not Codified: Part of section 11-2238, R.C.M. 1947, a validation clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 28, Ch. 89, L. 1913.

Case Notes

Reassessments: This section does not authorize reassessments to make up for delinquent assessments. State ex rel. Truax v. Lima, 121 M 152, 193 P2d 1008 (1948).

Construction of Section: This section does not authorize the reassessment of any of the property in a special improvement district to make up for delinquent assessments against other property. Its provisions have to do with the correction of invalid or erroneous assessment by reassessment. A reassessment cannot be made unless authorized by statute, and then only in the manner provided. School District v. Helena, 87 M 300, 287 P 164 (1930).

Collateral References

Municipal Corporations *key* 514(1), (2).

63 C.J.S. Municipal Corporations §1541.

Statute authorizing or requiring reassessment for public improvement when original assessment is invalid or void as applicable when proceedings leading to original assessment were without jurisdiction. 83 ALR 1190.

Prior judgment as precluding reassessment for public improvement. 60 ALR 513.

7-12-4187. Certain errors not to invalidate assessments and liens.

Collateral References

Municipal Corporations *key* 479, 480.

63 C.J.S. Municipal Corporations §1439.

7-12-4188. Due date for district assessments.

Compiler's Comments

1985 Amendment: In (1) after "payable" substituted requirements for installments payable by 5 p.m. November 30 and May 31 for "on or before 5 p.m. on November 30 of each year except as provided in subsection (2).

(2) The governing body of a municipality may provide by resolution that one-half of the payment on special assessments or installments of special assessments may be deferred to no later than 5 p.m. on May 31 of the following year"; and in (2) changed "date" to "dates".

1981 Amendment: In (1) changed the time of payment from "6" to "5" p.m.; at end of (3) substituted "delinquent property taxes under 15-16-102" for "are or may hereafter be provided by the laws of Montana for other delinquent taxes".

Collateral References

Municipal Corporations *key* 518(1), 524.

63 C.J.S. Municipal Corporations §§1578, 1579.

7-12-4189. Simple interest on assessments.

Compiler's Comments

2001 Amendment: Chapter 162 in (1) at beginning inserted exception clause; in (1)(b) at end inserted "at the time the assessment is levied each fiscal year"; inserted (3) providing that while any bonds or warrants secured by assessments bear interest at a variable rate, the installments of assessments remaining unpaid must bear simple interest at an annual rate equal to the sum of 1% a year, plus the interest rate payable on the outstanding bonds or warrants of the rural special improvement district at the time the assessment is levied each fiscal year, plus, to the extent that the interest rate on the bonds or warrants is then less than the maximum rate prescribed for them or if there is no prescribed maximum rate, up to an additional 1% a year, as

may be prescribed by the board of county commissioners in the resolution authorizing the issuance or sale of the bonds or warrants; and made minor changes in style. Amendment effective March 28, 2001.

1995 Amendment: Chapter 229 in (1) substituted "equal to" for "not exceeding"; inserted (1)(c) concerning additional 1/2 of 1%; inserted (2) concerning reduction or elimination of additional interest rate; and made minor changes in style. Amendment effective March 24, 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

1985 Amendment: Near end of (1), after "charged", inserted remainder of subsection providing a vote not exceeding 1/2 of 1% over that payable on the district's bonds or warrants.

Collateral References

Municipal Corporations *key* 518(1).

63 C.J.S. Municipal Corporations §1578.

7-12-4190. Payment of assessments in installments.

Compiler's Comments

1987 Amendment: In (2), at beginning, substituted "The assessments are payable" for "If the bonds of the special improvement district are issued as serial bonds, the assessments must be payable", in two places, before "installments", substituted "semiannual" for "annual", and after first "installments" substituted reference to principal with interest on unpaid installments and resolution of city council or commission authorizing issuance of special improvement district bonds for "If the bonds are issued as amortization bonds, the assessments must be payable".

1985 Amendment: In (1), after "cost of" inserted "acquiring or" and after "years" deleted "payments to be made in equal annual installments"; inserted (2) relating to payment in installments; and inserted (3) relating to prepayment of assessments.

Case Notes

Assessments to Include Interest to Maturity: Special improvement district bonds are not general obligations of the city, and their payment is strictly limited to the fund provided by statute and ordinance; the lien of the assessments extends to each lot or parcel of land separately and not jointly, and payment thereof on one lot or issue of tax deed thereon discharges the lien thereon; assessments upon property in the district must, under this section, include the interest on the bonds to maturity, as part of the cost of such improvements. State ex rel. Griffith v. Shelby, 107 M 571, 87 P2d 183 (1939).

Collateral References

Municipal Corporations *key* 406, 449.

63 C.J.S. Municipal Corporations §§1294, 1391.

7-12-4191. Assessments and certain other charges as liens.

Case Notes

Tax Deed of Special Improvement Assessments Payable Before Execution: A general tax lien and a special improvement assessment lien are not of equal rank. Support of government is higher obligation than cost of local improvement. Where a special assessment for city improvement became delinquent on November 30, 1940, and was certified by the city to the County Clerk on December 7, 1940, and by the County Treasurer entered upon the tax rolls as a lien against the property, a county tax deed issued on December 23, 1940, extinguished the lien for the 1940 installment of the city special improvement assessment, because under 15-18-309 (since repealed) such assessment installment was payable before execution of the tax deed. Hartman v. Nimmack, 116 M 392, 154 P2d 279 (1944), cited in First Trust Co. of Mont. v. Great Falls, 256 M 390, 845 P2d 1227, 50 St. Rep. 45 (1993).

Extinguishment of Lien: Under our statutory provisions with relation to special improvements in cities and towns, any special assessment made and levied to defray the cost and expenses of special improvements constitutes a lien upon all property included in an improvement district, but under the provisions of 15-18-403 (since repealed), such a lien is extinguished by the issuance of a tax deed on sale of the property for delinquent taxes. Stanley v. Jeffries, 86 M 114, 284 P 134 (1929); State ex rel. Great Falls v. Jeffries, 83 M 111, 270 P 638 (1928).

Commencement of Lien: Where the City Council had acquired jurisdiction to order a special improvement and levy the assessment to pay for it, the assessment became a lien against the property benefited by it from the date the assessment became due, not affected by the circumstance that plaintiffs had recovered judgments against the city for damages caused by the improvement. Allen v. Butte, 55 M 205, 175 P 595 (1918).

Collateral References

Municipal Corporations *key* 519(1).

63 C.J.S. Municipal Corporations §1564.

70A Am. Jur. 2d Special or Local Assessments §§187 through 198.

Superiority of special or local assessment lien over earlier private lien or mortgage, where statute creating such special lien is silent as to superiority. 75 ALR 2d 1121.

Duration of lien of special assessment and period of limitation of action for its enforcement as affected by adoption of installment plan of payment. 114 ALR 399.

Priority as between liens for public improvements. 99 ALR 1478; 5 ALR 1301.

Constitutionality of statute giving priority to lien for public improvements over pre-existing liens. 78 ALR 513.

Priorities between lien of general taxes and the lien of special assessments. 65 ALR 1379.

7-12-4192. Change in outstanding principal of district — relevy of assessments.

Compiler's Comments

1989 Amendment: Inserted next-to-last sentence relating to term over which refunding bonds may be relevied; and made minor changes in phraseology. Amendment effective April 5, 1989.

Saving Clause: Section 17, Ch. 449, L. 1989, was a saving clause.

Severability: Section 18, Ch. 449, L. 1989, was a severability clause.

7-12-4194. Refunding bonds.

Compiler's Comments

2001 Amendment: Chapter 162 in (4)(a) at end inserted "or, if the bonds to be refunded bear interest at a variable rate, the council determines that the issuance of fixed rate refunding bonds is in the best interest of the owners of property in the district and the city or the council determines that the issuance of variable rate refunding bonds based on a different index or formula than that of the refunded bonds is reasonably expected to result over the remaining term of the bonds to be refunded in an interest rate at least 1/2 of 1% a year less than the rate of interest on the refunded bonds". Amendment effective March 28, 2001.

1989 Amendment: At beginning of introductory clause of (4) deleted "Unless there is, or will be on the next payment date, a default in the payment of bond principal or interest"; inserted (4)(b) relating to an actual default or a default by next payment date; inserted (4)(c) relating to a greater than 50% delinquency rate; in (6)(b) inserted "that will not be satisfied by a loan from the revolving fund"; inserted (6)(c) relating to a delinquency rate greater than 50%; and made minor changes in form and phraseology. Amendment effective April 5, 1989.

Saving Clause: Section 17, Ch. 449, L. 1989, was a saving clause.

Severability: Section 18, Ch. 449, L. 1989, was a severability clause.

1987 Amendment: In (4), at beginning of sentence, inserted introductory phrase concerning default; and in (6)(a), at beginning before "one-third", inserted "the proceeds of such refunding bonds do not redeem such outstanding bonds until".

Part 42
Special Improvement Districts
Continued

Part Compiler's Comments

Section Not Codified: Section 11-2281, R.C.M. 1947, a severability clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 8, Ch. 260, L. 1947.

Section 11-2282, R.C.M. 1947, allowing a municipality to cancel SID liability accounts incurred prior to 1929 if the liability has been extinguished, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 65, L. 1949, as amended by sec. 1, Ch. 2, L. 1951.

Part Attorney General's Opinions

City Obligation to Make Revolving Fund Loans and Levy Taxes to Discharge Special Improvement District Bonds: When a city has established a revolving fund to secure payments on special improvement district (SID) bonds and when an SID fund does not have sufficient amounts to make payments on its bonds, the city must continue to make loans from the revolving fund to the SID fund and continue to levy the property tax in accordance with 7-12-4222 until the obligations on all bonds and warrants in the SID are discharged. 42 A.G. Op. 82 (1988).

7-12-4201. Use of bonds and warrants.

Compiler's Comments

1985 Amendment: In first sentence inserted "acquisition or" and "or incurred in the issuance of the bonds or warrants of the district, including incidental expenses".

Case Notes

No Power to Assess Expenses Apart From Bond Sale: Under this statute, a city does not have the authority to levy special improvement district assessments against property for incidental expenses of anticipated improvements when the improvements are not constructed on the property by the city. The statute clearly provides that creation costs shall be payable by special improvement district bonds. Assessments for special improvements must be in proportion to the benefits conferred by the improvement. Tocci v. Three Forks, 216 M 159, 700 P2d 171, 42 St. Rep. 720 (1985).

Issuance of Bonds at Discount: City Council has no power to issue bonds or warrants at a discount in payment of special improvement work, and a contract let to one who in making out his bid took into consideration the fact that the warrants he would receive were worth only 90 cents on the dollar and therefore added 10% to the actual cost was invalid as an attempt to do indirectly what the Council was prohibited from doing directly. Evans v. Helena, 60 M 577, 199 P 445 (1921).

Collateral References

Municipal Corporations *key* 370, 896, 897, 911, 923.

63 C.J.S. Municipal Corporations §1203; 64 C.J.S. Municipal Corporations §§1892, 1907, 1935.

7-12-4203. Details relating to special improvement district bonds and warrants.

Compiler's Comments

2003 Amendment: Chapter 277 deleted former (3) that read: "(3) As used in part 41 and this part, unless the context clearly indicates otherwise, the following definitions apply:

(a) "Amortization bonds" means the form of bonds that bear interest at a fixed rate and on which:

(i) a part of the principal must be paid each time that interest becomes payable;

(ii) the part payment of principal increases at each installment in the same amount that the interest decreases;

(iii) the combined interest and principal due on each due date remains the same until the bonds are paid;

(iv) the final payment may vary from prior payments in the amount resulting from disregarding fractional costs in prior payments; and

(v) the initial payment may be larger than subsequent payments if the increase represents interest accrued over an additional period not greater than 6 months.

(b) "Serial bonds" means a bond issue payable in semiannual or annual installments commencing not more than 2 years from the date of issue, any one installment consisting of one or more bonds, with the principal amount of bonds maturing in each installment not exceeding five times the principal amount of the bonds maturing in the immediately preceding installment." Amendment effective July 1, 2003.

2001 Amendment: Chapter 162 in (1)(a) inserted last two sentences providing that bonds or warrants sold at a private, negotiated sale may bear interest at a rate varying at times and on terms determined by the governing body of the municipality and allowing the terms to include a maximum interest rate or convertibility to a fixed rate; inserted (1)(b) stating when variable rate bonds may be sold at a private, negotiated sale; in (1)(c) in second sentence substituted "may bear the corporate seal" for "must bear the corporate seal"; in (3) in definition of amortization bonds in introductory clause inserted "that bear interest at a fixed rate and" and in definition of serial bonds near beginning substituted "semiannual or annual installments" for "annual installments"; and made minor changes in style. Amendment effective March 28, 2001.

1997 Amendment: Chapter 459 deleted former (3) that read: "(3) All special improvement district bonds must be amortization bonds unless, in the judgment of the city council, serial bonds will be more advantageous to the district and can be sold at a comparatively reasonable rate or rates of interest"; and made minor changes in style.

1989 Amendments: Chapter 256 in (2) inserted last sentence relating to when the term of a bond commences; in (4)(b) substituted definition of serial bonds for former language that read: ""Serial bonds" means the form of bonds that are payable in annual installments and on which the amount maturing each year may not be more than three times the principal amount of bonds maturing in any previous year"; and made minor changes in phraseology. Amendment effective March 23, 1989.

Chapter 449 in (2), in first sentence, after "years", inserted clause authorizing a 30-year period for refunding bonds; in (4)(b) increased the annual maturity amount to five times from three times the principal amount from the previous year; and made minor changes in phraseology. Amendment effective April 5, 1989.

Saving Clause: Section 9, Ch. 256, L. 1989, and sec. 17, Ch. 449, L. 1989, were saving clauses.

Severability: Section 18, Ch. 449, L. 1989, was a severability clause.

1985 Amendment: Inserted (3) relating to preference for amortization bonds.

Subsection (4), defining amortization and serial bonds, was enacted as a separate section by sec. 51, Ch. 665, L. 1985, but is codified here for convenience.

1981 Amendment: Changed the payment of interest period to annually or semiannually at the discretion of the municipality on such dates as it prescribes, instead of on specified dates unless the municipality decided otherwise.

Case Notes

Bonds of Improvement District Not General Obligations: Special improvement district bonds are not a general obligation of the city or town. State ex rel. Truax v. Lima, 121 M 152, 193 P2d 1008 (1948).

Collateral References

Municipal Corporations *key* 896, 923.

64 C.J.S. Municipal Corporations §§1892, 1935.

7-12-4204. Procedure to issue bonds and warrants.

Compiler's Comments

1993 Amendment: Chapter 6 near beginning of (3) deleted reference to 7-7-4253; and made minor changes in style.

1985 Amendment: In (1), near beginning substituted "the improvements" for "making the improvement" and "benefited property" for "the property", and after "cash" substituted remainder of subsection (see 1985 Session Law for text) for "and for not less than the face value of such bonds or warrants, including interest thereon"; inserted (2) relating to a private negotiated sale; and in (3) inserted "In all other cases".

Law Review Articles

Financing America's Public Infrastructure: Issues for Local Governments, 22 Akron L. Rev. 381 (1989).

Collateral References

Municipal Corporations *key* 370, 897, 911.

63 C.J.S. Municipal Corporations §1203; 64 C.J.S. Municipal Corporations §§1892, 1907.

64 Am. Jur. 2d Public Securities and Obligations §§206 through 217.

7-12-4205. Disposition of bond or warrant proceeds.

Compiler's Comments

1985 Amendment: In (1) substituted "payment for the cost of the improvements. Payments to contractors" for "payment to the contractor or contractors. Such payment"; in (2) inserted "During the construction of the improvements" and "construction account of the"; and inserted (3) relating to application of excess proceeds to the revolving fund.

1983 Amendment: Inserted (2) providing for the credit of interest to construction account.

Collateral References

Municipal Corporations *key* 370, 897, 911.

63 C.J.S. Municipal Corporations §1203; 64 C.J.S. Municipal Corporations §§1892, 1907.

7-12-4206. Redemption of bonds and warrants.

Compiler's Comments

1995 Amendment: Chapter 423 at end of (1) substituted "as provided in the resolution authorizing the issuance of the bonds" for "in order of registration, on any interest payment date"; in first sentence of (2) extended redemption date from 10 days after notice to 30 days after notice; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1985 Amendment: In (1) substituted "Special improvement district warrants or bonds shall be redeemed on any interest payment date from the proceeds of the bonds or warrants remaining after payment of all costs of the improvements, as provided in 7-12-4205, or from the prepayment of assessments levied in the district. Special improvement district bonds or warrants are subject to redemption and prepayment at the option of the city, in order of registration, on any interest payment date" for "The warrants or bonds shall be redeemed by the treasurer when there is money in the special improvement district fund against which the warrants or bonds are drawn, on presentation of the coupons belonging thereto, and any money remaining shall be applied to the payment of the principal and the redemption of the warrants or bonds in the order of their registration"; in (2), deleted former first sentence that read: "Whenever there is any money in any special improvement district fund after paying the interest on the warrants or bonds drawn against the fund, the treasurer shall call in for payment outstanding warrants or bonds which, together with the interest thereon to the date of redemption, will equal the amount of the fund on that date", in first sentence substituted "mailing of notice" for "of service of notice", in second sentence, after "give", deleted "notice by publication once in a newspaper published in the city or, at the option of the treasurer, by", and inserted "to be redeemed" in two places, and inserted last sentence requiring Treasurer to publish notice of redemption if addresses of holders of bonds or warrants are not known.

Case Notes

Where Action Held Maintainable to Recover on Warrants Paid Out of Order by County Treasurer: While the rule as to a city's liability to warrant holders damaged by reason of their warrants being paid out of order does not generally apply to county warrants, held, that where the County Commissioners created a special improvement district within an unincorporated town for the installation of waterworks, the county assumed the same duties as rest upon incorporated cities and towns and therefore was properly held liable for damage sustained by a holder of warrants not paid in the order of registration when the special fund became exhausted, and holder could presume Treasurer would do his duty by calling and giving notice. Witter v. Phillips County, 111 M 352, 109 P2d 56 (1941).

Mandamus to Pay Principal Held Up for Payment of Interest After Maturity: Where court refused mandamus proceedings on the ground that under this section the Treasurer was required to first pay all the accrued interest on outstanding bonds before payment of any principal, held, on appeal, that assessments could not provide a fund for payment of interest after maturity of the bonds and that plaintiff was entitled to payment of the principal of the bond sued upon but not to interest accrued thereon after maturity. State ex rel. Griffith v. Shelby, 107 M 571, 87 P2d 183 (1939).

Misapplication of Fund by Treasurer: The office of City Treasurer is a continuing one regardless of the person occupying the office at any particular time. The Treasurer is the servant of the city, and where he misapplies trust funds, such as for special improvement purposes, the municipality is liable to the warrant holders. Blackford v. Libby, 103 M 272, 62 P2d 216 (1936).

Statute of Limitations on Recovery — Trust Rule: The Statute of Limitations does not begin to run against registered city warrants or bonds until the City Treasurer calls them for payment or until the holder has an immediate cause of action. Being a trust fund, under the rule that as between trustee and beneficiary of an express and continuing trust, the Statute of Limitations does not begin to run until trust is repudiated and the beneficiary has received notice. Blackford v. Libby, 103 M 272, 62 P2d 216 (1936), distinguished as to creation of a trust and tolling of the statute of limitations in Samson v. St., 285 M 310, 948 P2d 232, 54 St. Rep. 1165 (1997).

Collateral References

Municipal Corporations *key* 896, 923.

64 C.J.S. Municipal Corporations §§1892, 1935.

64 Am. Jur. 2d Public Securities and Obligations §§250 through 269.

7-12-4207. Investment of interest and sinking fund money.

Compiler's Comments

1993 Amendment: Chapter 10 near middle of (1) deleted reference to Federal Savings and Loan Insurance Corporation; and made minor changes in style.

1985 Amendment: Near middle of (1), after "bank", inserted "savings and loan association, or credit union", and after "corporation", inserted "federal savings and loan insurance corporation, or national credit union administration".

1983 Amendment: In (2), after "credited to the" inserted "sinking".

7-12-4221. Creation of special improvement district revolving fund.

Compiler's Comments

1983 Amendment: Near beginning, following "may in its discretion" deleted "as to such district or districts created prior to February 25, 1929, and shall as to such district or districts created after February 25, 1929," and inserted last sentence prohibiting elimination of a revolving fund until all bonds and warrants have been paid.

Case Notes

Bond Issues — Payment: Where a special improvement district was established under 7-12-4102 and bonds were issued "payable from the collection of the special tax or assessment which is a lien against the real estate within said improvement district", the bonds were not a general obligation of the town and the town could not be compelled to redeem the bonds from a water fund made up of water rentals from water users, even though the town may have had authority to make payments from such fund. State ex rel. Truax v. Lima, 121 M 152, 193 P2d 1008 (1948).

Constitutionality — Validity as to Districts Created in Future, Invalidity as to Those Established in the Past: Contention that 7-12-4221 through 7-12-4228, referring to the matter of special improvement district revolving funds, are in conflict with Art. XIII, sec. 1, 1889 Mont. Const.; contravene Art. V, sec. 26, 1889 Mont. Const.; and conflict with Art. XII, sec. 11, 1889 Mont. Const. (now Art V, sec. 9, 1972 Mont. Const.), held groundless under authority of the case of Stanley v. Jeffries, 86 M 114, 284 P 134 (1929). Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

Collateral References

Municipal Corporations *key* 887.

64 C.J.S. Municipal Corporations §1884.

Power and duty to include in a periodical special assessment the amount of a deficiency for a previous period resulting from delinquent assessments which may eventually be paid. 96 ALR 1275.

7-12-4222. Sources of money for revolving fund.

Compiler's Comments

1995 Amendment: Chapter 229 in (1)(b), at beginning, substituted "shall, if the bonds or warrants are secured by the revolving fund pursuant to 7-12-4225" for "may", near middle substituted "equal to 5%" for "up to 5%", and at end substituted "as provided in 7-12-4169" for "and deposit it in the revolving fund upon receipt of such proceeds"; in (1)(c), after "levy", deleted "and collect"; and made minor changes in style. Amendment effective March 24, 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

1983 Amendment: In (1)(b) in the middle and at the end, inserted "secured thereby" following "special improvement district bonds and warrants"; and in (2) inserted "secured by the revolving fund" after "any bond or warrant of such district" near beginning and after "alley approach warrants" near end.

1981 Amendments: Chapter 308 substituted the last two sentences of (1)(b) concerning when a tax may not be levied and, if levied, the amount permitted for "such levy, together with such transfer, not to exceed in any one year 5% of the principal amount of the then-outstanding special improvement district bonds or sidewalk, curb, and alley approach warrants".

Chapter 435 inserted (1)(a)(ii) relating to deposit of up to 5% in revolving fund.

Case Notes

City Ordinance Requiring Developer Surcharge — Valid Exercise of Self-Governing Power: A city ordinance imposing a 5% surcharge on developers of raw land prior to creation of a special improvement district was a valid exercise of the city's self-governing powers. Diefenderfer v. Billings, 223 M 487, 726 P2d 1362, 43 St. Rep. 1934 (1986).

Attorney General's Opinions

City Obligation to Make Revolving Fund Loans and Levy Taxes to Discharge Special Improvement District Bonds: When a city has established a revolving fund to secure payments on special improvement district (SID) bonds and when an SID fund does not have sufficient amounts to make payments on its bonds, the city must continue to make loans from the revolving fund to the SID fund and continue to levy the property tax in accordance with this section until the obligations on all bonds and warrants in the SID are discharged. 42 A.G. Op. 82 (1988).

Collateral References

Municipal Corporations *key* 887.

64 C.J.S. Municipal Corporations §1884.

Right of municipal authorities temporarily to loan or transfer money from one fund or department to another. 70 ALR 431.

7-12-4223. Loans from revolving fund to meet payments on bonds and warrants.

Compiler's Comments

2001 Amendment: Chapter 162 at end inserted sentence stating that the loan must be made even if, in the case of bonds or warrants bearing interest at a variable rate, the interest rate on the special assessments when the loan is made is less than or later becomes less than the interest rate on the bonds or warrants. Amendment effective March 28, 2001.

1995 Amendment: Chapter 229 at beginning of first sentence inserted "During the period described in 7-12-4225(2)" and near middle, after "fund", inserted "after a transfer from the appropriate district reserve account, if established"; at end of second sentence substituted "and money available in the district fund" for "when added to such insufficient amount, as the case may require"; and made minor changes in style. Amendment effective March 24, 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

1983 Amendment: In first sentence, inserted "which are secured by the revolving fund".

Case Notes

"May" to Mean "Must": The provision of this section "may, by order of the council be loaned" out of the special improvement revolving fund, held mandatory, the word "may" meaning "must", thus leaving no discretion in the city officials or their successors. (See 2001 amendment.) Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

Unconstitutional in Part: Chapter 24, L. 1929 (7-12-4221 through 7-12-4228), insofar as it authorizes cities to assume liabilities for losses suffered by holders of special improvement bonds and warrants issued prior to the passage of the act, amounts to a reimbursement of the holders of such losses and is violative of Art. XII, sec. 11, 1889 Mont. Const. (now Art. V, sec. 9, 1972 Mont. Const.). Stanley v. Jeffries, 86 M 114, 284 P 134 (1929).

Attorney General's Opinions

City Obligation to Make Revolving Fund Loans and Levy Taxes to Discharge Special Improvement District Bonds: When a city has established a revolving fund to secure payments on special improvement district (SID) bonds and when an SID fund does not have sufficient amounts to make payments on its bonds, the city must continue to make loans from the revolving fund to the SID fund and continue to levy the property tax in accordance with 7-12-4222 until the obligations on all bonds and warrants in the SID are discharged. 42 A.G. Op. 82 (1988).

Collateral References

Municipal Corporations *key* 867(2), 904(1), 953.

64 C.J.S. Municipal Corporations §§1859, 1900, 1955.

7-12-4224. Lien arising due to loan from revolving fund.

Compiler's Comments

2001 Amendment: Chapter 162 at end inserted "and that was determined at the time the loan was made, even if the interest rate on the bond or warrant subsequently changes"; and made minor changes in style. Amendment effective March 28, 2001.

Case Notes

Constitutionality: This section, providing a lien for money loaned to a special city improvement district, is not obnoxious to Art. I, sec. 10, U.S. Const., as impairing the obligations of the contracts of the holders of the bonds of the district, in that the lien is superior, senior, and prior to that of such holders, the purpose of the revolving fund being rather to add to the holders' security. Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

Collateral References

Municipal Corporations *key* 887.

64 C.J.S. Municipal Corporations §1884.

7-12-4225. Covenants to use revolving fund — duration of revolving fund obligation — factors to be considered.

Compiler's Comments

1995 Amendment: Chapter 229 near middle of (1) substituted "the issuance of" for "any public offering of"; at beginning of (1)(a) substituted "make" for "issue orders annually authorizing"; in (1)(b), after parenthetical, deleted "as the city or town council may so agree to and undertake"; at end of (2) substituted "until the earlier of" for "so offered or any interest thereon remain unpaid"; inserted (2)(a) concerning payment or discharge; inserted (2)(b) concerning maturity or payment or discharge of assessments; inserted (3) concerning discharge of delinquent assessments; inserted (4) concerning factors to be considered; inserted (5) concerning conclusive evidentiary basis of findings; and made minor changes in style. Amendment effective March 24, 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

1983 Amendment: Inserted (3) authorizing bonds unsecured by revolving fund.

Collateral References

Municipal Corporations *key* 867, 904, 953.

64 C.J.S. Municipal Corporations §§1859, 1900, 1955.

7-12-4226. Investment of surplus reserves.

Collateral References

Municipal Corporations *key* 887.

64 C.J.S. Municipal Corporations §1884.

7-12-4227. Utilization of excess money in revolving fund.

Compiler's Comments

1983 Amendment: Inserted "secured thereby" following "payment or redemption of maturing bonds or warrants" near end of first paragraph, in middle of (1), and near beginning of (2).

1981 Amendments: Chapter 308 substituted "5% of the outstanding special improvement district bonds and warrants and the council considers any part of the excess to be greater than the amount" for "the amount which the council deems" after "in excess of" in the first sentence; substituted "the excess that is greater than the amount necessary for the payment or redemption of maturing bonds or warrants or interest thereon" for "such excess" in (1) and (2); inserted "amount of the" before "excess" in (1).

Chapter 435 inserted "deposited in the revolving fund under 7-12-4169(2) and in excess of the amount" after "excess of the amount" in the first sentence of the section.

Collateral References

Municipal Corporations *key* 580, 887.

63 C.J.S. Municipal Corporations §1644; 64 C.J.S. Municipal Corporations §1884.

7-12-4228. Disposition of tax certificates and tax-sale property.

Collateral References

Municipal Corporations *key* 580, 887.

63 C.J.S. Municipal Corporations §1644; 64 C.J.S. Municipal Corporations §1884.

7-12-4243. Procedure to create and maintain supplemental revolving fund.

Compiler's Comments

1995 Amendment: Chapter 387 in (1)(a) inserted "held in conjunction with a regular or primary election"; and made minor changes in style.

7-12-4244. Issuance of bonds based upon supplemental revolving fund — election.

Compiler's Comments

1989 Amendment: In (1), in two places, deleted reference to 7-12-4202; and made minor changes in phraseology. Amendment effective April 5, 1989.

Saving Clause: Section 17, Ch. 449, L. 1989, was a saving clause.

Severability: Section 18, Ch. 449, L. 1989, was a severability clause.

7-12-4247. Details relating to bonds.

Compiler's Comments

1989 Amendment: In (3) deleted reference to 7-12-4202; and made minor changes in phraseology. Amendment effective April 5, 1989.

Saving Clause: Section 17, Ch. 449, L. 1989, was a saving clause.

Severability: Section 18, Ch. 449, L. 1989, was a severability clause.

7-12-4250. Obligations of municipalities to bondholders.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §276.

When limitations begin to run against actions on public securities or obligations to be paid out of a special or particular fund. 50 ALR 2d 271.

7-12-4254. Hearing on petition — notice.

Compiler's Comments

2001 Amendment: Chapter 354 in (2) at end of first sentence substituted "as provided in 7-1-2121" for "and the date of hearing thereon by publication at least once a week for 2 calendar weeks in a newspaper published or of general circulation in the county where the city or town is situated and also by posting a written or printed copy thereof in at least three public places in each voting precinct of said city or town" and in second sentence after "publication" deleted "and posting"; and made minor changes in style. Amendment effective October 1, 2001.

Part 43
Special Provisions for Special Improvement Lighting Districts

7-12-4301. Special improvement districts for lighting streets authorized.

Compiler's Comments

1981 Amendment: Changed the allocation of the cost of the lighting system to the property owners from between one-fourth and three-fourths to all or any portion of the cost in (1)(b).

Case Notes

Electric Lighting System: A special improvement district created under this section for the purpose of lighting the streets included within its boundaries may not be utilized to require the payment of maintenance costs, which in truth and in fact are not the cost of maintenance at all but are rather designed to reimburse the power company for its own costs incurred in installing its own lighting system. Marchi v. Brackman, 130 M 228, 299 P2d 761 (1956). (Dissenting opinion, 130 M 228, 299 P2d 761 (1956).)

Collateral References

Municipal Corporations *key* 272, 450(1).

63 C.J.S. Municipal Corporations §§1052, 1359.

70A Am. Jur. 2d Special or Local Assessments §114.

Liability of municipal corporation for injury or death occurring from defects in, or negligence in construction, operation, or maintenance of its electric street-lighting equipment, apparatus, and the like. 19 ALR 2d 344.

Power to impose cost of maintenance or operation of street lighting system on local improvement district. 60 ALR 272.

7-12-4302. Resolution of intention to create special improvement lighting district.

Collateral References

Municipal Corporations *key* 293.
63 C.J.S. Municipal Corporations §1093.

7-12-4303. Notice of resolution of intent to create lighting district.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) in second sentence substituted "as provided in 7-1-4127" for "for 5 days in a daily newspaper or in one issue of a weekly newspaper in the city or town or, in case no newspaper is published in the city or town, then by posting for 5 days in three public places in the city or town". Amendment effective October 1, 2001.

1997 Amendment: Chapter 127 in (1), in third sentence after "proposed district", substituted "as listed on the current property tax record, at the property owner's address as the address is listed on the current property tax record" for "at his last-known address"; and made minor changes in style. Amendment effective July 1, 1997.

Collateral References

Municipal Corporations *key* 293.
63 C.J.S. Municipal Corporations §1093.
70A Am. Jur. 2d Special or Local Assessments §154, et seq.

7-12-4304. Protest against creation of lighting district.

Collateral References

Municipal Corporations *key* 293.
63 C.J.S. Municipal Corporations §1093.
70A Am. Jur. 2d Special or Local Assessments §§145 through 154.

7-12-4305. Consideration of protest.

Compiler's Comments

1983 Amendment: Inserted (2) relating to weight of protests.

Collateral References

Municipal Corporations *key* 293.
63 C.J.S. Municipal Corporations §1093.
70A Am. Jur. 2d Special or Local Assessments §146.

7-12-4306. Resolution to create lighting district.

Collateral References

Municipal Corporations *key* 293.
63 C.J.S. Municipal Corporations §1093.
70A Am. Jur. 2d Special or Local Assessments §138.

7-12-4307. Objections to irregular proceedings or manner of making improvements.

Collateral References

Municipal Corporations *key* 316, 318, 488.
63 C.J.S. Municipal Corporations §§1130, 1474.

7-12-4308. Operation of district.

Compiler's Comments

Section Not Codified: Part of section 11-2252, R.C.M. 1947, concerning districts created before June 30, 1943, was not codified in the MCA. The noncodified portions of this section have not been repealed and are still valid law. Citation may be made to sec. 7, Ch. 143, L. 1915, as amended by sec. 1, Ch. 17, L. 1923; sec. 7, Ch. 143, L. 1927; and sec. 1, Ch. 162, L. 1943.

Collateral References

Municipal Corporations *key* 293, 449, 450, 519, 887.

63 C.J.S. Municipal Corporations §§1093, 1359, 1391, 1564; 64 C.J.S. Municipal Corporations §1884.

Liability or recovery in automobile negligence action as affected by driver's being blinded by lights other than those of a motor vehicle. 64 ALR 3d 760.

7-12-4309. Record of expenses to be kept by city engineer.

Collateral References

Municipal Corporations *key* 460.
63 C.J.S. Municipal Corporations §1411.

7-12-4310. Role of city clerk.

Collateral References

Municipal Corporations *key* 460.
63 C.J.S. Municipal Corporations §1411.

7-12-4311. Termination of special improvement lighting district.

Compiler's Comments

1997 Amendment: Chapter 127 near end of first sentence, after "discontinued", inserted "or if a majority of the city or town council votes to discontinue a special improvement lighting district"; near beginning of second sentence, after "petition", inserted "or by a majority vote of the council to discontinue the district"; and made minor changes in style. Amendment effective July 1, 1997.

Collateral References

Electricity *key* 11.
29 C.J.S. Electricity §§24 through 37.

7-12-4321. Apportionment of costs.

Compiler's Comments

1981 Amendment: Changed the apportionment of costs to property owners from between one-fourth and three-fourths to all or any portion of the cost near the end of the section.

Collateral References

Municipal Corporations *key* 468, 469(1).
63 C.J.S. Municipal Corporations §§1426, 1427.

7-12-4322. Choice in manner of making assessments.

Collateral References

Municipal Corporations *key* 468, 469.
63 C.J.S. Municipal Corporations §1426.
70A Am. Jur. 2d Special or Local Assessments §92, et seq.

7-12-4323. Assessment of costs — area or taxable valuation option.

Compiler's Comments

1983 Amendment: Near beginning of (1), after "council" changed "shall" to "may"; and inserted (1)(b) relating to assessment on taxable valuation.

Collateral References

70A Am. Jur. 2d Special or Local Assessments §§100, 101.

7-12-4324. Assessment of costs — frontage option.

Collateral References

70A Am. Jur. 2d Special or Local Assessments §§102 through 105.

7-12-4325. Incidental expenses considered as costs of improvements.

Collateral References

70A Am. Jur. 2d Special or Local Assessments §86.

7-12-4326. Treatment of federal lands within lighting district.

Collateral References

Municipal Corporations *key* 426.
63 C.J.S. Municipal Corporations §1332.
70A Am. Jur. 2d Special or Local Assessments §§60, 62.

7-12-4328. Resolution to provide for assessment of costs of installation.

Compiler's Comments

1981 Amendment: Changed the assessment on property owners from between one-fourth and three-fourths to all or any portion of the cost in the middle of (1).

Collateral References

Municipal Corporations *key* 449, 455.

63 C.J.S. Municipal Corporations §§1391, 1399.

Power to impose cost of maintenance or operation of street lighting system on local improvement district. 60 ALR 272.

7-12-4329. Notice of resolution for assessment of installation costs — hearing on resolution.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) at end substituted "must be published as provided in 7-1-4127" for "for a period of 5 days shall be published at least once in a newspaper published in the city"; in (2) in last sentence before "publication" inserted "final"; and made minor changes in style. Amendment effective October 1, 2001.

7-12-4337. Incorporation of procedures to correct errors and omissions.

Collateral References

Municipal Corporations *key* 490.

63 C.J.S. Municipal Corporations §§1459, 1478.

7-12-4338. Assessments to have effect of lien.

Collateral References

70A Am. Jur. 2d Special or Local Assessments §§178 through 186.

Due process requirements as to notice in proceedings to foreclose a tax or similar lien on real property—Supreme Court cases. 1 L. Ed. 2d 1626.

7-12-4341. Financing of lighting district improvements.

Collateral References

Municipal Corporations *key* 896, 911, 923.

64 C.J.S. Municipal Corporations §§1892, 1905, 1935.

7-12-4342. Details relating to lighting district bonds and warrants.

Compiler's Comments

1997 Amendment: Chapter 127 at beginning of (1) substituted "Warrants or bonds issued pursuant to 7-12-4341 must be" for "Said warrants or bonds shall be"; in (3) increased time period from 8 years to 20 years; at end of (4) substituted "formed on or after July 1, 1997" for "formed hereafter"; and made minor changes in style. Amendment effective July 1, 1997.

7-12-4351. Major modification of existing lighting district.

Compiler's Comments

Applicability: Section 5, Ch. 276, L. 1987, provided in part: ". . . This act applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1986. . . . This act does not apply to any special assessments for the repayment of bonded indebtedness incurred before the effective date of this act if the bonds were issued on representations that the property exempted from special assessments by this act would be liable for repayment of the bonded indebtedness."

7-12-4354. Minor modifications exempt.

Compiler's Comments

1997 Amendment: Chapter 127 at end inserted last clause, (1), and (2) providing clarification of meaning of minor modifications to a lighting district. Amendment effective July 1, 1997.

Part 44
Special Provisions for Street Maintenance Districts

7-12-4401. Street maintenance district authorized — definition.

Compiler's Comments

1999 Amendment: Chapter 188 near end of (2) after "removal" inserted language expanding definition of maintenance to include traffic signal systems, traffic signs, pavement markings, and curb and gutter repair; and made minor changes in style. Amendment effective October 1, 1999.

1983 Amendment: In (1), after "desires to" deleted "sprinkle" and inserted "create a district for the maintenance of"; after "avenues of its city or town" deleted "with water, oil, salt, or any dust palliative"; at end of (1), substituted "the restrictions and regulations provided in this part" for "the following restrictions and regulations"; and inserted (2) defining maintenance.

Case Notes

Paving Projects: Where the work represents either a minor or major repaving or resurfacing project, it cannot be financed by special improvement taxes for the creation of a sprinkling district (formerly this part, since amended to maintenance districts) but must be financed under 7-12-4401. Peterson v. Missoula, 135 M 96, 337 P2d 367 (1959); Cyr v. Missoula, 135 M 94, 337 P2d 365 (1959).

Collateral References

Municipal Corporations *key* 674.
64 C.J.S. Municipal Corporations §1699.

7-12-4402. Creation of maintenance districts.

Compiler's Comments

1983 Amendment: In first sentence substituted "maintenance district" for "sprinkling districts", in second sentence substituted "and describe" for "or enumerate", and made changes in grammar.

Collateral References

Municipal Corporations *key* 450(1).
63 C.J.S. Municipal Corporations §1359.

7-12-4403. Alteration of maintenance districts.

Compiler's Comments

1983 Amendment: Substituted "maintenance districts may" for "sprinkling districts shall"; and at end of section, substituted "in any succeeding year" for "the following year or any year thereafter".

7-12-4404. Manner of providing maintenance.

Compiler's Comments

1983 Amendment: Near beginning of section, substituted "maintenance" for "sprinkling".

Collateral References

Municipal Corporations *key* 412.
63 C.J.S. Municipal Corporations §1302.

7-12-4405. Improvements within maintenance districts — ordinance required.

Compiler's Comments

1999 Amendment: Chapter 188 inserted (1)(b) defining improvements; and made minor changes in style. Amendment effective October 1, 1999.

1983 Amendment: In (1), substituted "maintenance districts" for "sprinkling districts"; before "will be of a durable and continuing benefit" substituted "maintenance" for "sprinkling and applying of water, oil, and salt or any other dust palliative or preventive"; and in (3), reduced time for final action from 15 to 12 days.

Collateral References

Municipal Corporations *key* 269(1), (2), 455.
63 C.J.S. Municipal Corporations §§1042 through 1044, 1399.
Governmental tort liability as to highway median barriers. 58 ALR 4th 559.

Liability of governmental entity or public officer for personal injuries or damages arising out of vehicular accident due to negligent or defective design of a highway. 45 ALR 3d 875, §13 superseded by 58 ALR 4th 559.

7-12-4406. Notice of ordinance for improvements.

Compiler's Comments

2001 Amendment: Chapter 354 at end substituted "The notice must be published as provided in 7-1-4127" for former (1) and (2) that read: "(1) by publication three times in a daily newspaper or in a weekly newspaper for two successive issues in such city or town; or

(2) if there be no such newspaper, then by posting for at least 10 days in three public places in each of the wards of said city or town"; and made minor changes in style. Amendment effective October 1, 2001.

1983 Amendment: At end of introductory clause, substituted "final adoption" for "passage"; and in (1), after "daily newspaper or" deleted "a newspaper printed and published every day except Sunday or".

Collateral References

Municipal Corporations *key* 455.

63 C.J.S. Municipal Corporations §1399.

7-12-4407. Protest against ordinance for improvements.

Compiler's Comments

1985 Amendment: Substituted entire section relating to protests against an ordinance for improvements for "If 40% or more of the abutting property owners protest in writing to said city or town council against the passage of said proposed ordinance, then no further action shall be taken upon the proposed district for 1 year".

1983 Amendment: At end of section, substituted "upon the proposed district for 1 year" for "thereon and the same shall lapse".

7-12-4421. Choice in manner of making assessments.

Compiler's Comments

1985 Amendment: Near end before "methods", deleted "three", and after "7-12-4422", deleted "through 7-12-4424".

1983 Amendment: After "expenses of" substituted "maintaining streets, alleys, and public places" for "sprinkling streets"; and after "within each" substituted "maintenance district" for "sprinkling district".

Collateral References

Municipal Corporations *key* 468, 469(1).

63 C.J.S. Municipal Corporations §1426.

Assessments for improvements by the front-foot rule. 56 ALR 941.

7-12-4422. Assessment of costs — area, frontage, lot, and taxable valuation options.

Compiler's Comments

1987 Amendment: Inserted (1) defining assessable area; in (2)(a), in two places, and in (2)(c) inserted "assessable" before "area"; and in (2)(e) inserted "may be used for the district as a whole or for any lot or parcel within the district" and made minor changes in phraseology.

1985 Amendment: Inserted lead-in concerning city council assessment of the cost of maintenance before "(1)"; in (1) made minor changes in phraseology; and inserted (2) through (5) relating to methods of assessing and the authority to combine methods.

Collateral References

Duty as between life tenant and remainderman as respects payment of improvement assessments. 10 ALR 3d 1309.

7-12-4425. Resolution for assessment of costs of maintenance.

Compiler's Comments

1985 Amendment: In (1) in second sentence, after "resolution", inserted "specifying the district assessment option and".

1983 Amendment: In (1), substituted "The city council shall estimate, as near as practicable, the cost of maintenance in each established district annually, not later than the second Monday in August. The council shall pass and finally adopt a resolution levying and assessing all the property within the several districts with an amount equal to not less than 75% of the entire cost

of said work" for "It shall be the duty of said council to estimate, as near as practicable, the cost of sprinkling in such districts so established for the season; and before the first Monday in November of each year, they shall pass and finally adopt a resolution levying and assessing all the property within the several districts with an amount equal to not less than 75% of the entire cost of said work, exclusive of the cost of sprinkling parks and public places."; in (2), after "cost of" substituted "maintenance" for "sprinkling"; and after "shall contain" inserted "or refer to".

Collateral References

Municipal Corporations *key* 449, 455.

63 C.J.S. Municipal Corporations §§1391, 1399.

7-12-4426. Notice of resolution for assessment.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) at end substituted "must be published as provided in 7-1-4127" for "for a period of 5 days, must be published at least once in a newspaper published in the city or town"; in (2) in last sentence near end before "publication" inserted "final"; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 188 near middle of (1) after "assessment" inserted "or changing the method of assessment"; near middle of (2) after "council" inserted language requiring statement of method of proposed assessment for adoption or change in assessment method; and made minor changes in style. Amendment effective October 1, 1999.

1983 Amendment: Near middle of (1), after "cost of" substituted "maintenance" for "sprinkling"; and substituted "the district or districts" for "the several districts".

7-12-4427. Hearing on resolution for assessment of costs.

Compiler's Comments

1983 Amendment: Near beginning of (1), after "shall meet" deleted "at their regular place of meeting"; in (2), after "delivered to the" substituted "financial officer" for "city treasurer on or before the first Monday in October"; and made minor changes in phraseology.

7-12-4428. Assessment of costs of improvements and maintenance of improvements.

Compiler's Comments

1985 Amendment: Near end after "7-12-4421", substituted "and 7-12-4422" for "through 7-12-4424".

1983 Amendment: After "the property in" substituted "maintenance" for "such sprinkling".

Collateral References

Municipal Corporations *key* 413.

63 C.J.S. Municipal Corporations §1304.

Exemption of public school property from assessments for local improvements. 15 ALR 3d 847.

7-12-4429. Financial assistance from the United States.

Compiler's Comments

1987 Amendment: In (2) changed "7-12-4405" to "7-12-4402".

1983 Amendment: Near middle of (2), after "derived from" deleted "such sprinkling".

Collateral References

Municipal Corporations *key* 869.

64 C.J.S. Municipal Corporations §1869.

7-12-4436. Water user entities exempt from special assessments.

Compiler's Comments

Applicability: Section 5, Ch. 276, L. 1987, provided in part: ". . . This act applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1986. . . . This act does not apply to any special assessments for the repayment of bonded indebtedness incurred before the effective date of this act if the bonds were issued on representations that the property exempted from special assessments by this act would be liable for repayment of the bonded indebtedness."

Part 45
Special Provisions for Street Parking Districts

7-12-4501. Abandonment of street parking improvement district — resolution.

Collateral References

Municipal Corporations *key* 861.
64 C.J.S. Municipal Corporations §1845.

7-12-4502. Notice of intention to abandon district.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) substituted "publish a notice as provided in 7-1-4127 of the intention to abandon" for "give notice of such intention to abandon by one publication in a newspaper published in such city or town at least 10 days prior to the passage of a resolution abandoning the same. In case there is no publication of a newspaper in such city or town, then notice shall be given by the posting of a notice of such intention to abandon in three places within such district to be abandoned"; and made minor changes in style. Amendment effective October 1, 2001.

7-12-4511. Water user entities exempt from special assessments.

Compiler's Comments

Applicability: Section 5, Ch. 276, L. 1987, provided in part: ". . . This act applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1986. . . . This act does not apply to any special assessments for the repayment of bonded indebtedness incurred before the effective date of this act if the bonds were issued on representations that the property exempted from special assessments by this act would be liable for repayment of the bonded indebtedness."

Part 46
Fire Hydrant Maintenance Districts

7-12-4601. Authorization to create fire hydrant maintenance districts.

Compiler's Comments

Preexisting Districts: Section 9, Ch. 572, L. 1983, provided: "Preexisting districts. A fire hydrant maintenance district established prior to July 1, 1983, is not subject to any provision of this part except 7-12-4611."

7-12-4603. Notice of resolution of intent to create a fire hydrant maintenance district.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) in first sentence substituted "publish a notice of the passage as provided in 7-1-4127" for "give notice of such passage. The notice must be published for 5 days in a daily newspaper or, if there is no daily newspaper, in one issue of a weekly newspaper in the city or town. If no newspaper is published in the city or town, notice must be given by posting the notice for 5 days in three public places in the city or town." Amendment effective October 1, 2001.

7-12-4611. Resolution for assessment — assessment options.

Compiler's Comments

1985 Amendment: Inserted (3)(b) relating to water meter size.

7-12-4621. Water user entities exempt from special assessments.

Compiler's Comments

Applicability: Section 5, Ch. 276, L. 1987, provided in part: ". . . This act applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1986. . . . This act does not apply to any special assessments for the repayment of bonded indebtedness incurred before the effective date of this act if the bonds were issued on representations that the property exempted from special assessments by this act would be liable for repayment of the bonded indebtedness."

CHAPTER 13
UTILITY SERVICES

Part 1
Metropolitan Sanitary and/or Storm Sewer District

Part Compiler's Comments

Section Not Codified: Section 16-4418, R.C.M. 1947, a validation clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 5, Ch. 165, L. 1965.

Part Case Notes

Benefit of Improvement to Be Commensurate With Burden of Levy: Although the creation of a sanitary and storm sewer district under the statutes was not challenged, appellant landowner challenged the creation of the district on the grounds that the burden imposed by the improvement tax to be levied exceeded the benefit to the property. As the property value after the improvement would increase from $500 per acre to $1,500 per acre, the trial court's finding that the benefit was commensurate with the burden was upheld. Duffie v. Metropolitan Sanitary & Storm Sewer District, 147 M 541, 417 P2d 227 (1966).

Part Law Review Articles

Local Role in Energy Planning, Rand, 9 Current Mun. Probs. 44 (1982).

Part Collateral References

Liability of governmental entity for issuance of permit for construction which caused or accelerated flooding. 62 ALR 3d 514.

Pollution control: validity and construction of statutes, ordinances, or regulations controlling discharge of industrial wastes into sewer systems. 47 ALR 3d 1224.

Municipality's liability for damage resulting from obstruction or clogging of drains or sewers. 59 ALR 2d 281.

7-13-101. Authorization to create metropolitan sanitary and/or storm sewer districts.

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §12; 56 Am. Jur. 2d Municipal Corporations §13.

Water distributor's liability for injury due to condition of service lines, meters, and the like, which serve individual customer. 20 ALR 3d 1363.

Water distributor's liability for damage caused by water escaping from main. 20 ALR 3d 1294.

Water distributor's liability for negligence in carrying out construction or repair of drains or sewers. 61 ALR 2d 874.

Water distributor's liability for damage resulting from clogging of drains or sewers. 59 ALR 2d 281.

7-13-107. Notice of resolution of intention upon concurrence — hearing.

Compiler's Comments

2001 Amendment: Chapter 354 in (2) in first sentence substituted "as provided in 7-1-2121" for "for 10 consecutive days in a daily newspaper or in two issues of a weekly newspaper published nearest to the place where such improvement district is to be created. The board shall also cause a copy of such notice to be posted in three public places within the boundaries of such special improvement district" and at end of last sentence deleted "or posted"; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §§20 through 22.

7-13-108. Right to protest.

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §23.

7-13-110. Hearing on protest.

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §24.

7-13-114. Applicable provisions of laws relating to rural improvement districts.

Compiler's Comments

2003 Amendment: Chapter 277 near beginning after "7-12-2107" deleted "7-12-2110"; and made minor changes in style. Amendment effective July 1, 2003.

2001 Amendment: Chapter 354 deleted 7-12-2106 from listed sections; and made minor changes in style. Amendment effective October 1, 2001.

1989 Amendment: Deleted reference to 7-12-2170. Amendment effective April 5, 1989.

Saving Clause: Section 17, Ch. 449, L. 1989, was a saving clause.

Severability: Section 18, Ch. 449, L. 1989, was a severability clause.

1987 Amendment: Near middle of section, after "pertaining to", deleted "the powers and duties of the county commissioners in" and at end inserted "unless in conflict with the provisions of this part".

7-13-121. Assessment of costs.

Case Notes

Assessment Not Predicated Upon Future Public Action: Appellant landowner challenged the creation of a sanitary and storm sewer district on the grounds that an additional special improvement district would be necessary to make water available on his land for the sewer system. The rule that an assessment cannot be predicated upon future actions of public authorities was not violated as the water company testified it would extend its main upon residential development, thereby precluding a future special improvement district. Duffie v. Metropolitan Sanitary & Storm Sewer District, 147 M 541, 417 P2d 227 (1966).

Collateral References

20 C.J.S. Counties §§50, 281 through 285.

25 Am. Jur. 2d Drains and Drainage Districts §§38 through 42; 70A Am. Jur. 2d Special or Local Assessments §§30, 94, 98, 101.

Advertising or promotional expenditures of public utility as part of operating expenses for ratemaking purposes. 83 ALR 3d 963.

7-13-126. Notice of resolution to assess and levy tax for making improvements — protest.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) at end substituted "as provided in 7-1-2121" for "in at least one publication in a newspaper published nearest to where the special improvement is to be made"; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §48; 70A Am. Jur. 2d Special or Local Assessments §§145 through 168.

7-13-127. Hearing on protest.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) before "publication" inserted "final"; in (2) in third sentence before "2 days" inserted "within"; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §§50, 51; 70A Am. Jur. 2d Special or Local Assessments §§155 through 160.

7-13-128. Assessments and other charges as lien.

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §54; 70A Am. Jur. 2d Special or Local Assessments §§178 through 186.

7-13-141. Charges for services.

Compiler's Comments

1981 Amendment: Deleted "full power and" before "authority" in (1).

Effective Date: Section 7, Ch. 419, L. 1981, provided: "This act is effective on January 1, 1982."

Coordination With House Bill 765: Section 6, Ch. 419, L. 1981, provided: "If House Bill 765 [Ch. 607, L. 1981] introduced in the 47th legislature is passed and approved:

(1) sections 1, 4, and 5 of this act are void and of no effect;

(2) the amendatory material added to 7-13-141, MCA, as subsection (3) in section 2 of this act relating to regulatory authority of the public service commission is void and of no effect; and

(3) the amendatory material added to 7-13-144, MCA, as new subsection (2) in section 3 of this act relating to the regulatory authority of the public service commission is void and of no effect and the code commissioner is authorized and instructed to internally renumber the subsections of section 7-13-144, MCA, accordingly.

(4) the bracketed material in section 3 relating to House Bill 765 is effective."

Law Review Articles

Raising Local Government Revenue Through Utility Franchise Charges: If the Fee Fits, Foot It, Colton & Sheehan, 21 Urb. Law. 55 (1989).

Collateral References

Public utilities: validity of preferential rates for elderly or low-income persons. 29 ALR 4th 615.

Validity and construction of regulation fixing sewer rates. 61 ALR 3d 1236.

7-13-142. Authorization to utilize federal funds.

Collateral References

56 Am. Jur. 2d Municipal Corporations §562.

7-13-144. Resolution to establish service charges — hearing — limitations and tax levy.

Compiler's Comments

1981 Amendments: Chapter 403 in temporary version increased from $7 to $10 the maximum per unit charges in (1) and (2).

Chapter 419 inserted "subject to the provisions of Title 69, chapter 7" in first sentence; and deleted "not to exceed $7 per unit user per year," after "year" in (1) and after "charge" in (2).

Effective Date — Temporary Version: Section 3, Ch. 403, L. 1981, provided: "This act is effective on passage and approval." Approved April 17, 1981.

Coordination With Chapter 419: Section 2, Ch. 403, L. 1981, provided: "If house bill 790 [Ch. 419, L. 1981] introduced in the 47th legislature is passed and approved, this act becomes void and of no effect on the effective date of house bill 790 [January 1, 1982]."

1981 Amendment Version Effective January l, 1982: Chapter 419 inserted "subject to the provisions of Title 69, chapter 7" in first sentence; and deleted "not to exceed $7 per unit user per year," after "year" in subsection (1) and after "charge" in subsection (2).

Effective Date — Version Effective January 1, 1982: Section 7, Ch. 419, L. 1981, provided: "This act is effective on January 1, 1982."

Coordination with Chapter 607 — Version Effective January 1, 1982: Section 6, Ch. 419, L. 1981, provided: "If House Bill 765 (Ch. 607, L. 1981) introduced in the 47th legislature is passed and approved:

(1) sections 1, 4, and 5 of this act are void and of no effect;

(2) the amendatory material added to 7-13-141, MCA, as subsection (3) in section 2 of this act relating to regulatory authority of the public service commission is void and of no effect; and

(3) the amendatory material added to 7-13-144, MCA, as new subsection (2) in section 3 of this act relating to the regulatory authority of the public service commission is void and of no effect and the code commissioner is authorized and instructed to internally renumber the subsections of section 7-13-144, MCA, accordingly.

(4) the bracketed material in section 3 relating to House Bill 765 is effective."

Termination by Chapter 607 — Version Effective January 1, 1982: Section 9, Ch. 607, L. 1981 (HB 765) provided: "This act shall become effective on July l, 1981. It shall terminate on July 1, 1983." Chapter 588, L. 1983, effective April 19, 1983, removed the termination provision.

7-13-145. Hearing and notice on tax levy for operation and maintenance.

Compiler's Comments

2001 Amendment: Chapter 354 in (2) at end deleted "and notice must also be posted in three public places within the district"; and made minor changes in style. Amendment effective October 1, 2001.

1985 Amendment: In (2) substituted language relating to notice pursuant to 7-1-2121 for "Notice clearly setting forth the subject matter of the hearing and the date and place thereof will be given by the commissioners by publication in a newspaper published and circulated in the county wherein the district is located once a week for 3 consecutive weeks. The notice shall also be posted in three public places within the district."

Part 2
Solid Waste Management Districts

Part Compiler's Comments

Applicability to Garbage and Ash Collection Districts: Section 35, Ch. 770, L. 1991, provided: "(1) The duties and responsibilities of garbage and ash collection districts that exist within the boundary of a municipality must be assumed by the municipality on [the effective date of this act] [effective July 1, 1991].

(2) Garbage and ash collection districts outside a municipality must become a solid waste district or part of an existing solid waste district upon passage of a resolution by the county commission.

(3) (a) The resolution must provide for compliance with the provisions of Title 7, chapter 13, part 2.

(b) If the boundaries and service charges for the new district remain the same as for the garbage and ash collection district, notice of intention or right to protest, as provided in 7-13-208 through 7-13-211, need not be provided."

Part Case Notes

Estoppel for Late Challenge to District's Creation: Residents of a joint refuse disposal district established by three counties were estopped from challenging the creation of the district more than 5 years after its creation. Public policy required estoppel. To invalidate the district would cause considerable confusion. Such things as taxes, bonds, and contracts related to the district need to be secure, and the public depended on the district. Hammermeister v. N. Mont. Joint Refuse Disposal District, 278 M 464, 925 P2d 859, 53 St. Rep. 1009 (1996).

Establishment of District by County With Self-Governing Power: Title 7, ch. 13, part 2, is not mandatory upon a county charter form of government when it establishes a refuse disposal district (now solid waste management district) and system. That part applies to the establishment of a refuse disposal district (now solid waste management district) by governments that are of general power status, not those with self-government status. Title 7, ch. 13, part 2, does not direct or require a local government to provide a service within the meaning of 7-1-114. Clopton v. Madison County Comm'n, 216 M 335, 701 P2d 347, 42 St. Rep. 851 (1985).

Part Attorney General's Opinions

School District Not Exempt From Payment of Solid Waste Management District Assessments: Article VIII, sec. 5, Mont. Const., authorizes the Legislature to exempt state property from taxation, and 15-6-201 exempts school district property from taxation. However, taxation does not generally include special assessments or user fees. The purpose of a solid waste management district assessment is to recoup the costs of providing infrastructure and services that directly and tangibly benefit affected properties, not to raise general revenue or fund other programs. Therefore, solid waste management district assessments are not considered taxes within the meaning of 15-6-201. School district properties are not exempt from paying reasonable solid waste management fees that do not exceed the cost of waste management services. 48 A.G. Op. 21 (2000). See also 46 A.G. Op. 7 (1995).

No County Obligation to Provide Waste Disposal and Landfill Services to Towns: Under 7-11-104 and 7-13-203, a county has no legal obligation to provide solid waste disposal and landfill services to towns that have used the county landfill on a charge-per-load basis if there is no refuse disposal district (now solid waste management district) or interlocal agreement between the towns and county to provide those services. 43 A.G. Op. 1 (1989).

Nonusers Within District as "Receiving a Service" — Liability for Assessment: A property owner is "receiving a service", as that phrase is used in 7-13-231, for the purposes of fee assessment under this part whether or not the property owner is actually using facilities. 40 A.G. Op. 22 (1983). This holding was applied specifically to solid waste management districts in 44 A.G. Op. 28 (1992).

Part Law Review Articles

Burned-If-We-Do, Burned-If-We-Don't: Treament of Municipal Solid Waste Incinerator Ash Under RCRA's Household Waste Exclusion, Groff, 27 Ga. L. Rev. 555 (1993).

Does Garbage Have Standing? Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management, Diederich, 11 Pace Envtl. L. Rev. 157 (1993).

Facility Siting. The Use of Zoning and Other Local Controls for Siting Solid and Hazardous Waste Facilities, Shortlidge & White, 7 Nat. Resources & Env't 3 (1993).

The Problems of Medical and Infectious Waste, MacKnight, 23 Envtl. L. 785 (1993).

Trash, Ash, and Interpretation of RCRA, Sale, 17 Harv. Envtl. L. Rev. 409 (1993).

Part Collateral References

56 Am. Jur. 2d Municipal Corporations §§455 through 457, 461.

7-13-201. Findings and purpose.

Compiler's Comments

Code Commissioner Instruction — Name Change: Section 29, Ch. 770, L. 1991, provided: "In 7-13-201 through 7-13-243 [7-13-214 and 7-13-241 through 7-13-243, now repealed], MCA, the code commissioner is instructed to change the term "refuse" to "solid waste" and the term "refuse disposal" to "solid waste management"." Therefore, if either of those terms appeared in this section, it has been changed in accordance with the Code Commissioner instruction.

Law Review Articles

Municipal Liability for Household Hazardous Waste: An Analysis of the Superfund Statute and Its Policy Implications, Meegan, 79 Geo. L.J. 1783 (1991).

Superfund Liability for Municipal Waste, Martin, 6 Nat. Resources & Env't 6(6) (1991).

7-13-202. Definitions.

Compiler's Comments

1995 Amendment: Chapter 418 in definition of solid waste, in (b), substituted "department of environmental quality" for "department of state lands", with regard to reclamation, and substituted "department of natural resources and conservation" for "department of state lands", with regard to forest debris; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: In definition of board, at end, deleted reference to 7-13-241; substituted definition of solid waste for former definition of refuse that read: ""Refuse" means all putrescible and nonputrescible solid wastes (except body wastes), including garbage, rubbish, street cleanings, dead animals, yard clippings, and solid market and solid industrial wastes"; and substituted definition of solid waste management district for former definition of refuse disposal district that read: ""Refuse disposal district" means an area established with definite boundaries for the purpose of collecting and disposing of all refuse created in said district". Amendment effective July 1, 1991.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

Attorney General's Opinions

Solid Waste District Not Special Taxing District or Political Subdivision: Under the rationale of 17-5-1604 and 42 A.G. Op. 80 (1988), a refuse disposal district (now solid waste management district) has no independent governing body and therefore does not fall within the definition of "special taxing district". Further, under the rationale of 43 A.G. Op. 56 (1990), because a refuse board (now solid waste management district board) is not a separate and independent body and has not been delegated supervisory authority over a refuse disposal district (now solid waste management district), a refuse disposal district (now solid waste management district) cannot be considered a political subdivision, as that term is used in 17-5-1604. 43 A.G. Op. 68 (1990).

7-13-203. Authorization to create solid waste management district.

Compiler's Comments

Code Commissioner Instruction — Name Change: Section 29, Ch. 770, L. 1991, provided: "In 7-13-201 through 7-13-243 [7-13-214 and 7-13-241 through 7-13-243, now repealed], MCA, the code commissioner is instructed to change the term "refuse" to "solid waste" and the term "refuse disposal" to "solid waste management"." Therefore, if either of those terms appeared in this section, it has been changed in accordance with the Code Commissioner instruction.

Attorney General's Opinions

No County Obligation to Provide Waste Disposal and Landfill Services to Towns: Under 7-11-104 and this section, a county has no legal obligation to provide solid waste disposal and landfill services to towns that have used the county landfill on a charge-per-load basis if there is no refuse disposal district (now solid waste management district) or interlocal agreement between the towns and county to provide those services. 43 A.G. Op. 1 (1989).

Collateral References

56 Am. Jur. 2d Municipal Corporations §13.

7-13-204. Resolution of intention to create solid waste management district.

Compiler's Comments

1991 Amendment: In (1) substituted reference to a solid waste management district for reference to any refuse disposal district; and inserted (2)(f) requiring designation of delegated board powers and powers to be exercised only with approval of County Commissioners. Amendment effective July 1, 1991.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

1981 Amendment: Substituted (2)(e) relating to proposed fees for "the estimated cost thereof".

Attorney General's Opinions

Solid Waste Management District Not Considered Political Subdivision for Municipal Finance Consolidation Purposes: A solid waste management district is not governed by an independent board autonomous from the supervisory control of the Board of County Commissioners. Therefore, a solid waste management district is not considered a political subdivision for purposes of funding under the Municipal Finance Consolidation Act. 44 A.G. Op. 28 (1992).

7-13-205. Sufficiency of description in resolution of intention.

Compiler's Comments

Code Commissioner Instruction — Name Change: Section 29, Ch. 770, L. 1991, provided: "In 7-13-201 through 7-13-243 [7-13-214 and 7-13-241 through 7-13-243, now repealed], MCA, the code commissioner is instructed to change the term "refuse" to "solid waste" and the term "refuse disposal" to "solid waste management"." Therefore, if either of those terms appeared in this section, it has been changed in accordance with the Code Commissioner instruction.

Case Notes

Validity of Created District Smaller Than District in Notice of Intent to Create: Plaintiffs sought to have a joint refuse district (now solid waste district) invalidated on the grounds that the district created was not the district noticed. There is no statutory requirement that when a district is geographically smaller than the district described in the notice of intent to create a district, the notice of intent must be renoticed. In this case, the notice of intent included four counties and the created district excluded one of those counties. The resulting district was valid. Hammermeister v. N. Mont. Joint Refuse Disposal District, 278 M 464, 925 P2d 859, 53 St. Rep. 1009 (1996).

7-13-208. Notice of resolutions of intention and concurrence — hearing.

Compiler's Comments

2001 Amendment: Chapter 354 in (2) at end deleted "and shall also be posted in three public places within the boundaries of the proposed district"; and made minor changes in style. Amendment effective October 1, 2001.

1985 Amendment: In (2) substituted "as provided in 7-1-2121" for "in the newspaper published nearest to the place where the proposed district is to be created for 10 consecutive days in a daily newspaper or in two issues of a weekly newspaper"; and in (3) inserted "of the notice" and substituted "as provided in 7-1-2122" for "by first-class mail".

1981 Amendment: Substituted "proposed fees to be charged for the service" for "estimated costs" in (1).

Case Notes

Validity of Created District Smaller Than District in Notice of Intent to Create: Plaintiffs sought to have a joint refuse district (now solid waste district) invalidated on the grounds that the district created was not the district noticed. There is no statutory requirement that when a

district is geographically smaller than the district described in the notice of intent to create a district, the notice of intent must be renoticed. In this case, the notice of intent included four counties and the created district excluded one of those counties. The resulting district was valid. Hammermeister v. N. Mont. Joint Refuse Disposal District, 278 M 464, 925 P2d 859, 53 St. Rep. 1009 (1996).

7-13-209. Right to protest.

Compiler's Comments

1991 Amendment: Near beginning of (1) decreased from 30 days to 21 days the period for making written protest. Amendment effective July 1, 1991.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

1981 Amendment: Added "or against the fees proposed to be charged for the service" at the end of (1).

7-13-210. Hearing on protest.

Compiler's Comments

1991 Amendment: Inserted (2) requiring Commissioners to evaluate and rule on the factual accuracy and legal basis of protests against a resolution of intent and to halt proceedings upon determining a defect. Amendment effective July 1, 1991.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

7-13-211. Sufficient protest to bar proceedings.

Compiler's Comments

1981 Amendment: Inserted (2) relating to protest against proposed fee.

7-13-212. Resolution creating district — power to order improvements.

Compiler's Comments

1991 Amendment: In (1) substituted reference to solid waste management district for reference to refuse disposal district; inserted (2) allowing Commissioners to change district boundaries and description in certain cases; in (3)(a) decreased from 30 days to 21 days the period for making written protest; and in (3)(b), after "when", substituted "an insufficient number of protests have been made as provided for in 7-13-211" for "a protest shall have been found by said commissioners to be insufficient". Amendment effective July 1, 1991.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

Case Notes

Estoppel for Late Challenge to District's Creation: Residents of a joint refuse disposal district (now solid waste management district) established by three counties were estopped from challenging the creation of the district more than 5 years after its creation. Public policy required estoppel. To invalidate the district would cause considerable confusion. Such things as taxes, bonds, and contracts related to the district need to be secure, and the public depended on the district. Hammermeister v. N. Mont. Joint Refuse Disposal District, 278 M 464, 925 P2d 859, 53 St. Rep. 1009 (1996).

Validity of Created District Smaller Than District in Notice of Intent to Create: Plaintiffs sought to have a joint refuse district (now solid waste district) invalidated on the grounds that the district created was not the district noticed. There is no statutory requirement that when a district is geographically smaller than the district described in the notice of intent to create a district, the notice of intent must be renoticed. In this case, the notice of intent included four counties and the created district excluded one of those counties. The resulting district was valid. Hammermeister v. N. Mont. Joint Refuse Disposal District, 278 M 464, 925 P2d 859, 53 St. Rep. 1009 (1996).

7-13-213. District to be administered by appointed board of directors.

Compiler's Comments

1995 Amendment: Chapter 543 at end inserted "subject to the provisions of 7-1-201 through 7-1-203".

Code Commissioner Instruction — Name Change: Section 29, Ch. 770, L. 1991, provided: "In 7-13-201 through 7-13-243 [7-13-214 and 7-13-241 through 7-13-243, now repealed], MCA, the code commissioner is instructed to change the term "refuse" to "solid waste" and the term "refuse

disposal" to "solid waste management"." Therefore, if either of these terms appeared in this section, it has been changed in accordance with the Code Commissioner instruction.

7-13-215. Powers and duties of board.

Compiler's Comments

1995 Amendment: Chapter 543 at end inserted "as well as any additional powers granted the board in the resolution".

1991 Amendment: Substituted present language limiting board powers and duties to those listed in 7-10-112, except for reserved powers, for former text that read: "The board of a refuse disposal district established and organized under this part has the following powers and duties, with the approval of the county commissioners of the counties involved:

(1) to develop and administer a program for the collection or disposal of refuse in the district;

(2) to employ personnel;

(3) to purchase, rent, or execute leasing agreements for such equipment and material necessary for carrying on an effective refuse collection or disposal program;

(4) to cooperate with any corporation, association, individual, or group of individuals, including any agency of the federal, state, or local government, in order to carry out effective programs;

(5) to receive gifts, grants, or donations for the purpose of advancing the program and to acquire by gift, deed, purchase, or condemnation land necessary for refuse disposal purposes;

(6) to enforce department of health and environmental sciences or local board of health rules pertaining to the storage, collection, and disposal of refuse;

(7) to apply for and receive from the federal government or the state government, on behalf of the refuse disposal district, money appropriated by federal or state legislative bodies for aiding these programs;

(8) to borrow from any loaning agency funds available for assistance in planning or financing a refuse disposal district and repay these with the money received from the fees levied under this part". Amendment effective July 1, 1991.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

Case Notes

County Commission's Approval Power — Withdrawal of Approval: A county refuse board (now solid waste management district board) contracted with an individual to operate a sanitary landfill. Because the individual failed to obtain an operator's license, the County Commissioners were exposed to possible liability. The withdrawal of approval was proper under the circumstances. The Board of County Commissioners' express power of approval is complemented by the implied power to withhold approval upon a showing of adequate cause. A logical extension of an implied power to withhold approval is an implied power to withdraw approval. Ryan v. Bd. of County Comm'rs, 190 M 273, 620 P2d 1203, 37 St. Rep. 1965 (1980).

Rescission of Landfill Operation Contract — Operator Unlicensed: The county refuse board (now solid waste management district board) contracted with an individual to operate a landfill. Because the individual failed to comply with the statutory and contractual requirements to obtain a license to operate the landfill, the Department of Health Solid Waste Management Bureau began refusing to lift sanitary restrictions on proposed subdivisions in the area. The refusal prevented the approval of those subdivisions and thereby exposed the County Commissioners to potential liability. Because there was a failure of consideration through the fault of the individual, the Commissioners properly rescinded the contract. Ryan v. Bd. of County Comm'rs, 190 M 273, 620 P2d 1203, 37 St. Rep. 1965 (1980).

Attorney General's Opinions

Solid Waste Management District Not Considered Political Subdivision for Municipal Finance Consolidation Purposes: A solid waste management district is not governed by an independent board autonomous from the supervisory control of the Board of County Commissioners. Therefore, a solid waste management district is not considered a political subdivision for purposes of funding under the Municipal Finance Consolidation Act. 44 A.G. Op. 28 (1992).

7-13-218. Role of county attorney.

Compiler's Comments

Code Commissioner Instruction — Name Change: Section 29, Ch. 770, L. 1991, provided: "In 7-13-201 through 7-13-243 [7-13-214 and 7-13-241 through 7-13-243, now repealed], MCA, the code commissioner is instructed to change the term "refuse" to "solid waste" and the term "refuse disposal" to "solid waste management"." Therefore, if either of these terms appeared in this section, it has been changed in accordance with the Code Commissioner instruction.

7-13-231. Authorization for charges for services.

Compiler's Comments

2001 Amendment: Chapter 170 in first sentence in (3) substituted "fees collected" for "fees imposed. Amendment effective March 30, 2001.

1999 Amendment: Chapter 261 inserted (4) concerning department of revenue assisting in determining rates for service charges. Amendment effective October 1, 1999.

1995 Amendment: Chapter 418 in (3), in first sentence, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendments — Code Commissioner Instruction — Name Change: Chapter 643 inserted (3) providing that no opportunity for protest or hearing is required for Department to increase fees under 75-10-115 but requiring notice of rate directly attributable to imposed fee. Amendment effective July 1, 1991.

Section 29, Ch. 770, L. 1991, provided: "In 7-13-201 through 7-13-243 [7-13-214 and 7-13-241 through 7-13-243, now repealed], MCA, the code commissioner is instructed to change the term "refuse" to "solid waste" and the term "refuse disposal" to "solid waste management"." Therefore, if either of those terms appeared in this section, it has been changed in accordance with the Code Commissioner instruction.

Retroactive Applicability: Section 10, Ch. 643, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all applications provided for in 75-10-221 received after January 1, 1990."

1981 Amendment: In (1), after "county commissioners", inserted language concerning a public hearing and approval and implementation of a fee increase.

Attorney General's Opinions

Collection of Entire Annual Refuse District Fee During Initial Year of Operation: The entire annual refuse district (now solid waste management district) fee may be collected on tax notices due in the initial year of district operation even though services will be provided for only a portion of the calendar year. 43 A.G. Op. 78 (1990).

Real Property Owners to Pay Fee: Mobile home park owners, and not mobile home lessees, are responsible for payment of refuse disposal district (now solid waste management district) fees under this section. 40 A.G. Op. 36 (1984).

"Receiving a Service" — No Actual Use of Facility: A property owner is "receiving a service" for purposes of fee assessment under this part whether or not the property owner is actually making use of the facilities. 40 A.G. Op. 22 (1983). This holding was applied specifically to solid waste management districts in 44 A.G. Op. 28 (1992).

7-13-232. Determination of service charge.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 354 in (6) substituted "7-1-4127" for "7-1-4128"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 453 at end of (3)(a) deleted "the size of a vehicle used to dispose of the waste"; inserted (3)(a)(iii) concerning any combination of factors; and made minor changes in style. Amendment effective April 30, 2001.

Preamble: The preamble attached to Ch. 453, L. 2001, provided: "WHEREAS, section 75-10-102(1)(e), MCA, provides that it is the public policy of the state of Montana that "costs for the management and regulation of solid waste management systems should be charged to those persons generating solid waste in order to encourage the reduction of the solid waste stream"; and

WHEREAS, appointed solid waste boards may assess service charges on only one of several factors available to determine usage by persons in a solid waste management district; and

WHEREAS, a fixed assessment on family residential units does not accurately charge all users for waste generated; and

WHEREAS, service charges based on a combination of factors are more equitable to all the users of a solid waste system and promote the greatest reduction in the waste stream."

1999 Amendment: Chapter 159 inserted (3)(b) limiting rate district may charge family residential unit with home-based business; and made minor changes in style. Amendment effective March 24, 1999.

Applicability: Section 3, Ch. 159, L. 1999, provided: "[This act] applies to service charges assessed by solid waste management districts or joint solid waste districts after [the effective date of this act]." Effective March 24, 1999.

1991 Amendment: Substituted (1) allowing board to establish service charge rates for former (1) that read: "(1) the fees shall be based upon a family residential unit, and fees for commercial and industrial accounts shall be based on the comparison with a typical residential unit as to volume and type of waste produced"; inserted (2) through (4) regarding basis for service charges, assessment, and initial rate; deleted former (3) that read: "(3) In no case shall the fee for disposal service exceed one-half the total fee for both collection and disposal services"; and inserted (6) requiring notice of intention to increase rates. Amendment effective July 1, 1991.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

1989 Amendment: Inserted (2) requiring registered mobile home owner to pay fee. Amendment effective July 1, 1989.

Attorney General's Opinions

School District Not Exempt From Payment of Solid Waste Management District Assessments: Article VIII, sec. 5, Mont. Const., authorizes the Legislature to exempt state property from taxation, and 15-6-201 exempts school district property from taxation. However, taxation does not generally include special assessments or user fees. The purpose of a solid waste management district assessment is to recoup the costs of providing infrastructure and services that directly and tangibly benefit affected properties, not to raise general revenue or fund other programs. Therefore, solid waste management district assessments are not considered taxes within the meaning of 15-6-201. School district properties are not exempt from paying reasonable solid waste management fees that do not exceed the cost of waste management services. 48 A.G. Op. 21 (2000). See also 46 A.G. Op. 7 (1995).

Initiative Inappropriate Process for Alteration of Method of Establishment and Collection of County Solid Waste Management District Service Charges: The initiative process may not be used to amend the resolution creating a county solid waste management district when the district encompasses an area smaller than the entire county and the initiative petition seeks to alter the method of establishing and collecting service charges. Such a proposed action is administrative in character rather than a legislative act subject to initiative or referendum. 45 A.G. Op. 5 (1993).

7-13-233. Procedure to collect service charge.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (3), after "department of revenue", deleted "or its agent". Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1991 Amendment: Substituted present (1) through (5) regarding procedure to collect service charge for former text that read: "The month the service begins, the department of revenue or its agents shall insure that the amount of this fee is placed on the tax notices, to be collected with the tax. If a property owner fails to pay this fee, it shall become a lien upon the property". Amendment effective July 1, 1991.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

Attorney General's Opinions

Enactment of Local Government Ordinance Providing That Delinquent Solid Waste Service Charges Become Lien on Property Served: A city-county charter that provided that levies for special services were the obligation of the property owners was not in conflict with state constitutional powers delegated to local governments or with state law governing local

governments, nor was it inconsistent with state provisions in an area affirmatively subjected to state control. Therefore, a local government with self-governing powers may enact an ordinance that provides that delinquent solid waste management service charges become a lien on the property served, consistent with the remedy available to a solid waste management district for collecting its delinquent service charges under this section. 44 A.G. Op. 34 (1992).

Issuance of Revenue Bonds Payable From Service Charges Not Allowed: The restrictive language of 7-13-308(1)(a) prohibits a joint solid waste management district from issuing revenue bonds payable from service charges placed on property tax notices to property owners and collected with property taxes. 44 A.G. Op. 19 (1991).

Collection of Entire Annual Refuse District Fee During Initial Year of Operation: The entire annual refuse district (now solid waste management district) fee may be collected on tax notices due in the initial year of district operation even though services will be provided for only a portion of the calendar year. 43 A.G. Op. 78 (1990).

Failure to Pay Disposal Fee Subjects Property to Tax Sale: The nonpayment of a refuse disposal (now solid waste disposal) fee by someone receiving a service from a refuse disposal district (now solid waste management district) constitutes a lien upon the underlying real property, and that property thereby becomes subject to a tax sale under the proceedings provided in Title 15, ch. 17. 40. A.G. Op. 45 (1984).

Tax Notices for Service Charges Not to Be Mailed Until Service Actually Begun: Under the language of the applicable statutes, the fee for the services of a refuse disposal district (now solid waste management district) could not be charged until the services of the district had commenced. The fee is to be collected in the same assessment of taxes that is sent to members of the district under this section which provides a schedule for collection beginning in the month that service begins. Tax notices containing the fee may therefore not be mailed until service is begun. (See 1991 amendment.) 40 A.G. Op. 45 (1984).

Law Review Articles

Adequate Assurance of Payment for Utilities Under 11 USC §366(b): The Need for a Legislative Solution, Johnson, 4 J. Banks, L. & Prac. 79 (1994).

Collateral References

Right of public utility to deny service at one address because of failure to pay for past service rendered at another. 73 ALR 3d 1292.

Right of municipality to refuse services provided by it to resident for failure of resident to pay for other unrelated services. 60 ALR 3d 714.

7-13-234. Disposition and administration of proceeds.

Compiler's Comments

Code Commissioner Instruction — Name Change: Section 29, Ch. 770, L. 1991, provided: "In 7-13-201 through 7-13-243 [7-13-214 and 7-13-241 through 7-13-243, now repealed], MCA, the code commissioner is instructed to change the term "refuse" to "solid waste" and the term "refuse disposal" to "solid waste management"." Therefore, if either of these terms appeared in this section, it has been changed in accordance with the Code Commissioner instruction.

7-13-235. Installment payments for capital improvements.

Compiler's Comments

1991 Amendment: At end decreased from 20 years to 10 years the allowable term for spreading of payments; and deleted second sentence that read: "Payments are to be made in equal installments out of the money received from the fee levy provided for in this part". Amendment effective July 1, 1991.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

7-13-236. Revenue bonds and obligations.

Compiler's Comments

1993 Amendment: Chapter 206 in (3)(a), at end, deleted "that are collected other than through tax notices and a lien upon property". Amendment effective July 1, 1993.

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

Effective Date: Section 36, Ch. 770, L. 1991, provided: "[This act] is effective July 1, 1991."

Attorney General's Opinions

Imposition of Service Charges for Repayment of Loans and Bonds — Restrictions: A solid waste management district may impose service charges on all property within the district to repay loans and revenue bonds issued pursuant to this section as long as the service charges are not collected through tax notices and a lien upon property. 44 A.G. Op. 28 (1992).

7-13-237. Solid waste management district bonds authorized.

Compiler's Comments

2001 Amendment: Chapter 29 in (2) after "exceed" substituted "1.4% of the total assessed value of taxable property, determined as provided in 15-8-111" for "22.5% of the taxable value of the property"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

Effective Date: Section 36, Ch. 770, L. 1991, provided: "[This act] is effective July 1, 1991."

Part 3
Joint Solid Waste Management Districts

Part Compiler's Comments

Saving Clause: Section 32, Ch. 770, L. 1991, was a saving clause.

Severability: Section 33, Ch. 770, L. 1991, was a severability clause.

Applicability to Joint Solid Waste Disposal: Section 34, Ch. 770, L. 1991, provided: "Joint refuse disposal districts organized under 7-13-241 [now repealed] prior to [the effective date of this act] [effective July 1, 1991] are continued under [sections 17 through 26] [7-13-302 through 7-13-311] and have all powers and duties of joint solid waste districts provided by [sections 17 through 26] [7-13-302 through 7-13-311]."

Effective Date: Section 36, Ch. 770, L. 1991, provided: "[This act] is effective July 1, 1991."

Part Attorney General's Opinions

Joint Solid Waste Management District as Political Subdivision — No Authority to Issue Bonds for Workers' Compensation Reserve Fund: Because a joint solid waste management district has been vested with broad plenary powers that may be exercised independent of a city or county governing body, a joint district must be considered a political subdivision within the meaning of 2-9-211. However, a joint solid waste management district or similar political subdivision does not have specific or express authority under 39-71-403 to participate in workers' compensation plan No. 1 or to issue bonds to establish a workers' compensation self-insurance fund. The bonding authority in 2-9-211 may not be used as a basis for issuance of bonds for the establishment of a reserve fund to guarantee payment of workers' compensation claims. 45 A.G. Op. 22 (1994).

7-13-308. Revenue bonds and obligations.

Compiler's Comments

1993 Amendment: Chapter 206 in (1)(a), at end, deleted "that are collected other than through tax notices and a lien upon property". Amendment effective July 1, 1993.

Attorney General's Opinions

Issuance of Revenue Bonds Payable From Service Charges Not Allowed: The restrictive language of subsection (1)(a) of this section prohibits a joint solid waste management district from issuing revenue bonds payable from service charges placed on property tax notices to property owners and collected with property taxes. 44 A.G. Op. 19 (1991).

7-13-309. Joint district bonds authorized.

Compiler's Comments

2001 Amendment: Chapter 29 in (2) after "exceed" substituted "1.4% of the total assessed value of taxable property, determined as provided in 15-8-111" for "22.5% of the taxable value of the property"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

Part 21
General Provisions Related to County Utility Services

Part Law Review Articles

Deconstructing and Reconstructing Consolidated Tax Savings for Public Utilities, Caldwell, 12 Va. Tax Rev. 735 (1993).

Insurance Coverage for Electric and Magnetic Field Litigation, Anderson & Stewart, 5 Envtl. Claims J. 401 (1993).

Nontraditional Uses of the Utility Concept to Fund Public Facilities, Schoettle & Richardson, 25 Urb. Law. 519 (1993).

Part Collateral References

39A C.J.S. Highways §139.

39 Am. Jur. 2d Highways, Streets, and Bridges §§220, 234, 255, 259, 260, 263.

7-13-2101. Authority to permit construction of utility mains.

Collateral References

Liability of one excavating on private property for injury to public utility cables, conduits, or the like. 28 ALR 5th 603.

Liability of one excavating in highway for injury to public utility cables, conduits, or the like. 73 ALR 3d 987.

Electric generating plant or transformer station as nuisance. 4 ALR 3d 902.

Power of municipality to sell, lease, or mortgage public utility plant or interest therein. 61 ALR 2d 595.

Electric power line within easement for highway. 58 ALR 2d 525.

Right of municipality to use subsurface of street for purposes other than sewers, pipes, conduits, and the like. 11 ALR 2d 180.

Part 22
County Water and/or Sewer Districts

Part Compiler's Comments

Severability Clause: Section 2, Ch. 263, L. 1967, was a severability clause.

Section Not Codified: Section 16-4521, R.C.M. 1947, providing for the applicability of general election laws to elections authorizing bonded indebtedness, was not codified in the MCA, it being redundant with 7-13-2222. This section has not been repealed and is still valid law. Citation may be made to sec. 21, Ch. 242, L. 1957. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Part Case Notes

Jurisdiction of Public Service Commission Over County Water Districts: Nothing in 7-13-2201 through 7-13-2348 expressly precludes the review and regulatory process of the P.S.C. pursuant to Title 69. The board of directors is empowered to establish rates; however, such rates are subject to review and alteration by the P.S.C. if unjust, unreasonable, or discriminatory. Helena v. Dept. of Public Service Regulation, 194 M 173, 634 P2d 192, 38 St. Rep. 1560 (1981).

Title Not Defective: That the title to the County Water District Act (Ch. 242, L. 1957) fails to refer to the water tax, bond tax, initiative, referendum, and addition of land provisions and only refers to the construction of waterworks does not render it defective and the Act unconstitutional. The water tax and bond tax provisions are necessary to finance the construction, and the remaining provisions are germane to the management sections of the Act. Parker v. Yellowstone County, 140 M 538, 374 P2d 328 (1962).

Part Attorney General's Opinions

Federal Revenue Sharing Funds — Allocation by Board of County Commissioners: The Board of County Commissioners of a county which has not adopted a self-government form of local government may not make a grant of federal revenue sharing funds to individual county residents for the purpose of creating a water district under Title 7, ch. 13, parts 22 and 23, because there is no express or necessarily implied authority under which such a grant could be

made and because the statutes provide a different mechanism for the creation and funding of a water district. 39 A.G. Op. 6 (1981).

Part Collateral References

Water furnished by public utility as "goods" within Uniform Commercial Code, Article 2 on sales. 48 ALR 3d 1060.

7-13-2201. Definitions.

Compiler's Comments

1993 Amendment: Chapter 160 in (3) inserted second sentence defining a district as a unit of local government; and made minor changes in style.

7-13-2202. Interpretation.

Case Notes

Jurisdiction of Public Service Commission Over County Water Districts: Nothing in 7-13-2201 through 7-13-2348 expressly precludes the review and regulatory process of the P.S.C. pursuant to Title 69. The board of directors is empowered to establish rates; however, such rates are subject to review and alteration by the P.S.C. if unjust, unreasonable, or discriminatory. Helena v. Dept. of Public Service Regulation, 194 M 173, 634 P2d 192, 38 St. Rep. 1560 (1981).

Attorney General's Opinions

Exercise of Eminent Domain by County Precluded With Regard to Municipal Property: A county water and sewer district may not exercise the right of eminent domain with respect to municipal property located within the district and used by the municipality to provide sewer services. 43 A.G. Op. 13 (1989).

Retention of Municipal Authority After Incorporation in County District: This section disclaims any intent to supersede through formation of a county district a municipality's authority with respect to maintenance or creation of a sewer and water system. Therefore, a municipality retains all authority granted under Title 7, ch. 13, part 43, with respect to providing water and sewer services after a county water and sewer district, which includes the municipality, has been incorporated. 43 A.G. Op. 13 (1989).

7-13-2203. County water and/or sewer districts authorized.

Attorney General's Opinions

Applicability of General Election Laws to County Water and Sewer Districts: The specific provisions governing water and sewer district elections in 7-13-2203, et seq., prevail over the requirements of the general election laws when the two conflict; therefore, the closure of registration and notice of closure requirements of 13-2-301 do not apply insofar as the time periods conflict. Reasonable time limitations can be adopted by the board of directors, giving electors at least 20 days' notice prior to closing registration. 37 A.G. Op. 45 (1977).

Collateral References

Waters and Water Courses *key* 183 ½.

94 C.J.S. Waters §243(1), (2).

56 Am. Jur. 2d Municipal Corporations §13.

Municipality's liability arising from negligence or other wrongful act in carrying out construction or repair of sewers and drains. 61 ALR 2d 874.

7-13-2204. Petition to create water and/or sewer district.

Collateral References

94 C.J.S. Waters §243(2).

25 Am. Jur. 2d Drains and Drainage Districts §17.

7-13-2205. Notice of petition — hearing required.

Compiler's Comments

1985 Amendment: In (1) substituted "as provided in 7-1-2121" for "once each week for 2 consecutive weeks in a newspaper printed and published", and at end deleted "together with a notice stating the time of the meeting at which same will be presented"; in (2) at beginning, deleted "The first publication shall be at least 2 weeks before the time at which the petition is to be presented"; and deleted former (3) that read: "With such publication there shall be published a notice of the time of the meeting of the board when such petition will be considered and that all persons interested therein may then appear and be heard."

Case Notes

Establishment of Boundaries of District Not a Taking: The hearing at which the boundaries of an improvement district are established does not constitute a taking. Hence, there is no constitutional right to be heard in opposition to the initiation of a project which may end in an assessment. Due process requirements are at issue when the assessment is actually imposed. Parker v. Yellowstone County, 140 M 538, 374 P2d 328 (1962).

Collateral References

94 C.J.S. Waters §243(2).

7-13-2206. Hearing on petition — protest.

Case Notes

Establishment of Boundaries of District Not a Taking: The hearing at which the boundaries of an improvement district are established does not constitute a taking. Hence, there is no constitutional right to be heard in opposition to the initiation of a project which may end in an assessment. Due process requirements are at issue when the assessment is actually imposed. Parker v. Yellowstone County, 140 M 538, 374 P2d 328 (1962).

Collateral References

94 C.J.S. Waters §243(2).

7-13-2208. Decision on petition — election required.

Compiler's Comments

1997 Amendments — Composite Section: Chapter 234 in (2), near middle of second sentence, inserted "conducted by mail ballot, as provided in Title 13, chapter 19, or must be". Amendment effective April 11, 1997.

Chapter 459 in (1), near beginning of first sentence, inserted "provided for in 7-13-2206"; at end of second sentence of (2) inserted "or may be held by mail ballot election as provided in Title 13, chapter 19"; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

1995 Amendment: Chapter 387 in (2), in second sentence, substituted "The election must be held in conjunction with a regular or primary election" for "The date of the election shall be no less than 75 or more than 90 days from the date of the final hearing of such petition"; and made minor changes in style.

1985 Amendment: Near end of (2) substituted "no less than 75 or more than 90 days" for "not more than 60 days".

Collateral References

94 C.J.S. Waters §243(2).

7-13-2209. Application to include benefited lands.

Collateral References

94 C.J.S. Waters §243(3).

7-13-2211. Conduct of election on question of creating district.

Attorney General's Opinions

Voting Procedures in Expanding County Water and Sewer District: An election to add land to a county water and sewer district must be conducted in the same manner as an election for the initial organization of a district. 39 A.G. Op. 12 (1981).

7-13-2212. Qualifications to vote on question of creating district.

Attorney General's Opinions

"Individual" to Include Corporation: The Legislature contemplated the participation of corporate property owners as voters in elections creating water and sewer districts. Although voter participation is limited to "individuals", a construction that would limit voter participation to natural persons would be unwarranted. 38 A.G. Op. 47 (1979).

Initiation of Petition by Nonresident Corporate Property Owners: Although statutory procedures do not specifically provide for establishing a water and sewer district when there are no registered voters in the territory encompassing the proposed district, a water and sewer district may be initiated by a petition signed by all the nonresident corporate property owners within the district when there are no other registered voters in the proposed district. 38 A.G. Op. 47 (1979).

Nonresident Corporate Property Owner as "Registered Voter": A nonresident corporate property owner is a "registered voter" in the district for water and sewer district election purposes. 38 A.G. Op. 47 (1979).

7-13-2214. Order creating district upon sufficient favorable vote.

Compiler's Comments

1991 Amendment: At beginning of (2) substituted "election administrator" for "county clerk" and near middle, before "recorder", substituted "clerk and" for "county".

Attorney General's Opinions

Voting Procedures in Expanding County Water and Sewer District: An election to add land to a county water and sewer district must be conducted in the same manner as an election for the initial organization of a district. 39 A.G. Op. 12 (1981).

7-13-2217. General powers of water and/or sewer district.

Case Notes

Water and Sewer District Power to Collect Delinquent Assessments: A water and sewer district had the power to bring an action under subsection (1)(b) of this section and 7-13-2301 to collect delinquent assessments from an individual without referring the same to a county for collection as taxes. RAE Subdivision County Water & Sewer District v. Gallatin County, 233 M 456, 760 P2d 755, 45 St. Rep. 1631 (1988).

Invalid Delegation of Power Not Present: This section is not unconstitutional as an invalid delegation of power. Adequate standards are provided in the County Water District Act (Ch. 242, L. 1957) to enable a district to know its rights and obligations. Parker v. Yellowstone County, 140 M 538, 374 P2d 328 (1962).

Collateral References

94 C.J.S. Waters §243(5).

Propriety of injunctive relief against diversion of water by municipal corporation or public utility. 42 ALR 3d 426.

7-13-2218. District powers related to water and sewer projects.

Compiler's Comments

2001 Amendment: Chapter 125 in (2) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1995 Amendment: Chapter 518 inserted (8) allowing the hiring of architects and engineers for water or sewer systems, with the costs of their services apportioned against the properties in the district; and inserted (9) allowing rules for the operation, maintenance, use, and availability of systems and improvements. Amendment effective April 25, 1995.

1991 Amendment: In (7), after "purposes", inserted "or sell sewer service" and in two places, after "water", inserted "or sewerworks capacity".

1991 Statement of Intent: The statement of intent attached to Ch. 645, L. 1991, provided: "A statement of intent is provided for this bill because rulemaking authority is delegated to the board of health and environmental sciences [functions now transferred to Department of Natural Resources and Conservation] to prescribe procedures for administrative enforcement actions undertaken by the department of health and environmental sciences [functions now transferred to Department of Natural Resources and Conservation] in administering the public water supply laws, as provided in Title 75, chapter 6, and to develop a fee schedule to enable the department to recover costs in administering these laws. Rulemaking authority is also delegated to the department to develop fees to pay for costs of reviewing plats and subdivisions under the laws related to sanitation in subdivisions, as provided in Title 76, chapter 4. It is the intent of the legislature that the rules establish a reasonable fee schedule that approximates the department's actual and necessary costs.

The legislature anticipates that the department will expand its enforcement activity in order to address ongoing and increasing health problems with public water supply systems and public sewage systems in Montana. In undertaking this effort, the legislature expects that the department will have the option to pursue administrative enforcement as a means of expediting and encouraging compliance with Title 75, chapter 6. Nonetheless, it is the department's duty to clearly inform each violator of:

(1) the nature of the action taken against it;
(2) what the department requires to resolve the matter; and
(3) what legal avenues are available to the violator if he desires to contest the matter.

The legislature recognizes that an economic hardship may be imposed on a public water supply system in order for that system to be brought into compliance with state and federal public water supply laws and that this hardship may be further increased by the levying of administrative and civil penalties for noncompliance. It is the intention of the legislature that the department adopt rules that establish a procedure for the progressive enforcement of this act in which the levying of administrative and civil penalties is a final action. The department may adopt rules that allow for the bypass of the enforcement procedures and the immediate assessment of penalties if specific circumstances warrant this action.

The rules also require the board of health and environmental sciences [functions now transferred to Department of Natural Resources and Conservation] to develop fees for recovery of costs incurred by the department in delivering services to persons who own or operate or intend to own or operate a public water supply system or public sewage system. These costs include costs associated with review of engineering plans and specifications, inspections, and general assistance. To assist the board in developing these rules, the department shall prepare and submit to the board a detailed estimate of projected costs associated with these services for fiscal years 1992 and 1993. The board shall develop a fee schedule that will provide revenues that are commensurate with the projected costs. A similar approach should be used by the department in developing rules setting new fees for review of plats and subdivisions under 76-4-105."

1989 Amendment: Inserted (2) relating to property acquisition by eminent domain; and made minor changes in phraseology and punctuation. Amendment effective March 30, 1989.

Case Notes

Invalid Delegation of Power Not Present: This section is not unconstitutional as an invalid delegation of power. Adequate standards are provided in the County Water District Act (Ch. 242, L. 1957) to enable a district to know its rights and obligations. Parker v. Yellowstone County, 140 M 538, 374 P2d 328 (1962).

Collateral References

94 C.J.S. Waters §243(5).

78 Am. Jur. 2d Waterworks and Water Companies §§7 through 15.

State and local government control of pollution from underground storage tanks. 11 ALR 5th 388.

Water distributor's liability for damages resulting from furnishing impure water. 54 ALR 3d 910.

Validity and construction of anti-water pollution statutes or ordinances. 32 ALR 3d 215.

Water distributor's liability for injury due to condition of service lines, meters, and the like, which serve individual customer. 20 ALR 3d 1363.

Water distributor's liability for damage caused by water escaping from main. 20 ALR 3d 1294.

Water distributor's liability for negligence in carrying out construction or repair of drains or sewers. 61 ALR 2d 874.

Water distributor's liability for damage resulting from clogging of drains or sewers. 59 ALR 2d 281.

Right to compel municipality to extend its water system. 48 ALR 2d 1222.

Liability for pollution of subterranean waters. 38 ALR 2d 1265.

7-13-2221. Powers related to district finances.

Compiler's Comments

1999 Amendment: Chapter 351 inserted (5) allowing the levy of special assessments against district property for bond payments; inserted (6) allowing entry into covenants and agreements for the favorable sale of bonds; and made minor changes in style. Amendment effective April 19, 1999.

Case Notes

Invalid Delegation of Power Not Present: This section is not unconstitutional as an invalid delegation of power. Adequate standards are provided in the County Water District Act (Ch. 242, L. 1957) to enable a district to know its rights and obligations. Parker v. Yellowstone County, 140 M 538, 374 P2d 328 (1962).

Attorney General's Opinions

Eligibility for Coal Impact Grants: "Local governmental units" eligible to receive impact grants from the Coal Board under 90-6-205 and 90-6-206 include counties, incorporated cities and towns, consolidated local governments, school districts, and any other statutorily created government unit or district empowered to exercise delegated sovereign powers over a defined geographical region of the state; county water and sewer districts; rural improvement districts that include areas of more than one county and have separate governing bodies (counties may apply for grants to pay for rural improvement district expenses); and special improvement districts within cities, towns, and consolidated units. Opinion No. 74, Vol. 36, Official Opinions of the Attorney General, is overruled except that portion excluding Indian tribes from impact grant eligibility. 37 A.G. Op. 22 (1977).

7-13-2222. Applicability of general election laws.

Compiler's Comments

Section Not Codified: Section 16-4521, R.C.M. 1947, was not codified in the MCA, it being redundant with this section. This section has not been repealed and is still valid law. Citation may be made to sec. 21, Ch. 242, L. 1957. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

7-13-2225. Combination of elections.

Compiler's Comments

1991 Amendment: At end of (3) substituted "7-13-2241 and 7-13-2246" for "7-13-2235 through 7-13-2247".

1985 Amendment: At end of (3) changed "7-13-2248" to "7-13-2247".

1981 Amendment: In (2), inserted "shall contain" before "the names of the candidates"; deleted "may be given in the manner prescribed by 7-13-2210, [7-13-2248], or either of them" at the end of (2); made minor changes in phraseology; removed brackets around internal reference in (3).

Attorney General's Opinions

Nonresident Corporate Property Owner Entitled to Vote: Since the election of officers of a district may be combined with the election to create the district, it is clear that the Legislature intended to allow nonresident corporate property owners to participate in the entire election process. 38 A.G. Op. 47 (1979).

7-13-2231. District to be governed by board of directors.

Compiler's Comments

1997 Amendment: Chapter 234 in (1), in second sentence, inserted "conducted by mail ballot, as provided in Title 13, chapter 19, or must be"; and made minor changes in style. Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 in first sentence of (1), after "district", substituted "shall elect a board" for "thus organized shall proceed, within 120 days after its formation, to the election of a board" and inserted "The election must be held in conjunction with the next regular or primary election"; and made minor changes in style.

Case Notes

Jurisdiction of Public Service Commission Over County Water Districts: The board of directors is only intended to displace the County Commissioners' authority with regard to water and sewer functions. The board of directors is empowered to establish rates; however, such rates are subject to review and alteration by the P.S.C. if unjust, unreasonable, or discriminatory. Helena v. Dept. of Public Service Regulation, 194 M 173, 634 P2d 192, 38 St. Rep. 1560 (1981).

Collateral References

94 C.J.S. Waters §243(4).

25 Am. Jur. 2d Drains and Drainage Districts §27.

7-13-2233. Qualifications of directors.

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §27.

7-13-2234. Term of office.

Attorney General's Opinions

Staggered Terms for Directors — Application to Pre-1979 Boards: This section's provision for staggered terms for directors elected at the first regular election held after July 1, 1979, applies to the directors of the boards of all counties, whether or not the original board was elected after July 1, 1979. 40 A.G. Op. 14 (1983).

Officers to Remain Until Successors Properly Qualified: Officers of water or sewer districts whose terms were due to expire in 1980 were entitled to remain in office until their successors were properly qualified following an election to be held in November 1981. 38 A.G. Op. 74 (1980).

7-13-2235. Election and appointment procedure.

Compiler's Comments

1981 Amendment: Substituted "this part" for "[7-13-2236 through 7-13-2253] and [7-13-2257 through 7-13-2259] and not otherwise" at the end of the section; made minor changes in grammar.

7-13-2236. General district election.

Compiler's Comments

1985 Amendments: Chapter 196 inserted (2) relating to mail ballots.

Chapter 220 in (1) substituted "2 years" for "4 years".

Attorney General's Opinions

Officers to Remain Until Successors Properly Qualified: Officers of water or sewer districts whose terms were due to expire in 1980 were entitled to remain in office until their successors were properly qualified following an election to be held in November 1981. 38 A.G. Op. 74 (1980).

Collateral References

Actionability, under 42 USCS §1983, of claim arising out of maladministration of election. 66 ALR Fed. 750.

7-13-2241. Filing of petition of nomination.

Compiler's Comments

1991 Amendment: In (1), near beginning after "nomination", substituted "signed by at least five electors of the district" for "consisting of not less than five individual certificates", before "the election administrator" substituted "filed with" for "presented to", and increased maximum days before election petition may be filed from 90 to 135; and inserted (3) concerning placing name of candidate on ballot if petition conforms to requirements of section.

1985 Amendment: In (1) substituted "not earlier than 90 days or later than 75 days" for "not earlier than 65 days or later than 50 days".

7-13-2243. Assistance for election administrator.

Compiler's Comments

1981 Amendment: Substituted "this part" for "[7-13-2235 through 7-13-2253]".

7-13-2246. Withdrawal of candidacy.

Compiler's Comments

1985 Amendment: In (1) and (2) substituted "75 days" for "30 days".

1981 Amendment: In (1), substituted "who has been nominated" for "whose name has been presented under [7-13-2235 through 7-13-2248]".

7-13-2247. Preservation of petitions.

Compiler's Comments

1991 Amendment: After "nomination" deleted "and all certificates belonging thereto" and substituted "7-13-2241" for "7-13-2244".

7-13-2254. Provision for vote by corporate property owner.

Attorney General's Opinions

Nonresident Corporate Property Owner Entitled to Vote: Since the election of officers of a district may be combined with the election to create the district, it is clear that the Legislature intended to allow nonresident corporate property owners to participate in the entire election process. 38 A.G. Op. 47 (1979).

7-13-2255. Provision for vote by nonresident property owner.

Attorney General's Opinions

Nonresident Corporate Property Owner Entitled to Vote: Since the election of officers of a district may be combined with the election to create the district, it is clear that the Legislature intended to allow nonresident corporate property owners to participate in the entire election process. 38 A.G. Op. 47 (1979).

7-13-2258. Effect of failure to qualify for office.

Compiler's Comments

1999 Amendment: Chapter 254 at end substituted "7-13-2262(2)" for "7-13-2262"; and made minor changes in style. Amendment effective October 1, 1999.

7-13-2262. Insufficient candidates — vacancies on board of directors — appointment of entire board.

Compiler's Comments

1999 Amendment: Chapter 254 inserted (1) authorizing cancellation of election when number of candidates is equal to or less than number of positions, appointment of persons when no nominees for position, and election of person by acclamation when only one nominee; at beginning of (2) inserted exception clause; inserted (3) authorizing appointment of directors to staggered terms when no directors remain on board and no nominees for director exist; inserted (4) requiring board to include additional director appointed by mayor when district boundaries include city or cities and new board must be appointed; inserted (5) requiring directors to be elected following appointment under subsection (3); and made minor changes in style. Amendment effective October 1, 1999.

7-13-2273. Compensation of members of board.

Compiler's Comments

1981 Amendment: Substituted the monthly salaries for language that provided for $20 per meeting, no more than three meetings with pay, and no additional compensation.

7-13-2274. Conduct of business.

Compiler's Comments

1995 Amendment: Chapter 518 in (1) inserted second sentence providing that notice of the sessions be given and that they be held in compliance with Title 2, chapter 3, parts 1 and 2; in (3) substituted "may" for "shall"; and made minor changes in style. Amendment effective April 25, 1995.

7-13-2275. Procedure relating to ordinances and resolutions — rates, fees, and charges established.

Compiler's Comments

2003 Amendment: Chapter 395 in (4)(a) at beginning of introductory clause inserted exception clause; inserted (5) providing that a public hearing is not required for a cumulative rate increase of less than or equal to 5% within a 12-month period when notice is provided; and made minor changes in style. Amendment effective April 18, 2003.

1995 Amendment: Chapter 518 inserted (4) requiring a public hearing before enactment of fees or changes in fees, stating what the hearing notice must contain and how it must be mailed, allowing persons to appear and be heard, and allowing the hearing to be continued as necessary; and made minor changes in style. Amendment effective April 25, 1995.

7-13-2280. Levy of special assessments.

Compiler's Comments

Effective Date: Section 14, Ch. 351, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 19, 1999.

7-13-2281. Notice of resolution for levy of assessment hearing.

Compiler's Comments

Effective Date: Section 14, Ch. 351, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 19, 1999.

7-13-2282. Hearing on assessment — who considered owner — sufficient protest to bar proceedings.

Compiler's Comments

Effective Date: Section 14, Ch. 351, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 19, 1999.

7-13-2283. Collection of assessments by county treasurer — delinquencies.

Compiler's Comments

Effective Date: Section 14, Ch. 351, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 19, 1999.

7-13-2284. Payment of assessment under protest — action to recover.

Compiler's Comments

Effective Date: Section 14, Ch. 351, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 19, 1999.

7-13-2285. Procedure to correct assessment and to relevy.

Compiler's Comments

Effective Date: Section 14, Ch. 351, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 19, 1999.

7-13-2286. Certain errors not to invalidate assessments or liens.

Compiler's Comments

Effective Date: Section 14, Ch. 351, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 19, 1999.

7-13-2287. Term of payment of assessments.

Compiler's Comments

Effective Date: Section 14, Ch. 351, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 19, 1999.

7-13-2288. Interest rate on unpaid assessments.

Compiler's Comments

Effective Date: Section 14, Ch. 351, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 19, 1999.

7-13-2289. Assessments and certain other charges as liens.

Compiler's Comments

Effective Date: Section 14, Ch. 351, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 19, 1999.

Part 23
County Water and/or Sewer Districts
Continued

Part Compiler's Comments

Severability Clause: Section 2, Ch. 263, L. 1967, was a severability clause.

Part Case Notes

No Duty of County to Collect Delinquent Water and Sewer Charges — Mandamus Denied: A water and sewer district sought a writ of mandamus to compel a county to collect delinquent assessment owed by an individual. This part does not set forth a clear legal duty on the part of the county to collect the delinquent charges. The county can assess taxes sufficient to cover both bonded indebtedness payments and operating expenses, but only after advance notice required by 7-13-2304 through 7-13-2307. Delinquent water and sewer assessments levied against an individual are different from taxes levied against all district property under 7-13-2302. Absent a clear legal duty, mandamus was properly denied. RAE Subdivision County Water & Sewer District v. Gallatin County, 233 M 456, 760 P2d 755, 45 St. Rep. 1631 (1988).

Jurisdiction of Public Service Commission Over County Water Districts: Nothing in 7-13-2201 through 7-13-2348 expressly precludes the review and regulatory process of the P.S.C. pursuant to Title 69. The board of directors is empowered to establish rates; however, such rates

are subject to review and alteration by the P.S.C. if unjust, unreasonable, or discriminatory. Helena v. Dept. of Public Service Regulation, 194 M 173, 634 P2d 192, 38 St. Rep. 1560 (1981).

Part Attorney General's Opinions

Federal Revenue Sharing Funds — Allocation by Board of County Commissioners: The Board of County Commissioners of a county which has not adopted a self-government form of local government may not make a grant of federal revenue sharing funds to individual county residents for the purpose of creating a water district under Title 7, ch. 13, parts 22 and 23, because there is no express or necessarily implied authority under which such a grant could be made and because the statutes provide a different mechanism for the creation and funding of a water district. 39 A.G. Op. 6 (1981).

Part Collateral References

94 C.J.S. Waters §243(7).

7-13-2301. Establishment of charges for services — payment of charges.

Compiler's Comments

1999 Amendment: Chapter 351 in (2) at end of introductory clause inserted "with the collections of any special assessments levied pursuant to 7-13-2280 through 7-13-2289 and appropriated"; and made minor changes in style. Amendment effective April 19, 1999.

1995 Amendment: Chapter 518 in (2), in introductory clause, inserted review requirement and substituted "for the services, facilities, and benefits directly afforded by the facilities, taking into account services provided and direct benefits received that will be sufficient in each year to provide income and revenue adequate for" for "pay the operating expenses of the district, provide for repairs and depreciation of works owned or operated by it, pay the interest on any bonded debt, and so far as possible, provide a sinking or other fund for the payment of the principal of such debt as it may become due"; inserted (2)(a) through (2)(d) stating what the charges must be adequate to pay for; inserted (3) providing that a facility may not be used without paying the established rate and providing sanctions for nonpayment; inserted (4) providing for collection of delinquent charges, notice to the delinquent persons, content of the notice, a list of properties with unpaid charges, and assessment of the charges as a tax against the properties; inserted (5) allowing suit to collect unpaid charges; in (6) substituted references to facilities for references to treatment works; and made minor changes in style. Amendment effective April 25, 1995.

Case Notes

No Authority to Levy Annual Assessment Against Nonusers: This section does not authorize a water and sewer district to levy annual assessments against nonusers. The assessments against the defendants were therefore void. RAE Subdivision County Water & Sewer District v. Frank J. Trunk & Son, 251 M 22, 823 P2d 845, 48 St. Rep. 1065 (1991).

Water and Sewer District Power to Collect Delinquent Assessments: A water and sewer district had the power to bring an action under 7-13-2217(1)(b) and this section to collect delinquent assessments from an individual without referring the same to a county for collection as taxes. RAE Subdivision County Water & Sewer District v. Gallatin County, 233 M 456, 760 P2d 755, 45 St. Rep. 1631 (1988).

Jurisdiction of Public Service Commission Over County Water Districts: The board of directors is only intended to displace the County Commissioners' authority with regard to water and sewer functions. The board of directors is empowered to establish rates; however, such rates are subject to review and alteration by the P.S.C. if unjust, unreasonable, or discriminatory. Helena v. Dept. of Public Service Regulation, 194 M 173, 634 P2d 192, 38 St. Rep. 1560 (1981).

Collateral References

Public utilities: validity of preferential rates for elderly or low-income persons. 29 ALR 4th 615.

Validity and construction of regulation by municipal corporation fixing sewer-use rates. 61 ALR 3d 1236.

Municipality's liability for damage resulting from obstruction or clogging of drains or sewers. 59 ALR 2d 281.

Right to cut off water supply because of failure to pay sewer service charge. 26 ALR 2d 1359.

Discrimination between property within and that outside municipality or other governmental district as to public service or utility rates for use of sewers. 4 ALR 2d 595.

7-13-2302. Levy of taxes to meet bond obligations and other expenses.

Attorney General's Opinions

County Water and Sewer District General Obligation Bonds Payable by Levy on All District Property: Under 7-13-2331, general obligation bonds for water and sewer districts are issued in the same manner prescribed for school district bonds, unless the school district process conflicts. School district bonds are payable by levy on the taxable value of all real and personal property within a school district. Sections 7-13-2301 and 7-13-2303 and this section set the manner and conditions for payment of a bonded debt that is primarily based on revenue or fees generated from water and sewer district services and contingently backed by a tax levy upon lands benefited by the district, but do not expressly outline the manner and conditions for payment of a bonded debt based on a general obligation. Therefore, general obligation bonds issued by a county water and sewer district are payable by levy on the taxable value of all real and personal property in the district in the same manner as school district bonds. 49 A.G. Op. 22 (2002).

Water and Sewer District Levies for Repayment of Loan Obligation as Property Taxes: Assessments levied by a water and sewer district pursuant to this section for the purpose of repaying a general loan obligation are considered property taxes under Title 15, ch. 10, part 4. Therefore, the property tax limitations of part 4 apply, even if the district has never previously exercised its levy authority under this section. 43 A.G. Op. 46 (1989).

Payment of Property Taxes for Municipal Sewer Service by County District Residents: Persons receiving municipal sewer services but residing within a county water and sewer district are required to pay that portion of property taxes imposed pursuant to this section with respect to the district's expenditures unrelated to principal and interest payments for bonded indebtedness. 43 A.G. Op. 13 (1989).

Collateral References

20 C.J.S. Counties §§280 through 285.

25 Am. Jur. 2d Drains and Drainage Districts §38; 70A Am. Jur. 2d Special or Local Assessments §§30, 31.

7-13-2303. Method of assessment.

Case Notes

Area Basis Assessment Not Unconstitutional: The assessment of property within the district on an area basis was not violative of the 14th amendment to the United States Constitution as the evidence showed that the property assessed would be enhanced to the extent of the burden imposed. Parker v. Yellowstone County, 140 M 538, 374 P2d 328 (1962).

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §§41, 45; 70A Am. Jur. 2d Special or Local Assessments §§92 through 113.

7-13-2304. Notice of intention to levy tax.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (2)(c) substituted "property tax record maintained by the department of revenue for" for "assessment book on file in the office of the assessor of"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1985 Amendment: In (2)(b) substituted "as provided in 7-1-2121" for "once each week for 2 consecutive weeks in a newspaper published in each county wherein the district is located"; and in (2)(c) substituted "mail as provided in 7-1-2122" for "regular first-class mail or registered or certified mail".

1983 Amendment: In (2)(c), after "owners" inserted "and the purchasers under contracts for deed".

Attorney General's Opinions

County to Bear Notice Costs: The Board of County Commissioners shall assume the expense attendant to providing notice of intent to levy property taxes on behalf of a county water and sewer district. 43 A.G. Op. 13 (1989).

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §48; 70A Am. Jur. 2d Special or Local Assessments §§163, 165, 167.

7-13-2305. Legal sufficiency of notice.

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §49.

7-13-2306. Contents of notice — hearing and protest.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (3), after "treasurer", deleted "or assessor" and at end inserted "or with the department of revenue"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Collateral References

70A Am. Jur. 2d Special or Local Assessments §167.

7-13-2307. Hearing on protest to levy of tax.

Case Notes

Health Problem Cured as Benefit to Land: That a health problem would be cured by the creation of a water district is a special benefit to the land justifying the imposition of an assessment. Parker v. Yellowstone County, 140 M 538, 374 P2d 328 (1962).

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §50; 70A Am. Jur. 2d Special or Local Assessments §§161, 168.

7-13-2310. Taxes to be lien.

Collateral References

25 Am. Jur. 2d Drains and Drainage Districts §54; 70A Am. Jur. 2d Special or Local Assessments §§178 through 186.

7-13-2321. Procedure to incur bonded indebtedness.

Compiler's Comments

1995 Amendment: Chapter 518 after "indebtedness" inserted "other than for indebtedness to refund bonded indebtedness as provided for in 7-13-2331"; and made minor changes in style. Amendment effective April 25, 1995.

Collateral References

20 C.J.S. Counties §§258, 259, 261.

64 Am. Jur. 2d Public Securities and Obligations §107.

7-13-2323. Election on question of incurring bonded indebtedness.

Compiler's Comments

1997 Amendment: Chapter 234 in (1), in second sentence at beginning, inserted exception clause and after "election must be" inserted "conducted by mail ballot, as provided in Title 13, chapter 19, or must be"; inserted (2) authorizing board of directors to order special elections under certain conditions; and made minor changes in style. Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 inserted second sentence that read: "The election must be held in conjunction with a regular or primary election"; and made minor changes in style.

Collateral References

20 C.J.S. Counties §266.

64 Am. Jur. 2d Public Securities and Obligations §§131, 132.

7-13-2324. Notice of election on incurring bonded indebtedness.

Compiler's Comments

1995 Amendment: Chapter 518 in (1) deleted provision that the notice contain the resolution adopted by the board; inserted (1)(a), (1)(b), (1)(d), (1)(e), and (1)(f) concerning specific items that the notice must contain and relating to election and polls information, the purpose, amount, and term of the bond issue, availability of the resolution for inspection, and other information considered proper; at end of (1)(c) deleted "and the location of polling places"; and made minor changes in style. Amendment effective April 25, 1995.

Collateral References

64 Am. Jur. 2d Public Securities and Obligations §§143, 150.

7-13-2328. Sufficient vote required to issue bonds.

Collateral References

20 C.J.S. Counties §267.

64 Am. Jur. 2d Public Securities and Obligations §§206 through 208.

7-13-2329. Sale of bonds.

Collateral References

20 C.J.S. Counties §267.

7-13-2331. Issuance of general obligation bonds.

Compiler's Comments

Effective Date: Section 10, Ch. 518, L. 1995, provided that this section is effective April 25, 1995.

Attorney General's Opinions

County Water and Sewer District General Obligation Bonds Payable by Levy on All District Property: Under this section, general obligation bonds for water and sewer districts are issued in the same manner prescribed for school district bonds, unless the school district process conflicts. School district bonds are payable by levy on the taxable value of all real and personal property within a school district. Sections 7-13-2301 through 7-13-2303 set the manner and conditions for payment of a bonded debt that is primarily based on revenue or fees generated from water and sewer district services and contingently backed by a tax levy upon lands benefited by the district, but do not expressly outline the manner and conditions for payment of a bonded debt based on a general obligation. Therefore, general obligation bonds issued by a county water and sewer district are payable by levy on the taxable value of all real and personal property in the district in the same manner as school district bonds. 49 A.G. Op. 22 (2002).

7-13-2332. Issuance of refunding bonds without election.

Compiler's Comments

Effective Date: Section 10, Ch. 518, L. 1995, provided that this section is effective April 25, 1995.

7-13-2341. Addition of land to district.

Compiler's Comments

1997 Amendment: Chapter 234 in (2), in second sentence after "general election", inserted "at a special election that is conducted by mail ballot, as provided in Title 13, chapter 19"; and made minor changes in style. Amendment effective April 11, 1997.

1995 Amendment: Chapter 387 in (2), at end, substituted "held in conjunction with a regular or primary election" for "held, as provided in this part and part 22, no less than 75 or more than 90 days after the adoption of such ordinance"; in (4), at beginning, substituted "After the filing" for "From and after the date"; and made minor changes in style.

1985 Amendments: Chapter 250 in (2) substituted "no less than 75 or more than 90 days" for "within 70 days".

Chapter 597 in (5), near beginning before "sewer facility", inserted "water facility or a", near middle, after "property owners", inserted "and with the written consent of all property owners to whom the service is to be extended" and after "include land", deleted "in an unincorporated area".

1981 Amendment: Inserted "Except as provided in subsection (5)" at the beginning of (1); inserted (5) relating to adding contiguous land.

Case Notes

Jurisdiction of Public Service Commission: The Public Service Commission (P.S.C.) has no authority to determine water service area boundaries of an incorporated city, nor may the P.S.C. assume jurisdiction over the expansion of an adjoining county water district. Under this section, control over the size of a county water district is expressly vested in the board of directors and the electors. The statute does not mention a requirement of P.S.C. approval before land may be added to a county water district. It should be noted, however, that the P.S.C. has authority under 69-3-201 to determine on a case-by-case basis whether adequate service is provided at reasonable rates to customers who are within the service area. Billings v. P.S.C., 193 M 358, 631 P2d 1295, 38 St. Rep. 1162 (1981).

Attorney General's Opinions

Voting Procedures in Expanding County Water and Sewer District: The results of an election to add land to a county water and sewer district are to be determined in the same manner as the results of an election for the initial organization of a district under 7-13-2214. 39 A.G. Op. 12 (1981).

Collateral References

Construction or maintenance of sewers, water pipes, or the like by public authorities in roadway, street, or alley as indicating dedication or acceptance thereof. 52 ALR 2d 263.

7-13-2345. Hearing and notice on petition to exclude land.

Compiler's Comments

1985 Amendment: In (1) substituted "as provided in 7-1-2121" for "once each week for 2 consecutive weeks in a newspaper of general circulation published in each county in which the district is situated", and at end deleted "and shall state the time of the hearing and the place thereof".

7-13-2351. Dissolution of district.

Compiler's Comments

1987 Amendment: In (5), after "shall be distributed", substituted "according to a specific plan adopted by the board of directors after a public hearing and set forth in the resolution recommending that the district be dissolved" for "pro rata by taxable valuation to the general funds of the counties in which the district was located".

1985 Amendment: In (1) in third sentence, after "published", substituted "as provided in 7-1-2121" for "once a week for 3 consecutive weeks in a newspaper of general circulation in each county in which the district is located".

Part 25
Television Districts

Part Collateral References

56 Am. Jur. 2d Municipal Corporations §13.

7-13-2506. Notice of petition.

Compiler's Comments

1985 Amendment: Substituted "as provided in 7-1-2121" for "once a week for at least 3 consecutive weeks in a newspaper of general circulation within the county where the petition is presented", and at end deleted "With the publication of the petition, there shall be published a notice of the time of the meeting of the county commissioners when the petition will be considered, stating that all persons interested may appear and be heard."

7-13-2509. Resolution to create district.

Compiler's Comments

2001 Amendment: Chapter 396 at end of last sentence of (2) substituted "a fee, which must be set and deposited in accordance with 2-15-405" for "for which he shall receive a fee of $5"; and made minor changes in style. Amendment effective July 1, 2001.

7-13-2510. Powers of district.

Compiler's Comments

1995 Amendment: Chapter 543 at beginning of introductory clause inserted "In addition to any powers granted pursuant to 7-1-201"; and made minor changes in style.

1987 Amendment: Near end of (8) substituted "as provided in 17-5-102" for "at a rate not exceeding the limitation of 17-5-102".

1983 Amendment: Made 1981 amendment permanent. (Amendment was to terminate July 1, 1983—sec. 21, Ch. 500, L. 1981.)

1981 Amendment: Substituted "the limitation of 17-5-102" for "7% per annum" in (8).

7-13-2521. Appointment of board of trustees.

Compiler's Comments

1995 Amendment: Chapter 543 near middle, after "board of", deleted "three" and at end inserted "subject to the provisions of 7-1-201 through 7-1-203"; and made minor changes in style.

7-13-2527. List of property owners.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (1) substituted "department of revenue" for "county assessor of each county within the district"; and in (2), at beginning, substituted "department" for "assessor". Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1993 Amendment: Chapter 267 in (2), after "class four", deleted "or class eleven"; and made minor changes in style. Amendment effective April 2, 1993.

Severability: Section 11, Ch. 267, L. 1993, was a severability clause.

Effective Date — Applicability: Section 13, Ch. 267, L. 1993, provided: "[This act] is effective on passage and approval and applies to tax years beginning on or after January 1, 1994." Approved April 2, 1993.

1991 Amendment: In (2), after "class four", deleted "class twelve" and substituted reference to class eleven for reference to class fourteen. Amendment effective May 15, 1991.

Applicability: Section 18(1), Ch. 773 L. 1991, provided that the 1991 amendment to this section applies to tax years beginning on or after January 1, 1992.

1989 Amendment: In (2), after "owning", substituted "class four, class twelve, or class fourteen property" for "television sets".

Applicability: Section 5, Ch. 72, L. 1989, provided: "[This act] applies to tax years beginning after December 31, 1989."

7-13-2528. Financial administration of district.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (1) substituted "department of revenue" for "county assessor"; in (2), near end after "recorder", substituted "who shall notify the department of revenue for entry of the tax on the property tax record" for "and entered on the assessment books"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1989 Amendment: Near end of (1) inserted "prior to September 1".

Applicability: Section 5, Ch. 72, L. 1989, provided: "[This act] applies to tax years beginning after December 31, 1989."

Attorney General's Opinions

Collection of Television District Taxes: Absent a legislative declaration that a lien exists on property owned by a person against whom television district taxes are imposed and in view of the fact that such taxes are imposed against specific persons directly, the proper remedy for nonpayment of television district taxes should be in personam rather than in rem. The normal debt collection process is the proper means for enforcing collection of television district taxes. 38 A.G. Op. 40 (1979).

7-13-2529. Exemption for nonbenefited taxpayers.

Compiler's Comments

1997 Amendment: Chapter 216 in (1), near middle after "district", substituted "upon request and with the approval of the television district board of trustees, may be exempted" for "are exempt" and near end, after "television district", deleted "upon the filing of an affidavit setting forth one of"; deleted former (1)(c) that read: "(c) The taxpayer does not receive the translator signal directly but receives services through the medium of a community antenna system and does not directly or indirectly use any signal repeated by the television district as its source"; in (2), in first sentence at beginning, substituted "request for exemption" for "affidavit" and near middle substituted "the request and approval of the exemption" for "such affidavit"; and made minor changes in style

1991 Amendment: At beginning of (1), before "taxpayers", inserted "following" and after "television district" inserted "are exempt from payment of the tax for the support of the television services of the television district upon the filing of an affidavit setting forth one of the following grounds"; at beginning of (1)(c) inserted "The taxpayer does not receive the translator signal directly but" and near middle, after "system", substituted "and does not directly or indirectly use any signal repeated by the television district as its source" for "on which they are a subscriber in good standing"; in (2)(d) substituted language concerning taxpayer receiving services through community antenna system and having written agreement with district relating to transmission

of district signals for "will be exempt from the payment of the tax for the support of the television services of the television district, provided they file an affidavit setting forth any of the grounds above mentioned"; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: In (1), near beginning of second sentence, inserted "before September 1".

Applicability: Section 5, Ch. 72, L. 1989, provided: "[This act] applies to tax years beginning after December 31, 1989."

Attorney General's Opinions

Community Antenna System Subscribers Exempt — Signals Acquired From District Translators: Subscribers of a community antenna system are exempted from television district taxes by the clear language of this section even though three of the seven channels available to them are acquired from the television translator. (See 1997 amendment.) 40 A.G. Op. 11 (1983).

Part 30
Consolidated Local Government Water Supply and Sewer Districts

Part Collateral References

94 C.J.S. Waters 226 through 313.

78 Am. Jur. 2d Waterworks and Water Companies §§7 through 15.

Validity and construction of regulation by municipal corporation fixing sewer-use rates. 61 ALR 3d 1236.

7-13-3005. Notice of resolution of intention upon concurrence — hearing.

Compiler's Comments

2001 Amendment: Chapter 354 in (2) in first sentence substituted "as provided in 7-1-2121" for "for 10 consecutive days in a daily newspaper published nearest to the place where the district is to be created. The governing body shall also cause a copy of the notice to be posted in three public places within the boundaries of the district"; and made minor changes in style. Amendment effective October 1, 2001.

7-13-3021. Notice of resolution to assess and levy tax for making improvements — protest.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) at end substituted "as provided in 7-1-2121" for "at least once in a newspaper published nearest to where the special improvement is to be made". Amendment effective October 1, 2001.

7-13-3023. Hearing on protest.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) before "publication" inserted "final"; and in (2) in first sentence near beginning inserted "for the hearing". Amendment effective October 1, 2001.

7-13-3028. Hearing and notice on tax levy for operation and maintenance.

Compiler's Comments

2001 Amendment: Chapter 354 in (2) at end deleted "and notice must also be posted in three public places within the district". Amendment effective October 1, 2001.

7-13-3043. Applicable provisions of laws relating to rural improvement districts.

Compiler's Comments

2003 Amendment: Chapter 277 near beginning after "7-12-2107" deleted "7-12-2110"; and made minor changes in style. Amendment effective July 1, 2003.

2001 Amendment: Chapter 354 deleted 7-12-2106 from listed sections. Amendment effective October 1, 2001.

Part 41
General Provisions Related to Municipal Utility Services

Part Law Review Articles

Deconstructing and Reconstructing Consolidated Tax Savings for Public Utilities, Caldwell, 12 Va. Tax Rev. 735 (1993).

Insurance Coverage for Electric and Magnetic Field Litigation, Anderson & Stewart, 5 Envtl. Claims J. 401 (1993).

Nontraditional Uses of the Utility Concept to Fund Public Facilities, Schoettle & Richardson, 25 Urb. Law. 519 (1993).

7-13-4101. Authority to permit laying of utility mains.

Case Notes

Duty to Maintain Pipes and Mains: When a city grants a water company the right to lay pipes and mains, there is also imposed an obligation to keep them in repair. Even though Public Service Commission rules required the owner of the premises being served by the water company to own, operate, maintain, and repair the curb box, neither the city nor the water company could pass the burden of reasonably safe maintenance on to the property owner. The property owner is merely the water company's agent for the performance of the water company's duty to maintain the pipes and mains. Nord v. Butte Water Co., 96 M 311, 30 P2d 809 (1934).

Duty to Restore Excavated Streets: A water company authorized by a city to excavate streets in supplying water to the city was under an obligation to restore the streets to the condition in which they were found and anticipate and guard against the effect of natural causes that might render them dangerous. The primary duty did not rest with the city. The water company's negligence in so restoring made it liable to the plaintiff when she overturned her carriage and suffered injuries as a result of the negligence. Robinson v. Mills, 25 M 391, 65 P 115 (1901).

Collateral References

Municipal Corporations *key* 680.

39A C.J.S. Highways §139.

39 Am. Jur. 2d Highways, Streets, and Bridges §§220, 234, 255, 263, 293.

Liability of one excavating on private property for injury to public utility cables, conduits, or the like. 28 ALR 5th 603.

Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding. 23 ALR 4th 631.

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding. 97 ALR 3d 587.

Electric power line within easement for highway. 58 ALR 2d 525.

Right of municipality to use subsurface of street for purposes other than sewers, pipes, conduits, and the like. 11 ALR 2d 180.

7-13-4102. Authority to acquire natural gas system — indebtedness permitted.

Collateral References

56 Am. Jur. 2d Municipal Corporations §567; 64 Am. Jur. 2d Public Utilities §137.

Amount paid by public utility to affiliate for goods or services as includable in utility's rate base and operating expenses in rate proceeding. 16 ALR 4th 454.

7-13-4103. Limitation on indebtedness for acquisition of natural gas system.

Compiler's Comments

2001 Amendment: Chapter 29 near middle after "exceed" substituted "0.92% of the total assessed value of taxable property, determined as provided in 15-8-111, within" for "17% of the total taxable value of the property of" and after "town" deleted "subject to taxation"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1981 Amendment: Increased 11% to 17%.

7-13-4106. Erection of poles, wires, rods, and cables.

Collateral References

Municipal Corporations *key* 680.

39 Am. Jur. 2d Highways, Streets, and Bridges §§220, 234, 255, 259, 260.

7-13-4107. Protection of private waste disposal service in municipality.

Case Notes

Town Code Not Permitted to Charge for Unused Garbage Services: L&L Sanitation (L&L) hauled garbage for a number of years for the town of Culbertson. When its contract ended and was awarded to another hauler, L&L advertised to haul commercial and residential garbage for citizens living inside and outside the town limits. Citizens who requested L&L services then contacted the town clerk to discontinue their town garbage service but were advised that they could not discontinue their town garbage service and that if they did not pay their garbage bills, their water service would be turned off. L&L sought a declaratory judgment that the town, pursuant to its own town code, could not restrict garbage collection to the town's contracted service and had no power to shut off water service to any person or business disposing of garbage through contract with L&L or otherwise. The District Court found for the city, noting that although the town code did not provide that the town's contracted garbage service was exclusive, neither did the code provide that the collection fee was abated if the town collection service was not used. The Supreme Court reversed after examining the applicable town code and holding that the code neither required nor permitted a fee to be charged for its garbage service unless the service was used. The issue of the town's power to discontinue water service for failure to pay for garbage service was apparently not addressed. Labatte v. Culbertson, 282 M 342, 938 P2d 611, 54 St. Rep. 377 (1997).

Constitutionality — Substantial Impairment of Contractual Obligations: On November 25, 1978, a city and a private garbage collection service entered into a contract in which the latter was to provide garbage collection services for the city from November 1, 1978, through June 30, 1979. On June 30, 1979, the city voted to provide its own garbage service beginning July 1, 1979. Retroactive application of this section would clearly substantially impair the contractual obligations of the city. Whether it constitutes an unconstitutional impairment of contract under Art. II, sec. 31, Mont. Const., was not decided because the contract expired before the effective date of the statute. D & F Sanitation Serv. v. Red Lodge, 196 M 490, 640 P2d 461, 39 St. Rep. 287 (1982).

Effective Date: On November 25, 1978, a city and a private garbage collection service entered into a contract in which the latter was to provide garbage collection services for the city from November 1, 1978, through June 30, 1979. On June 30, 1979, the city voted to provide its own garbage service beginning July 1, 1979. This section was not applicable, as there was no contract in existence on the section's effective date of July 1, 1979. Furthermore, this section was not intended to apply to contracts in existence before January 1, 1979. D & F Sanitation Serv. v. Red Lodge, 196 M 490, 640 P2d 461, 39 St. Rep. 287 (1982).

Part 42
Public Sewer Systems

7-13-4201. Establishment of sewer systems.

Collateral References

Municipal Corporations *key* 270.

64 C.J.S. Municipal Corporations §§1802, 1806.

56 Am. Jur. 2d Municipal Corporations §569.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility. 42 ALR 3d 426.

7-13-4202. Construction of public sewers.

Case Notes

"Public Sewer" Defined:

In a sewer system composed of both public and district sewers, the main artery or trunkline is the public sewer. Also, a sewer built according to public sewer specification, which fits into the general sewer system of the city, serves the public, and will drain a large area of the city when other sewers are established, is a public sewer. Crutchfield v. Nash, 84 M 556, 276 P 938 (1929).

A sewer system designated a trunk sewer and intended to serve as an outlet for the district sewers to be constructed later is a public sewer; its construction costs cannot be assessed under the special improvement district laws. Rush v. Grandy, 66 M 222, 213 P 242 (1923).

Collateral References

Municipal Corporations *key* 270.

64 C.J.S. Municipal Corporations §1802.

56 Am. Jur. 2d Municipal Corporations §569.

Liability of abutting landowner for injury to municipal employee engaged in constructing or repairing sewers or drains. 58 ALR 3d 1085.

Municipality's liability arising from negligence or other wrongful act in carrying out construction or repair of sewers and drains. 61 ALR 2d 874.

7-13-4203. Financing of public sewers.

Case Notes

Main Trunkline Sewer Not to Be Paid for by Assessments: A special improvement district was created for construction of a main trunkline sewer, district main sewer, and submain sewer. This system would not serve a majority of the lots within the district until lateral sewers could be constructed, requiring the creation of local districts within the main trunkline district. This was improper, as the sewer system contemplated was a public sewer system and could not be paid for by assessments on the property within the district. Crutchfield v. Nash, 84 M 556, 276 P 938 (1929).

Special Improvement District Laws Not Appropriate for Public Sewers: A sewer system designated a trunk sewer and intended to serve as an outlet for the district sewers to be constructed later was a public sewer; its construction costs could not be assessed under the special improvement district laws. Rush v. Grandy, 66 M 222, 213 P 242 (1923).

Attorney General's Opinions

Jurisdiction Over Municipal Sewer Rates: Chapter 13, part 42, confers jurisdiction over municipal sewage rates upon the Public Service Commission only when the city finances its sewer system under the SID method for district sewers, appropriates money from the general or sewer fund or issues municipal bonds for public sewers, and has obtained voter approval to impose such rates as provided in 7-13-4204. 37 A.G. Op. 65 (1977).

Service Charge for Sewer Connection: A municipality may impose an initial service charge for connections to the municipal sewer system based upon the size of the water service as long as the fee is reasonable and can be placed in a special fund used for repairs and capital improvements. No special provisions exist as to public notice or hearings. 37 A.G. Op. 30 (1977).

Collateral References

56 Am. Jur. 2d Municipal Corporations §574.

7-13-4204. Rental charges for use of sewer system — election required.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), after "special election", substituted "held in conjunction with a regular or special election" for "called for that purpose"; and made minor changes in style.

Attorney General's Opinions

Jurisdiction Over Municipal Sewer Rates: Chapter 13, part 42, confers jurisdiction over municipal sewage rates upon the Public Service Commission only when the city finances its sewer system under the SID method for district sewers, appropriates money from the general or sewer fund or issues municipal bonds for public sewers, and has obtained voter approval to impose such rates as provided in 7-13-4204. 37 A.G. Op. 65 (1977).

Service Charge for Sewer Connection: A municipality may impose an initial service charge for connections to the municipal sewer system based upon the size of the water service as long as the fee is reasonable and can be placed in a special fund used for repairs and capital improvements. No special provisions exist as to public notice or hearings. 37 A.G. Op. 30 (1977).

Collateral References

56 Am. Jur. 2d Municipal Corporations §574.

7-13-4205. Determination of rental charge.

Attorney General's Opinions

Jurisdiction Over Municipal Sewer Rates: Chapter 13, part 42, confers jurisdiction over municipal sewage rates upon the Public Service Commission only when the city finances its sewer system under the SID method for district sewers, appropriates money from the general or sewer fund or issues municipal bonds for public sewers, and has obtained voter approval to impose such rates as provided in 7-13-4204. 37 A.G. Op. 65 (1977).

Service Charge for Sewer Connection: A municipality may impose an initial service charge for connections to the municipal sewer system based upon the size of the water service as long as the

fee is reasonable and can be placed in a special fund used for repairs and capital improvements. No special provisions exist as to public notice or hearings. 37 A.G. Op. 30 (1977).

Collateral References

64 C.J.S. Municipal Corporations §1805.

7-13-4206. Procedure to collect rentals.

Attorney General's Opinions

Jurisdiction Over Municipal Sewer Rates: Chapter 13, part 42, confers jurisdiction over municipal sewage rates upon the Public Service Commission only when the city finances its sewer system under the SID method for district sewers, appropriates money from the general or sewer fund or issues municipal bonds for public sewers, and has obtained voter approval to impose such rates as provided in 7-13-4204. 37 A.G. Op. 65 (1977).

Collateral References

64 C.J.S. Municipal Corporations §1805.

7-13-4207. Special fund for sewer rentals.

Collateral References

64 C.J.S. Municipal Corporations §1805.

7-13-4208. Procedure to challenge rates.

Attorney General's Opinions

Jurisdiction Over Municipal Sewer Rates: Chapter 13, part 42, confers jurisdiction over municipal sewage rates upon the Public Service Commission only when the city finances its sewer system under the SID method for district sewers, appropriates money from the general or sewer fund or issues municipal bonds for public sewers, and has obtained voter approval to impose such rates as provided in 7-13-4204. 37 A.G. Op. 65 (1977).

Part 43
Municipal Sewage and/or Water Systems

Part Case Notes

Termination of Service — Federal Due Process Requirements: The declaration by the State of Montana in 7-13-430, the pertinent enabling legislation, that municipally owned water service utilities are to be created for the benefit of the public, taken in conjunction with the fact that under 7-13-4306 the services provided by such utilities may be terminated only for cause, establishes that a customer has a justified expectation of continued water service, created and secured by existing state and local law. Accordingly, a customer serviced by a municipally owned water service utility in the State of Montana may assert a "legitimate claim of entitlement" within the protection of the federal Due Process Clause of the 14th amendment. This court reads the Due Process Clause to require, prior to termination of utility services for nonpayment of charges: (1) notice informing the customer not only of the possibility of termination but also of a procedure for challenging a disputed bill; and (2) an established procedure for resolution of disputes or some specified avenue of relief to customers who dispute the existence of a liability. Frates v. Great Falls, 568 F. Supp. 1330, 40 St. Rep. 1307 (D.C. Mont. 1983).

Implied Power of City to Allocate Proportionate Share of Construction Cost: A city sought to construct a shop complex that would be used by various departments of the city, including the water and sewer department. Although there is no express statute, the city possesses an implied power to allocate a share of the construction costs against the funds of each department. Greener v. Great Falls, 157 M 376, 485 P2d 932 (1971).

Net Income — Reasonable Expenses: A city sought to construct a shop complex that would be used by various departments of the city, including the water and sewer department. Construction costs were to be partially financed by money from the special funds of the departments and would be paid in installments over 5 years. As the repayment of outstanding bonds was not in jeopardy, the payments were held to be reasonable expenses of operation and maintenance of the water and sewer department. Greener v. Great Falls, 157 M 376, 485 P2d 932 (1971).

Constitutionality: Legal electors under 7-13-4303 (now repealed) were not the proper parties to attack its constitutionality on the grounds that some people who could not vote would have to pay or that some people outside of the city might be charged. Also, that there were some people who could vote on the project but would not be required to pay for it did not yield an unreasonable classification. Billings v. Nore, 148 M 96, 417 P2d 458 (1966).

Part Attorney General's Opinions

Separate Accounting Required for Equipment Reserve Account in Enterprise Fund: Enterprise funds, such as funds generated from the provision of income-producing municipal services like water and sewer systems, may not be consolidated with revenue from other sources. A city may not reclassify equipment reserves maintained in the enterprise funds. Therefore, equipment reserve accounts in enterprise funds must be maintained separately from other equipment reserve accounts in a capital improvement fund. 44 A.G. Op. 5 (1991).

Retention of Municipal Authority After Incorporation in County District: Section 7-13-2202 disclaims any intent to supersede through formation of a county district a municipality's authority with respect to maintenance or creation of a sewer and water system. Therefore, a municipality retains all authority granted under this part with respect to providing water and sewer services after a county water and sewer district, which includes the municipality, has been incorporated. 43 A.G. Op. 13 (1989).

Part Collateral References

Water furnished by public utility as "goods" within Uniform Commercial Code, Article 2 on sales. 48 ALR 3d 1060.

Municipal operation of sewage disposal plant as governmental or proprietary function, for purposes of tort liability. 57 ALR 2d 1336.

7-13-4301. Establishment of sewage and water systems.

Compiler's Comments

1993 Amendment: Chapter 453 near beginning, after "town", deleted "when authorized to do so by a majority vote of the qualified electors voting on the question"; and made minor changes in style.

Case Notes

System Development Fees Allowable Form of Financing Future Expansion of City Water and Sewer System: When liberally construed, it is within the power of a self-governing municipality, as well as a reasonable extension of a city's express statutory authority, to implement the collection and accumulation of system development fees to fund a portion of the cost of future expansion of municipal water and sewer systems. The fees are proper as long as they are based on reasonably anticipated future costs of the city and the revenue generated from the fees is used solely to fund facility expansion or to pay for bonds sold for that purpose. Lechner v. Billings, 244 M 195, 797 P2d 191, 47 St. Rep. 1512 (1990).

Law Review Articles

Development Impact Fees: The Next Generation, Nelson, 26 Urb. Law. 541 (1994).

Collateral References

Municipal Corporations *key* 270, 271.

63 C.J.S. Municipal Corporations §§1049, 1051; 64 C.J.S. Municipal Corporations §§1802 through 1804.

56 Am. Jur. 2d Municipal Corporations §§567, 569; 64 Am. Jur. 2d Public Utilities §137; 78 Am. Jur. 2d Waterworks and Water Companies §§3, 13.

Municipality's liability for damages resulting from furnishing impure water. 54 ALR 3d 910.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility. 42 ALR 3d 426.

Municipality's liability for injury due to condition of service lines, meters, and the like, which serve individual customer. 20 ALR 3d 1363.

Municipality's liability for damage caused by water escaping from main. 20 ALR 3d 1294.

Municipality's liability for negligence in carrying out construction or repair of drains or sewers. 61 ALR 2d 874.

Municipality's liability for damage resulting from clogging of drains or sewers. 59 ALR 2d 281.

Practical Issues in Adopting Local Impact Fees, Kolo & Dicker, St. & Loc. Gov't Rev. (1993).

7-13-4304. Authority to charge for services.

Case Notes

Sewer District Not Local Self-Governing Unit: The lower court granted a multicounty sewer district's motion for summary judgment, ruling that the district had the right to impose hookup inspection fees on the appellant, Seypar, Inc. Seypar, Inc., argued that the district did not have the authority to impose the fee against individual property owners and that the cost should have

been assessed against the whole district. The Supreme Court ruled that although state law gave the district the same administrative powers as County Commissioners have over a single county sewer district, those powers are not the same as a local self-governing unit and therefore the district did not have the authority to exercise any power not prohibited by Montana law. The Supreme Court stated that since the district was not self-governing, it could not argue that the statutes relating to municipal districts applied to it by analogy. The Supreme Court held that the district did have the power to impose hookup fees under 7-12-2151. Seypar, Inc. v. Water & Sewer District No. 363, 1998 MT 149, 289 M 263, 960 P2d 311, 55 St. Rep. 578 (1998).

System Development Fees Allowable Form of Financing Future Expansion of City Water and Sewer System: When liberally construed, it is within the power of a self-governing municipality, as well as a reasonable extension of a city's express statutory authority, to implement the collection and accumulation of system development fees to fund a portion of the cost of future expansion of municipal water and sewer systems. The fees are proper as long as they are based on reasonably anticipated future costs of the city and the revenue generated from the fees is used solely to fund facility expansion or to pay for bonds sold for that purpose. Lechner v. Billings, 244 M 195, 797 P2d 191, 47 St. Rep. 1512 (1990).

Termination of Service — Federal Due Process Requirements: The declaration by the State of Montana in 7-13-430, the pertinent enabling legislation, that municipally owned water service utilities are to be created for the benefit of the public, taken in conjunction with the fact that under 7-13-4306 the services provided by such utilities may be terminated only for cause, establishes that a customer has a justified expectation of continued water service, created and secured by existing state and local law. Accordingly, a customer serviced by a municipally owned water service utility in the State of Montana may assert a "legitimate claim of entitlement" within the protection of the federal Due Process Clause of the 14th amendment. This court reads the Due Process Clause to require, prior to termination of utility services for nonpayment of charges: (1) notice informing the customer not only of the possibility of termination but also of a procedure for challenging a disputed bill; and (2) an established procedure for resolution of disputes or some specified avenue of relief to customers who dispute the existence of a liability. Frates v. Great Falls, 568 F. Supp. 1330, 40 St. Rep. 1307 (D.C. Mont. 1983).

Assessment to Be Equitable: Plaintiffs were assessed a tax for a portion of the costs of storm sewers and paid this tax under protest. At trial, the plaintiffs showed that it was highly unlikely that water running off their property would end up in the sewer system. Therefore, the assessments were not as equitable as possible in proportion to the services rendered and were erroneous. Berger v. Billings, 186 M 326, 607 P2d 558, 37 St. Rep. 397 (1980).

Commercial/Residential Rate Disparity: That commercial users of a storm sewer were charged three times as much as residential users is not objectionable because of the difference in runoff from the property. Billings v. Nore, 148 M 96, 417 P2d 458 (1966).

Duty Upon City to Administer: This section imposes a duty on a city to impose rates following an affirmative bond issue. A city ordinance setting forth the rates is an administrative act. Billings v. Nore, 148 M 96, 417 P2d 458 (1966).

Indirect Benefit Assessable: Because persons living within an existing storm sewer system would be indirectly benefited by a proposed extension of the system, they were properly assessable. Billings v. Nore, 148 M 96, 417 P2d 458 (1966).

No Violation of Legislature's Authority to Delegate Power: In authorizing a municipality to set rates for a water or sewage system, the Legislature has not violated its authority to delegate its powers. A considerable amount of administrative detail is necessary to implement such rates. Billings v. Nore, 148 M 96, 417 P2d 458 (1966).

Prevention of Pollution Not Required: Subsection (1) is specific and directly deals with rates and charges. The language does not require a finding of prevention of pollution before rates and charges can be assessed. Billings v. Nore, 148 M 96, 417 P2d 458 (1966).

Vacant Lots Not Charged for Storm Sewers: That certain vacant lots were not charged for storm sewer service is not objectionable because runoff was minimal and enforcement of the charges was impractical. Billings v. Nore, 148 M 96, 417 P2d 458 (1966).

Attorney General's Opinions

Service Charge for Sewer Connection: A municipality may impose an initial service charge for connections to the municipal sewer system based upon the size of the water service as long as the fee is reasonable and can be placed in a special fund used for repairs and capital improvements. No special provisions exist as to public notice or hearings. 37 A.G. Op. 30 (1977).

Collateral References

Waters and Water Courses *key* 203.

64 C.J.S. Municipal Corporations §1805.
56 Am. Jur. 2d Municipal Corporations §574.
Validity and construction of municipal regulation fixing sewer rates. 61 ALR 3d 1236.

7-13-4305. Consumers required to pay for services.

Compiler's Comments

1987 Amendment: Inserted (2) relating to reestablishing service.

Attorney General's Opinions

Municipality Authorized to Assess Charge for Providing Water Service to Fire Hydrants Owned by Rural Improvement District: When a rural improvement district requests that a municipal water utility provide water service to fire hydrants owned by the district, the municipality is authorized to provide that service and to assess a charge for it. 45 A.G. Op. 4 (1993).

7-13-4306. Effect of failure to pay charges.

Compiler's Comments

1987 Amendment: After "water" inserted "or provision of sewer service".

Case Notes

Termination of Service — Federal Due Process Requirements: The declaration by the State of Montana in 7-13-430, the pertinent enabling legislation, that municipally owned water service utilities are to be created for the benefit of the public, taken in conjunction with the fact that under 7-13-4306 the services provided by such utilities may be terminated only for cause, establishes that a customer has a justified expectation of continued water service, created and secured by existing state and local law. Accordingly, a customer serviced by a municipally owned water service utility in the State of Montana may assert a "legitimate claim of entitlement" within the protection of the federal Due Process Clause of the 14th amendment. This court reads the Due Process Clause to require, prior to termination of utility services for nonpayment of charges: (1) notice informing the customer not only of the possibility of termination but also of a procedure for challenging a disputed bill; and (2) an established procedure for resolution of disputes or some specified avenue of relief to customers who dispute the existence of a liability. Frates v. Great Falls, 568 F. Supp. 1330, 40 St. Rep. 1307 (D.C. Mont. 1983).

Attorney General's Opinions

No Lien for Nonpayment of Water Bill: A city or town may not file a lien against a landowner's property due to a tenant's failure to pay for water service contracted for and used by the tenant. Discontinuance of service is the only statutory remedy provided for nonpayment of water charges. When a power is conferred upon a municipality and the mode in which it is to exercise that power is prescribed, such mode must be pursued. 40 A.G. Op. 7 (1983).

Collateral References

Right of public utility to deny service at one address because of failure to pay for past service at another address. 73 ALR 3d 1292.

Right of municipality to refuse services provided by it to resident for failure of resident to pay for other unrelated services. 60 ALR 3d 714.

Liability of premises, owner, or occupant for water charges, irrespective of who is user. 19 ALR 3d 1227.

Right to cut off water supply because of failure to pay sewer service charge. 26 ALR 2d 1359.

7-13-4307. Establishment of amount of charges.

Case Notes

Reasonable Expenses — Proportionate Share of Construction Costs: A city sought to construct a shop complex that would be used by various departments of the city, including the water and sewer department. Construction costs were to be partially financed by money from the special funds of the departments and would be paid in installments over 5 years. The payments were held to be reasonable expenses of operation and maintenance of the water and sewer department. Greener v. Great Falls, 157 M 376, 485 P2d 932 (1971).

Attorney General's Opinions

Separate Accounting Required for Equipment Reserve Account in Enterprise Fund: Enterprise funds, such as funds generated from the provision of income-producing municipal services like water and sewer systems, may not be consolidated with revenue from other sources. A city may not reclassify equipment reserves maintained in the enterprise funds. Therefore,

equipment reserve accounts in enterprise funds must be maintained separately from other equipment reserve accounts in a capital improvement fund. 44 A.G. Op. 5 (1991).

7-13-4309. Procedure to collect sewer charges.

Compiler's Comments

1999 Amendment: Chapter 423 in (2) near beginning substituted "July 7" for "July 15" and near middle substituted "paid within 30 days of the notice" for "paid by August 15"; in (3)(a) near beginning substituted "at the time that the annual tax levy is certified to the county clerk" for "on September 1"; and made minor changes in style. Amendment effective October 1, 1999.

1993 Special Session Amendment: Chapter 27 in (2), at end, substituted "shown in property tax records maintained by the department of revenue" for "recorded in the office of the county assessor"; in (3)(a), in two places, substituted "department of revenue" for "county assessor"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1987 Amendments: Chapter 114 in (2) changed dates from January 15 to July 15, from January 1 to July 1, and from July 1 to August 15; and in (3)(a) changed March 1 to September 1.

Chapter 115 in (2) inserted fourth sentence relating to collection by suit; and inserted (4) relating to suing for debt.

7-13-4311. Authorization to furnish water and sewer services to industrial consumers.

Compiler's Comments

1997 Amendment: Chapter 42 in (2)(a), after "reasonable rates", deleted "filed by the city or town council and approved by the public service commission"; and made minor changes in style. Amendment effective March 12, 1997.

Case Notes

Public Service Commission Jurisdiction: By using the phrase "as a public utility", the Legislature equated municipal sewage plants with other easily recognizable public utilities. Accordingly, Public Service Commission approval of sewage rates is a condition precedent to the institution of those rates. (See 1997 amendment.) Gwynn v. Eureka, 178 M 191, 582 P2d 1262 (1978).

Collateral References

Validity and construction of statutes, regulations, or ordinances pertaining to discharge of industrial wastes in sewer system. 47 ALR 3d 1224.

Right to compel municipality to extend its water system within or without municipal boundaries. 48 ALR 2d 1222.

7-13-4312. Authorization to furnish water and sewer services to persons located outside municipality.

Case Notes

Public Service Commission Jurisdiction: By using the phrase "as a public utility", the Legislature equated municipal sewage plants with other easily recognizable public utilities. Accordingly, Public Service Commission approval of sewage rates is a condition precedent to the institution of those rates. Gwynn v. Eureka, 178 M 191, 582 P2d 1262 (1978).

Connections Within Service Area: A business located outside the corporate limits but within the city's water supply service area cannot be refused a connection to a service main already in place. Polson v. P.S.C., 155 M 464, 473 P2d 508 (1970).

No Duty to Furnish Mains: A city is under no duty to furnish mains to an area outside the corporate limits even though it has agreed to supply water to the area. The decision is within its discretion. Crawford v. Billings, 130 M 158, 297 P2d 292 (1956).

Attorney General's Opinions

Municipality Authorized to Assess Charge for Providing Water Service to Fire Hydrants Owned by Rural Improvement District: When a rural improvement district requests that a municipal water utility provide water service to fire hydrants owned by the district, the municipality is authorized to provide that service and to assess a charge for it. 45 A.G. Op. 4 (1993).

Collateral References

78 Am. Jur. 2d Waterworks and Water Companies §§11 through 13.

Right to compel municipality to extend its water system within or without municipal boundaries. 48 ALR 2d 1222.

Discrimination between property within and that without municipality as to rates for use of sewers. 4 ALR 2d 610.

7-13-4314. Annexation as a requirement for receiving service.

Case Notes

City's Annexation Ordinance Not Coercive: A city's annexation ordinance requiring property to be annexed prior to extension of water and sewer services was not tantamount to coercion and would not render the principles of estoppel inapplicable. Schanz v. Billings, 182 M 328, 597 P2d 67, 36 St. Rep. 1163 (1979).

Part 44
Water Supply and Regulation

Part Case Notes

City Ordinance Not Conclusive Presumption of Necessity — Standard of Proof: A city ordinance adopted pursuant to 7-5-4106 did not establish a conclusive presumption that the taking of private property for a water system was necessary. The controlling statutes are in this part, and absent an agreement to purchase, 7-13-4404 requires that the standard of proof outlined in 70-30-111 be met before private property may be taken for a public use. Since the District Court has the power to determine whether a condemnation is necessary, the votes of the people and the city council cannot be considered as dispositive of the issue of necessity; however, the public interest as expressed in these votes must be considered and weighed with the other factors in determining whether acquisition is necessary. Missoula v. Mtn. Water Co., 228 M 404, 743 P2d 590, 44 St. Rep. 1633 (1987).

7-13-4401. Water regulation.

Collateral References

Waters and Water Courses *key* 197.

94 C.J.S. Waters §232.

78 Am. Jur. 2d Waterworks and Water Companies §§37 through 41.

7-13-4402. Obtaining municipal water supply.

Case Notes

Power of Local Governments to Require All Residents to Connect to City Water Supply: The defendants argued that a city ordinance requiring them to hook up to the city water system violated their right to privacy by denying them the freedom to choose the type of water they wanted to use. The Supreme Court held that the interest asserted did not involve matters so fundamentally affecting the defendants' rights as to invoke constitutional protection. The court also held that a local government's concern with preventing health problems is a legitimate reason for controlling the water supply and a proper exercise of governmental power. Ennis v. Stewart, 247 M 355, 807 P2d 179, 48 St. Rep. 228 (1991).

Grant of Power to Cities: This section is the basic grant of power that allows cities to engage in the water business and charge for water and services provided. Leischner v. Knight, 135 M 109, 337 P2d 359 (1959).

Method of Installing Fixtures Within City's Discretion: As the statute is silent on the method to be used in tapping the main and installing the necessary fixtures, a city has discretionary power to decide the matter. Where a city chose its own employees, not licensed plumbers, to do the work exclusively instead of hiring independent plumbing contractors, it did not abuse its discretion. Leischner v. Knight, 135 M 109, 337 P2d 359 (1959).

Collateral References

Waters and Water Courses *key* 183.

63 C.J.S. Municipal Corporations §1051; 94 C.J.S. Waters §§230, 278.

78 Am. Jur. 2d Waterworks and Water Companies §§3, 13.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility. 42 ALR 3d 426.

7-13-4403. Acquisition of private water supply system.

Case Notes

Acquisition by City Not Mandatory: Where there is an existing water supply system being operated under a franchise granted by the city, it is not incumbent upon the city to acquire that system before it procures its own system. Carlson v. Helena, 39 M 82, 102 P 39 (1909).

Collateral References

Waters and Water Courses *key* 183.
94 C.J.S. Waters §236.
78 Am. Jur. 2d Waterworks and Water Companies §§14, 15.

7-13-4404. Use of eminent domain powers to acquire water supply system.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) and (2) substituted "Title 70, chapter 30" for "the laws relating to the taking of private property for public use"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

City Ordinance Not Conclusive Presumption of Necessity — Standard of Proof: A city ordinance adopted pursuant to 7-5-4106 did not establish a conclusive presumption that the taking of private property for a water system was necessary. The controlling statutes are in Title 7, chapter 13, part 44, and absent an agreement to purchase, this section requires that the standard of proof outlined in 70-30-111 be met before private property may be taken for a public use. Since the District Court has the power to determine whether a condemnation is necessary, the votes of the people and the city council cannot be considered as dispositive of the issue of necessity; however, the public interest as expressed in these votes must be considered and weighed with the other factors in determining whether acquisition is necessary. Missoula v. Mtn. Water Co., 228 M 404, 743 P2d 590, 44 St. Rep. 1633 (1987), affirmed in Missoula v. Mtn. Water Co., 236 M 442, 771 P2d 103, 46 St. Rep. 494 (1989).

Law Review Articles

An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources, Hunter, 12 Harv. Envtl. L. Rev. 311 (1988).

Collateral References

Waters and Water Courses *key* 183.
94 C.J.S. Waters §236.
78 Am. Jur. 2d Waterworks and Water Companies §§14, 15.

7-13-4405. Acquisition of water rights and other necessary property.

Compiler's Comments

2001 Amendment: Chapter 125 at end inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Collateral References

Waters and Water Courses *key* 190 through 192.
94 C.J.S. Waters §228.

7-13-4406. Control over territory occupied by water supply system — taxation and condemnation powers.

Compiler's Comments

2001 Amendment: Chapter 125 in (2) in second sentence substituted "in Title 70, chapter 30" for "by law"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Part 45
Local Water Quality Districts

Part Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 357, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [functions now tranferred to Board of Environmental Review] concerning rulemaking and approval of local water quality programs. The board shall adopt rules concerning the format of local water quality programs, including the level of information necessary for a local water quality district to show that its proposed program will be consistent with Title 75, chapter 5, and that its program will be effective in protecting, preserving, and improving the quality of surface water and ground water. The board may define by rule the types of best management practices that may be imposed upon each of the types of facilities and sources of pollution that may be regulated by local ordinances as authorized under [section 24(4)] [75-5-311(4)]. It is the intent of the legislature that administrative responsibilities be clearly allocated and, when necessary, clearly divided between the department of health and environmental sciences [functions now transferred to Department of Environmental Quality] and a local water quality district, insofar as possible, to ensure that permitholders, permit applicants, and citizens are not subject to conflicting or duplicative requirements. Through its approval of local water quality programs, the board of health and environmental sciences [functions now transferred to Board of Environmental Review] shall ensure that the department of health and environmental sciences' [functions now transferred to Board of Environmental Review] ability to continue to administer federally delegated water quality protection programs is not impaired. The board may also adopt rules to specify the procedures the department of health and environmental sciences [functions now transferred to Department of Environmental Quality] shall follow pursuant to 75-5-106 to authorize a local water quality district to enforce provisions of Title 75, chapter 5. It is the intent of the legislature that the boundaries of local water quality districts should correspond to the area or areas in which water quality problems have been documented.

Except as expressly provided in this bill, nothing in this bill may be considered to limit or restrict the authority of local governments to adopt rules and regulations authorized by other laws of the state."

7-13-4502. Definitions.

Compiler's Comments

1997 Amendment: Chapter 200 in definition of fee-assessed units, after "mobile homes", inserted "and manufactured homes". Amendment effective January 1, 1998.

1995 Amendments — Composite Section: Chapter 418 substituted definition of Board of Environmental Review for definition of Board of Health and Environmental Sciences. Amendment effective July 1, 1995.

Chapter 546 deleted definition of Board of Health and Environmental Sciences that read: ""Board of health and environmental sciences" as used in this part means the board of health and environmental sciences as provided in 2-15-2104"; and made minor changes in style. Amendment effective July 1, 1995.

Because Ch. 418 created a new Board, the Code Commissioner has codified the Board of Environmental Review.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

7-13-4507. Notice of resolutions of intention and concurrence.

Compiler's Comments

2001 Amendment: Chapter 354 in (2) at end deleted "and must also be posted in three public places within the boundaries of the proposed district". Amendment effective October 1, 2001.

1993 Special Session Amendment: Chapter 27 in (3) substituted "property tax record maintained by the department of revenue" for "county assessor's office". Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

7-13-4513. Insufficient protest to bar proceedings — resolution creating district — power to implement local water quality program.

Compiler's Comments

1995 Amendment: Chapter 418 in (3) substituted "board of environmental review" for "board of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

7-13-4517. Powers and duties of board of directors.

Compiler's Comments

1995 Amendment: Chapter 418 in (1) substituted "board of environmental review" for "board of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

7-13-4535. Referendum to abolish local water quality district or joint local water quality district — termination procedures.

Compiler's Comments

Effective Date: Section 4, Ch. 123, L. 1995, provided that this section is effective March 10, 1995.

7-13-4536. Allocation of funds upon termination of local water quality district or joint local water quality district.

Compiler's Comments

Effective Date: Section 4, Ch. 123, L. 1995, provided that this section is effective March 10, 1995.

CHAPTER 14
TRANSPORTATION

Part 1
General Provisions Related to Local Government Transportation Services

7-14-101. Acquisition of property for controlled-access facility.

Compiler's Comments

2001 Amendment: Chapter 125 at end substituted "provided in Title 60, chapter 4, part 1, and Title 70, chapter 30" for "as may now or hereafter be authorized by law for the acquisition of property or property rights in connection with highways, roads, and streets in their respective jurisdictions"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Law Review Articles

Managing Traffic Problems Resulting From Urbanization, McGarry, 1988 Inst. on Plan. Zoning & Eminent Domain 1.1-.21 (1988).

Recent Developments in Highways and Public Transportation, Friedman & Collins, 20 Urb. Law. 1105 (1988).

Collateral References

Right to and measure of damages, and elements of damage caused by conversion of conventional road to limited access highway. 42 ALR 3d 13, 148.

7-14-102. Allocation of state funds for public transportation.

Compiler's Comments

1995 Amendment: Chapter 18 in (2), at end of first sentence, substituted reference to 15-70-101(2)(b) for reference to 15-70-101(1)(b).

1993 Amendment: Chapter 10 in (2) substituted reference to 15-70-101(1)(b) for reference to 15-70-101(1)(a); and made minor changes in style.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Commerce and Department of Highways. Amendment effective July 1, 1991.

1983 Amendment: In (2), substituted "department of highways" for "state treasurer".

1981 Amendment: Substituted "department of commerce" for "department of community affairs" in (1)(a) and (3).

7-14-103. Use of county road equipment in certain municipalities.

Compiler's Comments

Section Not Codified: Section 32-2807, R.C.M. 1947, was not codified in the MCA, it being redundant with this section. This section has not been repealed and is still valid law. Citation may be made to sec. 5-107, Ch. 197, L. 1965. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Collateral References

40 C.J.S. Highways §193.

7-14-111. Transportation for senior citizens and persons with disabilities.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) near middle substituted "levy property taxes" for "in addition to all other property tax levies authorized by law, levy up to 1 mill of property taxes". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1997 Amendment: Chapter 472 throughout section substituted reference to disabilities for reference to handicapped.

1987 Amendment: In (1) and (4), near beginning, inserted reference to urban transportation districts; in introductory clause of (2) substituted "The proceeds of the levy may be used to" for "The county or municipality may use the proceeds of the levy to"; and in (3), in two places, substituted "taxing jurisdiction" for "county or municipality".

7-14-112. Senior citizen and persons with disabilities transportation services account — use.

Compiler's Comments

2003 Amendment: Chapter 114 in (1) substituted "61-3-321(6)(a)" for "61-3-406". Amendment effective October 1, 2003.

Effective Date: Section 10, Ch. 337, L. 2001, provided that this section is effective on passage and approval. Approved April 21, 2001.

Applicability: Section 11, Ch. 337, L. 2001, provided: "[This act] applies to registrations of motor vehicles occurring after December 31, 2001."

7-14-120. Transloading facility.

Compiler's Comments

1995 Amendment: Chapter 418 in (2) substituted "department of environmental quality" for "department of natural resources and conservation". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Commerce. Amendment effective July 1, 1991.

Appropriation for Transloading Facility: Section 8, Ch. 597, L. 1989, provided an appropriation of $300,000 as a grant to Toole County for construction of a transloading facility in accordance with this section. See 1989 Session Law for text of the appropriation.

Part 2
Urban Transportation Districts

Part Law Review Articles

Managing Traffic Problems Resulting From Urbanization, McGarry, 1988 Inst. on Plan. Zoning & Eminent Domain 1.1-.21 (1988).

Recent Developments in Highways and Public Transportation, Friedman & Collins, 20 Urb. Law. 1105 (1988).

Part Collateral References

Urban Mass Transportation Act of 1964, 49 U.S.C. §1601, et seq.

7-14-203. Petition to create or enlarge an urban transportation district.

Compiler's Comments

1997 Amendment: Chapter 177 at beginning, after "Proceedings for", substituted "creating or enlarging" for "creation of" and at end inserted "or the area to be added to an existing district".

7-14-204. Details relating to petition.

Compiler's Comments

1997 Amendment: Chapter 177 near beginning inserted "under 7-14-203" and near middle, after "proposed district", inserted "or the area to be added to an existing district"; and made minor changes in style.

7-14-207. Presentation of petition to board of county commissioners — hearing required.

Compiler's Comments

1997 Amendment: Chapter 177 in (1), near middle after "transportation district", inserted "or the area proposed to be added to an existing district" and at end inserted "to the petition"; in (2), at end, inserted "or the enlargement of the district"; and made minor changes in style.

7-14-208. Notice of hearing.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) substituted "as provided in 7-1-2121" for "in a newspaper having general circulation within the proposed transportation district or addition to the district once each week for at least 2 weeks, the last publication to be at least 2 weeks prior to the hearing. If there is not a newspaper having general circulation within the proposed district or addition, the notice of public hearing must be posted in at least three public places within the proposed district for 2 weeks prior to the hearing." Amendment effective October 1, 2001.

1997 Amendment: Chapter 177 in (1), near beginning of first sentence after "hearing", inserted "required by 7-14-207" and near middle, after "transportation district", inserted "or addition to the district" and in second sentence, after "proposed district", inserted "or addition"; in (2), at end, inserted "or addition"; and made minor changes in style.

7-14-209. Hearing on petition.

Compiler's Comments

1997 Amendment: Chapter 177 in (1), near beginning after "hearing", inserted "required by 7-14-207" and at end inserted "or addition to a district"; and made minor changes in style.

7-14-210. Election on question of creating urban transportation district or addition to a district.

Compiler's Comments

1997 Amendment: Chapter 177 in (1), near beginning after "hearing", inserted "required by 7-14-207" and near end, after "creation of the district", inserted "or addition to a district"; in (2), at end of first sentence, inserted "or whether the matter is to be determined by a mail ballot election held pursuant to the provisions of Title 13, chapter 19"; and made minor changes in style.

1995 Amendment: Chapter 387 in (2), in first sentence after "held", inserted "in conjunction with a regular or primary election"; and made minor changes in style.

7-14-212. District to be governed by transportation board.

Compiler's Comments

1999 Amendment: Chapter 254 inserted (4) authorizing cancellation of election when number of board candidates is equal to or less than number of positions and requiring election by acclamation of each candidate filing petition; inserted (5) regarding filling of vacancy when no board nominees exist; and inserted (6) regarding term of office for persons elected by acclamation or appointed to fill vacancy. Amendment effective October 1, 1999.

1993 Amendment: Chapter 608 in (1) substituted second sentence authorizing Commissioners and governing bodies to determine if board is elected or appointed for former second and third sentences that read: "The board shall consist of three members. After expiration of the term of the individuals appointed to the initial board, the board members shall be elected"; inserted (2) relating to resolution requirements; inserted (3) relating to changing method of board member selection by resolution; and made minor changes in style. Amendment effective May 3, 1993.

7-14-214. Election of members of transportation board.

Compiler's Comments

1993 Amendment: Chapter 608 deleted (2) that read: "(2) The names of six candidates receiving the highest number of votes in the primary election shall be placed on the ballots in the county general election"; and made minor changes in style. Amendment effective May 3, 1993.

1981 Amendment: Added the requirement and the exception relating to the number of petition signers near the end of (1).

7-14-232. Mill levy authorized.

Compiler's Comments

2001 Amendment: Chapter 574 at end of (1) substituted "sufficient to operate the district, taking into account the amount requested by the board" for "clearly sufficient to raise the amount certified by the board"; deleted former (2) that read: "(2) The tax levied for all district purposes other than payment of bonded indebtedness may not in any year exceed 12 mills on each dollar of taxable valuation of property within the district"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-14-236. Limitation on bonded indebtedness.

Compiler's Comments

2001 Amendment: Chapter 29 near middle after "exceed" substituted "1.51% of the total assessed value of taxable property, determined as provided in 15-8-111, within the district" for "28% of the taxable value of taxable property therein"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1981 Amendment: Substituted "shall not exceed 28% of the taxable value of taxable property" for "shall not exceed 5% of taxable property".

7-14-241. Procedure to be included in district or to remove an addition to a district.

Compiler's Comments

1997 Amendment: Chapter 177 deleted former (1) that read: "(1) The boundaries of any transportation district may be enlarged if 51% of the qualified electors of the area to be added to the existing district sign a petition requesting addition to the district"; in second sentence of (1), at beginning, substituted "The addition of the real property owner's property" for "Each addition"; in (2), near beginning of first sentence after "pursuant to", substituted "this part" for "subsection (1)"; and made minor changes in style.

1995 Amendment: Chapter 245 inserted (2) allowing an owner to petition for inclusion in district; in (4), at end of second sentence, substituted "the area" for "territory" and in third

sentence substituted "resubmit a corrected version" for "submit it again"; and made minor changes in style.

1987 Amendment: Inserted (3) relating to removal from district; and inserted (4)(b) relating to district indebtedness and removal.

7-14-244. Notice of hearing on question of dissolution of district.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) substituted "as provided in 7-1-2121" for "in a newspaper having general circulation in the transportation district once each week for at least 2 weeks, the last publication to be at least 2 weeks before the hearing. If there is no newspaper having general circulation in the district, the notice of the hearing shall be posted in at least three public places in the district for 2 weeks before the hearing"; and made minor changes in style. Amendment effective October 1, 2001.

Part 3
Local Option Motor Fuel Tax

Part Collateral References

Municipal Corporations *key* 966(9).

7-14-301. Local option motor fuel excise tax authorized — definitions.

Compiler's Comments

1995 Amendment: Chapter 18 in introductory clause of (1), after "tax", deleted "in increments of 1 cent per gallon, not to exceed 2 cents per gallon upon gasoline sold to the ultimate consumer within the county for use in motor vehicles operated upon public highways, streets, and roads" and after "imposed" inserted "within a county"; inserted (2) regarding imposition of the motor fuel excise tax; at beginning of (5) deleted "Every distributor shall pay the motor fuel excise tax to the agency specified in the initiative or referendum as provided in subsection (1). When the tax is collected by the department of transportation" and near beginning, after "department", inserted "of transportation"; in (7), after "transportation", deleted "collecting the tax authorized under subsection (1)"; in (8), after ""gasoline"", deleted ""import""; and made minor changes in style.

Code Commissioner Correction: Substituted references to Department of Transportation for references to Department of Revenue, pursuant to the authority of sec. 62, Ch. 16, L. 1991, which allows the Code Commissioner to correct erroneous references. Amendment effective July 1, 1991.

1983 Amendment: At beginning of (1), deleted "The people of a county by initiative may impose"; at end of (1) inserted "may be imposed:"; inserted (1)(a) relating to initiative; inserted (1)(b) relating to resolution and referral; and inserted "or referendum" after "initiative" in (2) through (4).

1981 Amendment: In (1), substituted "in increments of 1 cent per gallon, not to exceed" for "of not more than"; substituted "sold to the ultimate consumer within the county" for "distributed within the county"; inserted "highways" before "streets"; inserted provision for Department of Revenue to collect taxes; substituted (2) relating to 90-day period prior to assessment for "A county imposing the tax authorized under subsection (1) shall provide a means to provide refunds to persons who have paid the tax on motor fuel for uses other than on public streets and roads"; substituted (3) relating to distributor payment and administration for "The term "gasoline" has the meaning ascribed to it in 15-70-201"; inserted (4) relating to recordkeeping; inserted (5) relating to refunds; and in definition subsection inserted "distributor", "import", "motor vehicle", "person", and "use".

Collateral References

State sales or use tax as violating immunity of United States—Supreme Court cases. 44 L. Ed. 2d 719.

7-14-302. Use of local motor fuel excise tax revenue.

Compiler's Comments

1981 Amendment: In (2), substituted the first sentence relating to contracting for costs of collection for "Two percent of the motor fuel tax revenue collected in a county is allocated to the county governing body for use in administering the tax"; inserted "excise" before "tax"; inserted "collected" after "revenue"; substituted "to the distributor for the cost of compliance with this part" for "at the point of collection for use in administering the tax"; and made minor changes in phraseology.

7-14-303. Allocation of revenue and disposition of funds from county-imposed motor fuel tax.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways and Department of Revenue. The reference to the Department of Revenue was changed pursuant to the authority of sec. 62, Ch. 16, L. 1991, which allows the Code Commissioner to correct erroneous references. Amendment effective July 1, 1991.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

1981 Amendment: In (1), inserted "excise" before "tax"; substituted "apportioned" for "divided"; inserted (1)(b) relating to interlocal agreement; inserted (2) relating to deposit; and made minor changes in phraseology and punctuation.

7-14-304. Lien for delinquent tax — interest and penalty — statute of limitations.

Compiler's Comments

1981 Amendment: Substituted entire section (see 1981 Session Law for text) for "Penalties for violation of this part shall be the same as provided in 15-70-232."

Part 10
Transportation Improvement Authorities

Part Compiler's Comments

Effective Date: This part is effective October 1, 2003.

Part 11
Port Authorities

7-14-1101. Local port authority.

Compiler's Comments

1991 Amendment: In (2), after "appoint", inserted "or, at the option of the governing body, elect, as provided in 7-14-1106"; and in (2), near end after "appointed", inserted "or elected".

7-14-1102. Regional port authority.

Compiler's Comments

2001 Amendment: Chapter 354 in (4) substituted "as provided in 7-1-2121" for "at least 10 days prior to the hearing in a newspaper published in the county or municipality or, if there is no newspaper published therein, in a newspaper having general circulation in the county or municipality"; and made minor changes in style. Amendment effective October 1, 2001.

7-14-1103. Commissioners.

Compiler's Comments

1991 Amendment: In (3), in second sentence after "appointed", inserted "or elected" and in third sentence, after "reappointment", inserted "or election"; and made minor changes in style.

7-14-1104. Purpose — public and governmental functions.

Compiler's Comments

1995 Amendment: Chapter 22 in (2) inserted last sentence allowing a port authority to pledge, lease, sell, or mortgage its facilities to secure bonds. Amendment effective February 2, 1995.

1991 Amendment: In (1)(b), before "facilities", substituted "transportation, storage, or other" for "ports and transportation and storage"; and in (2), before "facilities", substituted "port authority" for "ports and transportation and storage".

1989 Amendment: Inserted (1) outlining the purposes of the local port authority to aid commerce and stimulate creation of jobs through economic development-related activities; and made minor changes in style.

Severability: Section 6, Ch. 507, L. 1989, was a severability clause.

7-14-1111. General powers of authority.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1991 Amendment: At beginning of (1) substituted "request annually the amount of tax to be levied by the governing body for port purposes, which request the governing body may in its discretion approve" for "certify annually to the governing bodies creating it the amount of tax to be levied by the governing bodies"; in (4) and (6), in two places before "facilities", substituted "transportation, storage, or other" for reference to ports and transportation and storage; and in (6), after "facilities", inserted "as may be necessary or convenient to carry out the purposes of this part".

1989 Amendment: Inserted (7) authorizing the port authority to provide financial and other support to organizations promoting economic development.

Severability: Section 6, Ch. 507, L. 1989, was a severability clause.

7-14-1112. Rules.

Compiler's Comments

1991 Amendment: In first sentence, before "facility", substituted "transportation, storage, or other" for "port or transportation and storage".

1989 Amendment: In first sentence, after "necessary", inserted "for its own administration, management, and governance as well as" and after "management" substituted "governance" for "government".

Severability: Section 6, Ch. 507, L. 1989, was a severability clause.

7-14-1125. Granting of operation and use privileges.

Compiler's Comments

1991 Amendment: In (1) and (1)(c), before "facility", substituted "transportation, storage, or other" for "port or transportation and storage"; and in (1)(a) and (1)(b), after "port", substituted "authority" for "or transportation and storage".

7-14-1126. Port property — disposal.

Compiler's Comments

1995 Amendment: Chapter 22 near end of second sentence, after "public property", inserted "unless a sale, lease, mortgage, or other disposition is made under 7-14-1133 to secure bonds of the authority"; and made minor changes in style. Amendment effective February 2, 1995.

1991 Amendment: Before "facility" substituted "transportation, storage, or other" for "port, transportation and storage".

7-14-1131. Municipal tax levy.

Compiler's Comments

2001 Amendment: Chapter 574 deleted former second sentence that read: "The levy made may not exceed the maximum levy permitted by 67-10-402 for port purposes or any lower limit that may have been established by the municipality or municipalities in the resolution creating the authority." Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1991 Amendment: Throughout section substituted "request" or "requested" for "certify" or "certified"; and in first sentence, after "annually", substituted "from" for "to" and in third sentence, after "authority", inserted "that it has authorized".

Attorney General's Opinions

Mandatory Duty of Governing Body to Levy Millage Certified by Port Authority: If the resolution creating a port authority confers plenary budget powers, the duty of the governing body to levy the millage certified by the port authority commissioners is mandatory. (See 1999 and 2001 amendments.) 43 A.G. Op. 63 (1990).

7-14-1132. County tax levy.

Attorney General's Opinions

Mandatory Duty of Governing Body to Levy Millage Certified by Port Authority: If the resolution creating a port authority confers plenary budget powers, the duty of the governing

body to levy the millage certified by the port authority commissioners is mandatory. (See 1999 and 2001 amendments to 7-14-1131.) 43 A.G. Op. 63 (1990).

7-14-1133. Bonds and obligations.

Compiler's Comments

1995 Amendment: Chapter 22 in (3), at end of second sentence, inserted "or from particular port, transportation, storage, or other facilities of the authority"; inserted (5)(b) allowing an authority to pledge, lease, sell, mortgage, or grant a security interest in its facilities; and made minor changes in style. Amendment effective February 2, 1995.

1991 Amendment: In (2), in second sentence before "taxes", inserted "to request"; and made minor changes in style.

1989 Amendment: At beginning of (1) inserted exception clause relating to providing support to private development organization; and inserted (6) concerning the limit on the use of port authority revenues and prohibiting pledge of state, county, or municipal credit for support of private organizations.

Severability: Section 6, Ch. 507, L. 1989, was a severability clause.

1987 Amendment: Near beginning of (3) substituted "as provided in 17-5-102" for "at a rate not exceeding the limitation of 17-5-102".

7-14-1134. Method of funding deficiency.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 495 in (3)(a) substituted "an election" for "a special election" and substituted "as provided in 15-10-425" for "in conjunction with a regular or primary election"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 574 near middle of (3)(a) substituted "an election" for "a special election" and substituted "held pursuant to 15-10-425" for "held in conjunction with a regular or primary election"; and made minor changes in style. Amendment effective July 1, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

1995 Amendment: Chapter 387 in (1), in first sentence after "10,000", deleted "with respect to bonds issued pursuant to this part by the local government or by an authority in which the local government is included"; inserted (3)(a)(ii) requiring the special election to be held in conjunction with a regular or primary election; and made minor changes in style.

7-14-1137. Tax exemption.

Compiler's Comments

1989 Amendment: After "control" expanded tax exemption to property and income derived by authority from private corporations organized to promote economic development.

Severability: Section 6, Ch. 507, L. 1989, was a severability clause.

Part 16
Railway Authorities

Part Compiler's Comments

Effective Date: Section 23, Ch. 333, L. 1993, provided: "[This act] [7-14-1601, 7-14-1602, 7-14-1611 through 7-14-1613, 7-14-1621 through 7-14-1625, and 7-14-1631 through 7-14-1639] is effective July 1, 1993."

7-14-1625. Railroad acquisition and operation — permits — eminent domain.

Compiler's Comments

2001 Amendment: Chapter 125 in (3) near beginning substituted "public use, as provided in Title 70, chapter 30" for "public purpose"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

7-14-1632. Mill levy authorized.

Compiler's Comments

2001 Amendment: Chapter 574 deleted former last sentence that read: "The tax levied for authority purposes other than for payment of bonded indebtedness may not in a year exceed 6

mills on each dollar of taxable valuation of property within the authority." Amendment effective July 1, 2001.

7-14-1633. Election required to impose mill levy.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 495 in (1) at end substituted "an election held pursuant to 15-10-425" for "the next regular school election held in accordance with 20-3-304 or by mail ballot election as provided by Title 13, chapter 19, in the following form:

"Shall there be a levy of (specify number, not to exceed 6) mills upon the taxable property of the (specify rail authority) necessary to raise the sum of (specify the approximate amount to be raised by the tax levy) for the purpose of (specify purpose for which the levy is made)?

[ ] FOR the tax levy.

[ ] AGAINST the tax levy."." Amendment effective October 1, 2001.

Chapter 574 in (1) substituted "at an election held pursuant to 15-10-425" for "at the next regular school election held in accordance with 20-3-304 or by mail ballot election as provided by Title 13, chapter 19, in the following form:

"Shall there be a levy of (specify number, not to exceed 6) mills upon the taxable property of the (specify rail authority) necessary to raise the sum of (specify the approximate amount to be raised by the tax levy) for the purpose of (specify purpose for which the levy is made)?

[ ] FOR the tax levy.

[ ] AGAINST the tax levy."." Amendment effective July 1, 2001.

Part 21
General Provisions
Related to County Roads

Part Attorney General's Opinions

Authority of U.S. Fish and Wildlife Service to Regulate Public Right-of-Way Within Wildlife Refuge: The U.S. Fish and Wildlife Service has the authority within the boundaries of a wildlife refuge to regulate the use of a public right-of-way established pursuant to Revised Statutes section 2477 (43 U.S.C. 932). Public recreational use of that right-of-way may be permitted only to the extent that is practicable and not inconsistent with the primary objectives for which the refuge was established. 45 A.G. Op. 13 (1993).

Part Collateral References

39A C.J.S. Highways §§37, 39.

Liability, in motor vehicle-related cases, of governmental entity for injury, death, or property damage resulting from defect or obstruction in shoulder of street or highway. 19 ALR 4th 532.

7-14-2101. General powers of county relating to roads and bridges — definitions.

Compiler's Comments

2001 Amendment: Chapter 125 in definition of county road inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1999 Amendments — Composite Section: Chapter 320 in (1)(a)(ii) after "levy taxes" substituted "for the laying out, maintenance, control, and management of the county roads and bridges within the county" for "therefor"; in (1)(b)(ii) after "levy taxes" substituted "for the laying out, maintenance, control, management, and improvement of county roads and bridges shared jointly with other counties, as agreed upon between the boards of the counties concerned and" for "therefor"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 440 substituted (2)(a)(i) through (2)(a)(iii) concerning what constitutes a county road for former text that read: "any public highway opened, established, constructed, maintained, abandoned, or discontinued by a county in accordance with this chapter"; inserted (2)(b) concerning acceptance of road after public hearing; inserted (2)(c) concerning survey exemption; inserted (2)(d) concerning road abandoned by state; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 584 in three places inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Preamble: The preamble attached to Ch. 440, L. 1999, provided: "WHEREAS, it has become necessary to clarify the duties of boards of county commissioners regarding roads under their jurisdiction; and

WHEREAS, it is appropriate to specify how the maintenance and oversight of certain roads may be transferred to a county in a manner that protects private property rights and allows the public to participate in the process; and

WHEREAS, clarifying in statute the definition of a county road and the rights and responsibilities of a board of county commissioners will prevent county road-related disputes from entering the court system."

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Case Notes

County Right-of-Way Considered Easement — Injunction Proper Remedy to Ensure Access to Right-of-Way: Jefferson County filed a complaint for a temporary injunction, an order allowing entry upon land to survey McCarty Creek Road, which passed through McCauley's land to public land beyond, and an order setting a show cause hearing. The District Court issued the injunction allowing the survey and set a date for hearing. At the hearing, the court found extensive documentary evidence, dating back to 1883, confirming the existence of McCarty Creek Road and, in its final order, determined that the road, as it crossed McCauley's property, was a dedicated and established county road. The court further enjoined McCauley from interfering with access or obstructing ingress and egress on the road. The Supreme Court affirmed, finding substantial credible evidence to support the District Court's determination and finding no abuse of discretion in enjoining McCauley from interfering with the public use of McCarty Creek Road. Jefferson County v. McCauley Ranches, 1999 MT 333, 297 M 392, 994 P2d 11, 56 St. Rep. 1329 (1999), following Bolinger v. Bozeman, 158 M 507, 493 P2d 1062 (1972), Reid v. Park County, 192 M 231, 627 P2d 1210, 38 St. Rep. 631 (1981), and Bailey v. Ravalli County, 201 M 138, 653 P2d 139, 39 St. Rep. 2010 (1982), and distinguishing Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), Knudson v. McDunn, 271 M 61, 894 P2d 295 (1995), and Lurie v. Sheriff, 284 M 207, 944 P2d 205, 54 St. Rep. 847 (1997).

Contempt Order Against County for Failure to Follow Proper Procedures Annulled: The lower court found the county in contempt for abandoning and changing a portion of a road without following the procedures suggested in an earlier court order. The Supreme Court stated that not all of the record had been before the lower court. An examination of the entire record indicated that the county had tried to follow the procedures set out in statute and the earlier court order. The Supreme Court annulled the contempt order and suggested that the parties might want to move to have the injunction against changing or abandoning the relevant portion of the road dissolved. State ex rel. Fallon County v. District Court, 245 M 382, 801 P2d 610, 47 St. Rep. 2187 (1990).

Abandoned Public Road to Revert to Abutting Property Owners: An action was filed to quiet title to a county road that had been established as a public road in 1909. The certificate of dedication of the 1909 plat stated that the streets therein were "granted and dedicated to the use of the public forever". In 1944, pursuant to section 1635, R.C.M. 1935, a petition for county road closure was filed. That same year the petition was granted by the County Commissioners. After 1944, neither the plaintiffs nor their predecessors in interest paid any taxes on the roadway and no portion of the roadway was fenced into the lands now belonging to the plaintiffs until 1980. The court quieted title in the plaintiffs, ruling that the 1909 plat dedication was the equivalent of a right-of-way deed under which the public acquired only the right-of-way and the incidents necessary to its enjoyment and that upon abandonment the fee in the street reverted to the abutting landowners, with each abutting landowner taking fee from the edge of his property to the center of the street. Bailey v. Ravalli County, 201 M 138, 653 P2d 139, 39 St. Rep. 2010 (1982), followed in Herreid v. Hauck, 254 M 496, 839 P2d 571, 49 St. Rep. 884 (1992).

Bid Calling and Fund Expenditure — Administrative Functions: In calling for bids and preparing to expend county funds for a paving project, the County Commissioners were performing administrative functions in furtherance of their responsibility to manage and maintain county roads. For this reason a referendum directing them not to expend funds or call for bids was invalid. The referendum did not address the decision of whether the county should pave the road, a legislative function. Chouteau County v. Grossman, 172 M 373, 563 P2d 1125 (1977).

Attorney General's Opinions

Access to Rivers and Streams Via County Road Right-of-Way and Bridges: Given that the public has the right to use public highways in any manner and for any purpose consistent with or reasonably incidental to public travel, this right includes the use of public rights-of-way created by county roads to gain access to rivers and streams. Using a county road right-of-way as an access point to a river or stream right-of-way is consistent with and reasonably incidental to the public's right to travel on county roads. Further, a bridge and its abutments, as part of a public highway, offer the same access to rivers and streams for recreational use as the highway to which they are attached. However, the public's right of access is not unlimited and is subject to the following limitations: (1) the recreating public must stay within the county road and bridge right-of-way, which is assumed to be 60 feet unless otherwise stated by petition or dedication; (2) access may be limited by the reasonable exercise of a governing body's police power to control the use of roads for purposes such as safety and parking; and (3) use of a public highway may be limited by the manner in which it was created, such as a road created by prescriptive easement, which is limited both in size and usage to the original use during the prescriptive period and may include access for hunting, fishing, and recreation. 48 A.G. Op. 13 (2000).

Maintenance of County Roads — Discretionary or Mandatory: A county is required to maintain county roads established through the petition process but is not legally required to maintain other county roads, which include county roads created by dedication to the public. The Board of County Commissioners exercised its discretion to authorize maintenance of a county road created by dedication to the public from 1952 until 1981. The county is not required by law to maintain the road but has, within the limits of available funds, the power and discretion to do so. 41 A.G. Op. 32 (1985).

Duty to Install Culverts: The duty to build bridges imposed by 7-14-2204(1) includes the duty to install culverts when such devices are deemed most appropriate for conveying water beneath a public street or highway. 38 A.G. Op. 39 (1979).

Authority to Close Roads Because of Hazardous Conditions: Because the county is potentially liable for failure to maintain county roads in a safe condition, it has the implied power to temporarily close county roads when hazardous conditions exist. It is also responsible for the placement and maintenance of traffic control devices necessary to warn and regulate traffic. The procedures to be followed and the individual who is to make the decision to close roads are to be determined by the Board of County Commissioners. A county road superintendent or supervisor, if appointed, would be appropriate. Only in case of extreme emergency may the Highway Patrol block traffic. 37 A.G. Op. 116 (1977).

"Public Highways" — Forest Development Roads: Use of the term "public highways" for the purpose of imposing a gross vehicle weight tax, a special fuels tax, license plates requirements, or weight limitations does not include forest development roads. 37 A.G. Op. 9 (1977).

Collateral References

Bridges *key* 6, 7, 10, 21; Highways *key* 22 through 24.

39A C.J.S. Highways §§1(3), 2, 40; 40 C.J.S. Highways §284.

39 Am. Jur. 2d Highways, Streets, and Bridges §§3, 11, 32, 41.

Measure and elements of damages for injury to bridge. 31 ALR 5th 171.

Highway contractor's liability to highway user for highway surface defects. 62 ALR 4th 1067.

Liability, in motor vehicle-related cases, of governmental entity for injury, death, or property damage resulting from defect or obstruction in shoulder of street or highway. 19 ALR 4th 532.

7-14-2102. General powers relating to county roads — assignment of responsibility.

Compiler's Comments

1995 Amendment: Chapter 336 inserted second sentence allowing Board to assign or allocate responsibility to county surveyor or to county road superintendent.

Attorney General's Opinions

Parameters of County Commission Authority to Permit County Road Use for Pipelines: A Board of County Commissioners is charged with a significant amount of discretion under 7-1-2103, this section, and 7-14-2107 in determining whether to permit the use of a county road right-of-way for the laying of permanent or temporary pipelines. This discretion is potentially limited by state regulations under Title 69, ch. 13, concerning pipeline carriers, depending on specific factual situations. To be consistent with the holding in Bolinger v. Bozeman, 158 M 507, 493 P2d 1062 (1972), the Board must find that the action: (1) is necessary for the best interest of the county roads and the road districts; (2) does not unreasonably impair the special easements of abutting owners in the street for purposes of access, light, and air; and (3) is conducive to the

public welfare and serves one of the purposes for which highways and streets are dedicated. 42 A.G. Op. 40 (1987).

Responsibility for Costs of Maintenance and Repair of County Road Established by Petition: If a rural special improvement district is created to improve a county road established by the county road petition process, the district is responsible for the costs of maintenance and repair of the road. 41 A.G. Op. 61 (1986).

Authority to Close Roads Because of Hazardous Conditions: Because the county is potentially liable for failure to maintain county roads in a safe condition, it has the implied power to temporarily close county roads when hazardous conditions exist. It is also responsible for the placement and maintenance of traffic control devices necessary to warn and regulate traffic. The procedures to be followed and the individual who is to make the decision to close roads are to be determined by the Board of County Commissioners. A county road superintendent or supervisor, if appointed, would be appropriate (see 1995 amendment allowing appointment of County Surveyor). Only in case of extreme emergency may the Highway Patrol block traffic. 37 A.G. Op. 116 (1977).

7-14-2103. Duties of county commissioners concerning county roads.

Compiler's Comments

1999 Amendment: Chapter 440 in (2) at end of first sentence substituted "established in accordance with this chapter" for "petitioned for by freeholders"; inserted (4) concerning level and scope of maintenance; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 440, L. 1999, provided: "WHEREAS, it has become necessary to clarify the duties of boards of county commissioners regarding roads under their jurisdiction; and

WHEREAS, it is appropriate to specify how the maintenance and oversight of certain roads may be transferred to a county in a manner that protects private property rights and allows the public to participate in the process; and

WHEREAS, clarifying in statute the definition of a county road and the rights and responsibilities of a board of county commissioners will prevent county road-related disputes from entering the court system."

1993 Amendment: Chapter 253 near beginning of (2) and (3), after "board", substituted "may" for "shall"; and made minor changes in style.

Case Notes

Discontinuing or Abandoning Roads — Not Mandatory:

Following remand of Baertsch, infra, the landowners appealed the District Court decision establishing the county's 100-foot right-of-way. The Supreme Court affirmed on all issues, holding that the trial court properly determined that: (1) procedural requirements for creating the right-of-way by statute were met; (2) the County Commission, in granting the petition for the right-of-way in 1890, was obviously granting its contents, which was a request for a 100-foot right-of-way; (3) mere nonuse of the right-of-way, even for extended periods of time, was insufficient in itself to indicate an intent to abandon the public property; (4) the public road could not be obtained by adverse possession; (5) failure to apply equitable estoppel did not create a manifest injustice to the landowners; and (6) because the county was not properly a party to the prior litigation, res judicata did not apply. Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106, 49 St. Rep. 1162 (1992), followed in DeVoe v. St., 281 M 356, 935 P2d 256, 54 St. Rep. 207 (1997).

After the decision in Ingram-Clevenger, infra, essentially the same landowners filed their complaint in this action, contending that: (1) the county road in its entirety was never properly dedicated; (2) the county abandoned all that portion of the road right-of-way not actually used for roadway and barrow pits; (3) the landowners obtained title to the disputed portion of the right-of-way by adverse possession; and (4) the county's claim was barred by equitable estoppel. The county raised the defense of res judicata, and the District Court concluded that res judicata was applicable. On appeal, the Supreme Court held that the issues in the two cases were not the same, noting that in Ingram-Clevenger the title to the road was not involved whereas in this case the claims were related to the title and could not properly have been presented as part of the proceedings for vacation of the road. As a result, the present case was not barred under a theory of res judicata, merger, the rule against splitting causes of action, or the doctrine of equitable estoppel. The case was remanded for a trial of the issues on the merits. Baertsch v. Lewis & Clark County, 223 M 206, 727 P2d 504, 43 St. Rep. 1660 (1986).

Although subsection (3) of this section appears to mandate that a Board of County Commissioners discontinue or abandon a county road when so petitioned, it must be read in conjunction with the provisions of Title 7, ch. 14, part 26; a reasonable interpretation for this provision would be that the Board of County Commissioners shall abandon county roads when a sufficient petition is filed, which, after the requisite investigation, is found to be feasible and desirable for the use and benefit of the public. (See 1993 and 1999 amendments.) Ingram-Clevenger, Inc. v. Lewis & Clark County, 194 M 43, 636 P2d 1372, 38 St. Rep. 1696 (1981).

Attorney General's Opinions

Responsibility for Costs of Maintenance and Repair of County Road Established by Petition: If a rural special improvement district is created to improve a county road established by the county road petition process, the district is responsible for the costs of maintenance and repair of the road. 41 A.G. Op. 61 (1986).

Maintenance of County Roads — Discretionary or Mandatory: A county is required to maintain county roads established through the petition process but is not legally required to maintain other county roads, which include county roads created by dedication to the public. The Board of County Commissioners exercised its discretion to authorize maintenance of a county road created by dedication to the public from 1952 until 1981. The county is not required by law to maintain the road but has, within the limits of available funds, the power and discretion to do so. 41 A.G. Op. 32 (1985).

Authority to Close Roads Because of Hazardous Conditions: Because the county is potentially liable for failure to maintain county roads in a safe condition, it has the implied power to temporarily close county roads when hazardous conditions exist. It is also responsible for the placement and maintenance of traffic control devices necessary to warn and regulate traffic. The procedures to be followed and the individual who is to make the decision to close roads are to be determined by the Board of County Commissioners. A county road superintendent or supervisor, if appointed, would be appropriate. Only in case of extreme emergency may the Highway Patrol block traffic. 37 A.G. Op. 9 (1977).

Collateral References

Highways: governmental duty to provide curve warnings or markings. 57 ALR 4th 342.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from failure to repair pothole and surface of highway or street. 98 ALR 3d 101.

7-14-2105. Reports to department of transportation.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

7-14-2107. Acquisition of right-of-way.

Case Notes

Right-of-Way Incidents: Where a county grants a city permission to lay a sewerline along a county road, the consent of landowners abutting the road is not necessary. A public right-of-way may be used as the convenience and welfare of the public demand, not only according to the usages when dedicated but in light of advancing civilization. Bolinger v. Bozeman, 158 M 507, 493 P2d 1062 (1972), followed in Adams v. Dept. of Highways, 230 M 393, 753 P2d 846, 45 St. Rep. 298 (1988), and Jefferson County v. McCauley Ranches, 1999 MT 333, 297 M 392, 994 P2d 11, 56 St. Rep. 1329 (1999).

Attorney General's Opinions

Access to Rivers and Streams Via County Road Right-of-Way and Bridges: Given that the public has the right to use public highways in any manner and for any purpose consistent with or reasonably incidental to public travel, this right includes the use of public rights-of-way created by county roads to gain access to rivers and streams. Using a county road right-of-way as an access point to a river or stream right-of-way is consistent with and reasonably incidental to the public's right to travel on county roads. Further, a bridge and its abutments, as part of a public highway, offer the same access to rivers and streams for recreational use as the highway to which they are attached. However, the public's right of access is not unlimited and is subject to the following limitations: (1) the recreating public must stay within the county road and bridge right-of-way, which is assumed to be 60 feet unless otherwise stated by petition or dedication; (2) access may be limited by the reasonable exercise of a governing body's police power to control the use of roads for purposes such as safety and parking; and (3) use of a public highway may be

limited by the manner in which it was created, such as a road created by prescriptive easement, which is limited both in size and usage to the original use during the prescriptive period and may include access for hunting, fishing, and recreation. 48 A.G. Op. 13 (2000).

Parameters of County Commission Authority to Permit County Road Use for Pipelines: A Board of County Commissioners is charged with a significant amount of discretion under 7-1-2103, 7-14-2102, and this section in determining whether to permit the use of a county road right-of-way for the laying of permanent or temporary pipelines. This discretion is potentially limited by state regulations under Title 69, ch. 13, concerning pipeline carriers, depending on specific factual situations. To be consistent with the holding in Bolinger v. Bozeman, 158 M 507, 493 P2d 1062 (1972), the Board must find that the action: (1) is necessary for the best interest of the county roads and the road districts; (2) does not unreasonably impair the special easements of abutting owners in the street for purposes of access, light, and air; and (3) is conducive to the public welfare and serves one of the purposes for which highways and streets are dedicated. 42 A.G. Op. 40 (1987).

County Commissioners — Road Abandonment: County Commissioners have no authority to vacate a previous road abandonment on their own initiative. 37 A.G. Op. 130 (1978).

Law Review Articles

Reengineering Regulation to Avoid Takings, Merriam, 33 Urb. Law. 1 (2001).

Land-Use Litigation: Takings and Due Process Claims, Roberts & Shearer, 24 Urb. Law. 833 (1992).

Regulatory Takings After the Supreme Court's 1991-92 Term: An Evolving Return to Property Rights, Eagle & Mellor, 29 Cal. W.L. Rev. 209 (1992).

A Blow for Land-Use Planning?—The Takings Issue Reexamined, 49 Ohio St. L.J. 1107 (1989).

Collateral References

Highways *key* 80.

39A C.J.S. Highways §§31, 136.

39 Am. Jur. 2d Highways, Streets, and Bridges §§157 through 159.

Current Condemnation Law; Takings Compensation & Benefits, Ackerman, A.B.A. (1994).

7-14-2108. Recording of instruments related to acquisition of right-of-way.

Compiler's Comments

2001 Amendment: Chapter 125 in (2) near beginning inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

7-14-2109. Transfer to state of county responsibility for right-of-way.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

7-14-2111. Layout of roads.

Collateral References

Highways *key* 45.

39A C.J.S. Highways §65.

Description with reference to highway as carrying title to center or side of highway. 49 ALR 2d 982.

7-14-2112. Width of roads.

Case Notes

Public Roads Created by Prescriptive Use: The width of a public road created by prescriptive use is determined by the extent of its use. This section applies only to public roads laid out by official act. Povah v. Portmann, 149 M 91, 423 P2d 56 (1967).

Collateral References

Highways *key* 47.

39A C.J.S. Highways §67.

39 Am. Jur. 2d Highways, Streets, and Bridges §51.

7-14-2113. County authority to establish speed limits.

Compiler's Comments

1999 Amendment: Chapter 43 near middle after "accordance with" deleted "61-8-306 and". Amendment effective May 28, 1999.

Severability: Section 8, Ch. 43, L. 1999, was a severability clause.

7-14-2121. County road districts.

Compiler's Comments

Section Not Codified: Part of section 32-4002, R.C.M. 1947, was not codified in the MCA, because it was redundant with this section. This provision has not been repealed and is still valid law. Citation may be made to sec. 8-202, Ch. 197, L. 1965. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Collateral References

Highways *key* 90.

39A C.J.S. Highways §§144 through 147.

39 Am. Jur. 2d Highways, Streets, and Bridges §14.

7-14-2122. County road supervisor.

Attorney General's Opinions

Authority to Close Roads Because of Hazardous Conditions: A Board of County Commissioners may designate a person who shall decide when hazardous conditions warrant county road closure. A county road supervisor is an appropriate person to so designate. 37 A.G. Op. 9 (1977).

Collateral References

Highways *key* 93, 95, 96.

39A C.J.S. Highways §§161, 163, 168.

39 Am. Jur. 2d Highways, Streets, and Bridges §13.

7-14-2123. Acquisition of machinery and materials.

Compiler's Comments

2001 Amendment: Chapter 125 in (1)(b) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Collateral References

40 C.J.S. Highways §193.

7-14-2126. Compensation for making inspections.

Compiler's Comments

2001 Amendment: Chapter 507 in first sentence near beginning after "person" deleted "or persons" and near middle substituted "a daily salary equal to the equivalent of a daily rate for the salary established in 7-4-2107(2)" for "a daily salary equal to that established in 7-4-2107(2)"; and made minor changes in style. Amendment effective May 1, 2001.

1985 Amendment: In middle of first sentence substituted "a daily salary equal to that established in 7-4-2107(2)" for "the sum of $33 per day".

Attorney General's Opinions

Elected County Surveyor: A county cannot pay the elected County Surveyor a salary or fee that exceeds the statutory limit unless the surveyor is directed to perform road inspections pursuant to 7-14-2125 and meets its particular requirements. 35 A.G. Op. 38 (1973).

7-14-2127. Temporary limitation or prohibition of traffic.

Compiler's Comments

1999 Amendment: Chapter 440 inserted (2) concerning closure of county road or bridge; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 440, L. 1999, provided: "WHEREAS, it has become necessary to clarify the duties of boards of county commissioners regarding roads under their jurisdiction; and

WHEREAS, it is appropriate to specify how the maintenance and oversight of certain roads may be transferred to a county in a manner that protects private property rights and allows the public to participate in the process; and

WHEREAS, clarifying in statute the definition of a county road and the rights and responsibilities of a board of county commissioners will prevent county road-related disputes from entering the court system."

Collateral References

Duty of highway construction contractor to provide temporary way or detour around obstruction. 29 ALR 2d 876.

7-14-2131. Reseeding of right-of-way.

Compiler's Comments

1985 Amendment: Near middle, after "shall require", substituted "the person or agency responsible for the disturbance to comply with 7-22-2152" for "that such disturbed areas be seeded to an adaptable perennial grass or combination of perennial grasses and legumes. Every effort shall be made to establish a sod cover on the disturbed area.

(2) All seed used shall meet certified standards.

(3) Time and method of seeding, fertilizing practices, and grass species shall be those recommended by the Montana extension service".

7-14-2132. Control of weeds along roads and highways.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1985 Amendment: In (1) changed "board of weed control and weed seed extermination supervisors" to "district weed board"; and in (2), near end of first sentence changed "supervisors" to "district weed board" and near beginning of second sentence changed "supervisors" to "board".

7-14-2133. Removal of obstructions on county roads.

Compiler's Comments

2001 Amendment: Chapter 245 inserted (3) defining obstruction; and made minor changes in style. Amendment effective April 16, 2001.

Case Notes

Evidence of Subsequent Repairs: In attempting to avoid chuckholes in a county road, the plaintiff's automobile crashed. Plaintiff brought an action against the county for its failure to remove an obstruction. Evidence of repairs to the road subsequent to the automobile crash was admitted to establish the physical condition of the road at the time of the crash. Lawlor v. Flathead County, 177 M 508, 582 P2d 751 (1978).

Collateral References

Highways *key* 153, 157.

40 C.J.S. Highways §§221, 225.

39 Am. Jur. 2d Highways, Streets, and Bridges §§277, 311, 312.

Liability of governmental unit for injuries or damage resulting from tree or limb falling onto highway from abutting land. 95 ALR 3d 778.

7-14-2134. Removal of highway encroachment.

Collateral References

Highways *key* 153, 157.

40 C.J.S. Highways §§221, 225.

39 Am. Jur. 2d Highways, Streets, and Bridges §277.

7-14-2135. Notice to remove encroachment.

Collateral References

40 C.J.S. Highways §224.

7-14-2137. Legal actions to remove encroachments or recover costs.

Collateral References

40 C.J.S. Highways §224.

39 Am. Jur. 2d Highways, Streets, and Bridges §§321, 322.

7-14-2138. Prosecution by county attorney.

Compiler's Comments

1987 Amendment: In (2), after "penalties", inserted "except those paid to a justice's court".

7-14-2140. Prevention of water flow over highway.

Collateral References

Liability of state, municipality, or public agency for vehicle accident occurring because of accumulation of water on street or highway. 61 ALR 2d 425.

Part 22
General Provisions
Related to Bridges

Part Collateral References

Measure and elements of damages for injury to bridge. 31 ALR 5th 171.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from design, construction, or failure to warn of narrow bridge. 2 ALR 4th 635.

7-14-2201. Maintenance and control of bridges.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Case Notes

Evidence of Subsequent Repairs Made After Accident: Evidence of repairs made by the county to a road previously the scene of an automobile accident is admissible to establish the physical condition of the road at the time of the accident. Lawlor v. Flathead County, 177 M 508, 582 P2d 751 (1978).

Attorney General's Opinions

Maintenance of Bridge Utilized by Public but Not Located on County Road: Prior to July 1, 1979, it would appear that a bridge on a road utilized by the public, which was located over a boundary between two counties, would be the common responsibility of the two counties. However, by adding a definition of "public bridges", the 1979 Legislature made it clear that counties are not responsible for maintenance of bridges that, although utilized by the public, are not located in a city or town in the county or on a county road maintained by the county. 38 A.G. Op. 50 (1979).

Duty to Install Culverts: The duty to build bridges imposed by 7-14-2204(1) includes the duty to install culverts when such devices are deemed most appropriate for conveying water beneath a public street or highway. 38 A.G. Op. 39 (1979).

Collateral References

Bridges *key* 21(2).

39 Am. Jur. 2d Highways, Streets, and Bridges §§11, 41, 80.

Liability for failure to warn of narrow bridge. 2 ALR 4th 635.

7-14-2202. Construction and maintenance of bridges crossing county lines.

Attorney General's Opinions

Maintenance of Bridge Utilized by Public but Not Located on County Road: Prior to July 1, 1979, it would appear that a bridge on a road utilized by the public, which was located over a boundary between two counties, would be the common responsibility of the two counties. However, by adding a definition of "public bridges", the 1979 Legislature made it clear that counties are not responsible for maintenance of bridges that, although utilized by the public, are not located in a city or town in the county or on a county road maintained by the county. 38 A.G. Op. 50 (1979).

Collateral References

Bridges *key* 10.

Construction contractor's liability to contractee for defects or insufficiency of work attributable to the latter's plans and specifications. 6 ALR 3d 1394.

Negligence of building or construction contractor as ground of liability upon his part for injury or damage to third person occurring after completion and acceptance of the work. 13 ALR 2d 191; 58 ALR 2d 865.

7-14-2203. Repairs to streambeds, watercourses, and banks.

Attorney General's Opinions

Notice of Planned Repairs and Maintenance of Bridges and Roads Required: Counties must give notice to the Department of Fish, Wildlife, and Parks of planned repairs and maintenance of bridges and roads in accordance with 87-5-502, except when an emergency threatens a bridge or road, in which case the provisions of 87-5-506 apply. The language of 7-14-2203 relating to county authority to make emergency repairs does not expressly or impliedly waive compliance with 87-5-502. 41 A.G. Op. 63 (1986).

Collateral References

Modern status of rules governing interference with drainage of surface waters. 93 ALR 3d 1193.

7-14-2204. Construction and maintenance of bridges in municipalities.

Attorney General's Opinions

Duty to Install Culverts: The duty to build bridges imposed by this section includes the duty to install culverts when such devices are deemed most appropriate for conveying water beneath a public street or highway. 38 A.G. Op. 39 (1979).

Irrigation Ditch as "Natural Stream": An irrigation ditch established prior to the existence of a public street intersecting the ditch is considered a "natural stream" as to that street. 38 A.G. Op. 39 (1979).

Law Review Articles

Qualified Immunity: A User's Manual, Blum, 26 Ind. L. Rev. 187 (1993).

Collateral References

Bridges *key* 9(2).

Measure and elements of damages for injury to bridge. 31 ALR 5th 171.

Personal injury liability of civil engineer for negligence in highway or bridge construction or maintenance. 43 ALR 4th 911.

Liability for damage to highway or bridge caused by size or weight of motor vehicle or load. 53 ALR 3d 1035, §§16, 17 superseded by 31 ALR 5th 171.

7-14-2205. Construction of bridge in municipality — election.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of (3) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1995 Amendment: Chapter 387 in (1) inserted "held in conjunction with a regular or primary election"; and made minor changes in style.

Part 23
County Road Superintendent

Part Collateral References

Highways *key* 93, 95.

39A C.J.S. Highways §§161, 168, 170.

39 Am. Jur. 2d Highways, Streets, and Bridges §13.

7-14-2301. County road superintendent — appointment and compensation.

Compiler's Comments

1995 Amendment: Chapter 336 at beginning of (1) substituted "A board" for "In counties without a county surveyor, each board"; and made minor changes in style.

Attorney General's Opinions

Authority to Close Roads Because of Hazardous Conditions: A Board of County Commissioners may designate a person who shall decide when hazardous conditions warrant county road closure. A county road superintendent is an appropriate person to so designate. 37 A.G. Op. 9 (1977).

7-14-2302. Duties of county road superintendent.

Attorney General's Opinions

Authority to Close Roads Because of Hazardous Conditions: A Board of County Commissioners may designate a person who shall decide when hazardous conditions warrant county road closure. A county road superintendent is an appropriate person to so designate. 37 A.G. Op. 9 (1977).

Collateral References

Automobiles: construction and operation of statutes or regulations restricting the weight of motor vehicles or their loads. 45 ALR 3d 503.

Power to limit weight of vehicle or its load with respect to use of streets or highways. 75 ALR 2d 376.

Part 24
County Road and Bridge Contracts

Part Collateral References

Highways *key* 113.

40 C.J.S. Highways §§197 through 202.

39 Am. Jur. 2d Highways, Streets, and Bridges §96.

7-14-2401. Authority to enter contracts.

Collateral References

State or local governmental unit's liability for injury to private highway construction worker based on its own negligence. 29 ALR 4th 1188.

Determination of amount involved in contract. 53 ALR 2d 498.

7-14-2402. Contracts for county roads.

Collateral References

Determination of amount involved in contract. 53 ALR 2d 498.

7-14-2403. Advertisement for bids.

Compiler's Comments

2001 Amendment: Chapter 354 substituted "as provided in 7-1-2121" for "at least once a week for 2 consecutive weeks in a newspaper of general circulation in the county"; and made minor changes in style. Amendment effective October 1, 2001.

7-14-2404. Competitive bids for county road contracts.

Compiler's Comments

2001 Amendment: Chapter 181 in second sentence near middle after "18-1-102" deleted "18-1-112"; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 28, Ch. 181, L. 2001, provided: "[This act] applies to contracts for which the contracting government entity begins the contracting process after October 1, 2001."

7-14-2405. Performance bond to be given by successful bidder.

Collateral References

40 C.J.S. Highways §§213 through 219.

What constitutes "public work" within statute relating to contractor's bond. 48 ALR 4th 1170.

7-14-2406. Contracts for bridges.

Compiler's Comments

2001 Amendment: Chapter 181 in (2) near middle of first sentence after "18-1-102" deleted "18-1-112"; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 28, Ch. 181, L. 2001, provided: "[This act] applies to contracts for which the contracting government entity begins the contracting process after October 1, 2001."

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Part 25
Financial Management of County Roads and Bridges

Part Collateral References

39 Am. Jur. 2d Highways, Streets, and Bridges §§122 through 129.

7-14-2501. General road tax authorized.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) in first sentence before "tax" deleted "general" and at end deleted "of not more than 20 mills, except in counties of the fourth, fifth, sixth, and seventh class, which may levy not more than 23 mills, payable to the county treasurer". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1989 Amendment: In (1) substituted "20 mills" for "15 mills" and "23 mills" for "18 mills". Amendment effective July 1, 1989.

1981 Amendment: Increased the permissive county road levy from 12 to 15 mills and from 15 to 18 mills in fourth, fifth, sixth, and seventh class counties.

Case Notes

No Exemption From Property Road Tax: The exemption statute, 7-33-2314, exempts firefighters from the per capita road tax, not from the property road tax. Missoula Rural Fire District v. Missoula County, 222 M 178, 720 P2d 1170, 43 St. Rep. 1153 (1986).

Attorney General's Opinions

Mill Increase for County Roads and Bridges Not Exception to I.M. No. 105 Tax Freeze: The 1989 increase in allowable mills for county road construction, maintenance, or improvement, as set out in this section, and for county bridge construction, maintenance, and repair, as set out in 7-14-2502, was not an exception to the I.M. No.105 property tax freeze established in 15-10-402, but rather was intended to be implemented by a reduction of millage in other areas of the county budget. (See 1999 amendment.) 43 A.G. Op. 74 (1990).

Mill Levy Increase — Proration to Parts of Fiscal Year to Accommodate October Effective Date: Section 7-14-2501 was amended in 1981 to authorize the Board of County Commissioners to levy 15 mills rather than 12 mills for the county road fund. (See 2001 amendment.) The increase, under the 1981 amendments to 1-2-201, becomes effective October 1, 1981. However, the county budget year begins July 1, 1981. The reasonable way to give effect to both amendments is to construe them to allow the Board to apply a rate of 12 mills for the 3 months of the current county fiscal year which fall before October 1, 1981, and a rate of 15 mills for the 9 months of the current county fiscal year which fall after October 1, 1981. 39 A.G. Op. 29 (1981).

Collateral References

Highways *key* 123 through 130 ½.

40 C.J.S. Highways §§275, 276, 279, 283.

7-14-2502. Special bridge tax authorized — combined ferry and bridge fund.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) after "tax" deleted "not to exceed 8 mills"; deleted former (2) that read: "(2) Subject to 15-10-420, an additional levy for these purposes may be made under the following conditions:

(a) In any county where the taxable value of property in that county is $20 million or less, the board may, if necessary, levy 1 mill.

(b) In counties where the taxable value of property in that county is not less than $20 million or more than $40 million, the board may, if necessary, levy 2 mills"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 in (1) and (2) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1989 Amendments: Chapter 36 in (4), at beginning of last sentence, inserted "Except when the county has a combined ferry and bridge fund"; and inserted (5) authorizing combination of revenue from bridge and ferry levies. Amendment effective July 1, 1989.

Chapter 147 in (1) increased mill levy amount from 4 mills to 8 mills; near beginning of (2)(a), after "where", deleted "the total linear feet of bridges or bridge construction is more than 4,000 and"; and near beginning of (2)(b), after "where", deleted "the total linear feet of bridges or bridge construction is more than 6,000 and". Amendment effective July 1, 1989.

Attorney General's Opinions

Mill Increase for County Roads and Bridges Not Exception to I.M. No. 105 Tax Freeze: The 1989 increase in allowable mills for county road construction, maintenance, or improvement, as set out in 7-14-2501, and for county bridge construction, maintenance, and repair, as set out in this section, was not an exception to the I.M. No.105 property tax freeze established in 15-10-402, but rather was intended to be implemented by a reduction of millage in other areas of the county budget. (See 1999 amendment.) 43 A.G. Op. 74 (1990).

Maintenance of Bridge Utilized by Public but Not Located on County Road: Prior to July 1, 1979, it would appear that a bridge on a road utilized by the public, which was located over a boundary between two counties, would be the common responsibility of the two counties. However, by adding a definition of "public bridges", the 1979 Legislature made it clear that counties are not responsible for maintenance of bridges that, although utilized by the public, are not located in a city or town in the county or on a county road maintained by the county. 38 A.G. Op. 50 (1979).

Duty to Install Culverts: The duty to build bridges imposed by 7-14-2204(1) includes the duty to install culverts when such devices are deemed most appropriate for conveying water beneath a public street or highway. 38 A.G. Op. 39 (1979).

7-14-2503. Special municipal bridge tax authorized.

Compiler's Comments

2001 Amendment: Chapter 574 near middle after "tax" deleted "not to exceed 5 mills". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-14-2504. Additional road and bridge construction tax — election required.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 495 in (2) substituted "as provided in 15-10-425" for "at a general election or a special election held in conjunction with a regular or primary election. The question must be in the following form, inserting the number of mills to be levied and the name of the county:

"Shall there be an additional levy of.... mills upon the taxable property in the county of...., state of Montana, for the purpose of constructing public highways and bridges?

[ ] YES

[ ] NO"." Amendment effective October 1, 2001.

Chapter 574 in (1) after "county" deleted "of up to 10 mills"; in (2) substituted "as provided in 15-10-425" for "at a general election or a special election held in conjunction with a regular or primary election. The question must be in the following form, inserting the number of mills to be levied and the name of the county:

"Shall there be an additional levy of.... mills upon the taxable property in the county of...., state of Montana, for the purpose of constructing public highways and bridges?

[ ] YES

[ ] NO"." Amendment effective July 1, 2001.

1995 Amendment: Chapter 387 in (2) inserted "held in conjunction with a regular or primary election"; and made minor changes in style.

7-14-2506. County road and bridge capital improvement fund — limitation.

Compiler's Comments

2003 Amendment: Chapter 35 near middle of first sentence after "bridge" substituted "capital improvement fund" for "depreciation reserve fund" and at end substituted "in accordance with the provisions of Title 7, chapter 6, part 6" for "to be used for acquisition and replacement of

property, capital improvements, and equipment necessary to maintain and improve county road and bridge facilities and services", deleted first sentence of former (2) that read: "Budgeted county road and bridge money that has not been expended or encumbered for a fiscal year may be deposited in the road and bridge depreciation reserve fund", and in second sentence increased fund cap from $200,000 to $500,000; deleted former (3) that read: "(3) Money in the road and bridge depreciation reserve fund must be invested as provided by law. Interest and income from the investment of the road and bridge depreciation reserve fund must be credited to the fund"; and made minor changes in style. Amendment effective July 1, 2003.

7-14-2520. Authorization of road and highway bonds.

Compiler's Comments

Effective Date: Section 5, Ch. 479, L. 2001, provided that this section is effective April 30, 2001.

7-14-2521. Bond financing for county bridges authorized.

Compiler's Comments

2001 Amendment: Chapter 479 at end before "bridges" deleted "roads, state highways, and"; and made minor changes in style. Amendment effective April 30, 2001.

Collateral References

Counties *key* 174.

39A C.J.S. Highways §158.

7-14-2522. County bridge bonds authorized.

Compiler's Comments

2001 Amendment: Chapter 479 in (1)(a) and (1)(b) before reference to bridges deleted reference to highways; and made minor changes in style. Amendment effective April 30, 2001.

Collateral References

39A C.J.S. Highways §158.

7-14-2523. Term of county bridge bonds.

Compiler's Comments

2001 Amendment: Chapter 574 deleted former (2)(b) that read: "(b) if the 10-year term requires an annual tax levy for payment of the refunding bonds which exceeds 10 mills on all property subject to taxation, the term may be so extended as to reduce the annual levy to 10 mills"; and made minor changes in style. Amendment effective July 1, 2001.

7-14-2524. Limitation on amount of bonds issued.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 7 in (1)(a)(i) in first sentence substituted "15-36-324(14)" for "15-36-324(13)". Amendment effective October 1, 2001. The amendment by Ch. 29 rendered the amendment by Ch. 7 void.

Chapter 29 in (1) near middle after "emergency bonds" substituted "exceeds 0.68% of the total assessed value of taxable property, determined as provided in 15-8-111" for "will exceed 11.25% of the total of the taxable value of the property" and after "county" substituted "as ascertained by the last assessment for state and county taxes" for "plus:

(a) (i) the value provided by the department of revenue under 15-36-324(13). The taxable property and the amount of taxes levied on new production, production from horizontally completed wells, and incremental production must be ascertained by the last assessment for state and county taxes prior to the issuance of the bonds.

(ii) an additional 50% of the taxable value of telecommunications property under 15-6-141 within the county for tax year 1999, multiplied by 11.25%, and an additional 50% of the taxable value attributable to electrical generation property under 15-6-141 within the county for tax year 1999, multiplied by 11.25%;

(b) for fiscal year 2001, an additional 25% of the taxable value of class six property within the county for tax year 1999, multiplied by 11.25%, and an additional 60% of the taxable value of class eight property within the county for tax year 1999, multiplied by 11.25%;

(c) for fiscal year 2002, an additional 50% of the taxable value of class six property within the county for tax year 1999, multiplied by 11.25%, and an additional 60% of the taxable value of class eight property within the county for tax year 1999, multiplied by 11.25%;

(d) for fiscal year 2003, an additional 75% of the taxable value of class six property within the county for tax year 1999, multiplied by 11.25%, and an additional 60% of the taxable value of class eight property within the county for tax year 1999, multiplied by 11.25%;

(e) for fiscal years in which the tax rate for class eight property is 2%, an additional 100% of the taxable value of class six property within the county for tax year 1999, in each case of class six property, multiplied by 11.25%, and an additional 77% of the taxable value of class eight property within the county for tax year 1999, multiplied by 11.25%;

(f) for fiscal years in which the tax rate for class eight property is 1%, an additional 94% of the taxable value of former class eight property within the county for tax year 1999, in each case of former class eight property, multiplied by 11.25%; and

(g) for the fiscal year and succeeding fiscal years in which 15-6-138 is repealed, an additional 100% of the taxable value of former class eight property within the county for tax year 1999, in each case of former class eight property, multiplied by 11.25%"; in (2) near beginning after "exceeds" substituted "0.68% but does not exceed 1.4% of the total assessed value of taxable property, determined as provided in 15-8-111" for "11.25% but does not exceed 22.5% of the total of the taxable value of the property, as adjusted in subsection (1), plus an additional 50% of the taxable value of telecommunications property under 15-6-141 within the county for tax year 1999, multiplied by the amount that exceeds 11.25% but does not exceed 22.5% and an additional 50% of the taxable value attributable to electrical generation property under 15-6-141 within the county for tax year 1999, multiplied by the amount that exceeds 11.25% but does not exceed 22.5%"; in (3) after "exceed" substituted "1.4% of the total assessed value of taxable property, determined as provided in 15-8-111" for "22.5% of the total of the taxable value of the property" and after "the county" substituted "as ascertained by the last assessment for state and county taxes prior to the issuance of the bonds" for "as adjusted in this section"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1999 Amendments — Composite Section: (Version effective July 1, 2000) Chapter 285 inserted (1)(b) relating to fiscal year 2001; inserted (1)(c) relating to fiscal year 2002; inserted (1)(d) relating to fiscal year 2003; inserted (1)(e) relating to fiscal years when class eight property tax rate is 2%; inserted (1)(f) relating to fiscal years when class eight property tax rate is 1%; inserted (1)(g) relating to fiscal years after repeal of 15-6-138; near middle of (2) after "property" substituted "as adjusted in subsection (1)" for "plus the value provided by the department of revenue under 15-36-324(13)"; in (3) at end substituted "as adjusted in this section" for "plus the value provided by the department of revenue under 15-36-324(13), as ascertained by the last preceding general assessment"; and made minor changes in style. Amendment effective July 1, 2000.

Chapter 426 inserted (1)(b) in temporary version and (1)(a)(ii) in July 1, 2000, version relating to taxable value of telecommunications property; in (2) near middle inserted language relating to taxable value of telecommunications property; in (3) at end substituted "as adjusted in this section" for "plus the value provided by the department of revenue under 15-36-324(13), as ascertained by the last preceding general assessment"; and made minor changes in style. Amendment effective January 1, 2000.

Chapter 556 inserted (1)(b) in temporary version and (1)(a)(ii) in July 1, 2000, version relating to taxable valuation attributable to electrical generation property; in (2) near middle inserted clause providing that 50% of taxable valuation attributable to electrical generation property multiplied by amount exceeding 11.25% but not exceeding 22.5% is included in maximum bonding limitation formula; in (3) at end substituted "as adjusted in this section" for "plus the value provided by the department of revenue under 15-36-324(13), as ascertained by the last preceding general assessment"; and made minor changes in style. Amendment effective January 1, 2000.

Saving Clause: Section 29, Ch. 285, L. 1999, was a saving clause.

Section 36, Ch. 556, L. 1999, was a saving clause.

Severability: Section 30, Ch. 285, L. 1999, was a severability clause.

Section 37, Ch. 556, L. 1999, was a severability clause.

Applicability: Section 43, Ch. 426, L. 1999, provided: "[This act] applies to tax years beginning after December 31, 1999."

Section 39(2), Ch. 556, L. 1999, provided that this section applies to fiscal years beginning after June 30, 2000.

1997 Amendments: Chapter 219 in two places, after "bonds and warrants", deleted reference to exception for county high school bonds; and in (3), after "indebtedness of the county", deleted reference to exception for county high school bonds. Amendment effective July 1, 1997.

Chapter 466 in (1), (2), and (3) substituted "15-36-324(13)" for "15-36-324(10)". Amendment effective April 30, 1997.

Effective Date — Applicability: Section 23, Ch. 219, L. 1997, provided: "[This act] is effective July 1, 1997, and applies to bonds issued on or after [the effective date of this act]."

1995 Amendment: Chapter 451 in (1), (2), and (3), after "plus the", substituted "value provided by the department of revenue under 15-36-324(10)" for previous formula (see 1995 Session Law for text). Amendment effective January 1, 1996.

Applicability: Section 55, Ch. 451, L. 1995, provided: "(1) [This act] applies to oil and natural gas produced and sold on or after January 1, 1996.

(2) (a) [Sections 21 through 26] [7-1-2111, 7-7-2101, 7-7-2203, 7-14-2524, 7-14-2525, and 7-16-2327] apply to county fiscal years beginning after June 30, 1996.

(b) [Sections 38 through 46] [20-9-104, 20-9-141, 20-9-161, 20-9-331, 20-9-333, 20-9-501, 20-9-507, 20-10-144, and 20-10-146] apply to school fiscal years beginning after June 30, 1996.

(3) (a) An operator is subject to provisions of Title 15, chapter 23, parts 1 and 6 [part 6 now repealed]; Title 15, chapter 36; Title 15, chapter 38; and Title 82, chapter 11, part 1, as those laws read on December 31, 1995, for all oil and natural gas produced and sold by the operator before January 1, 1996. [On December 31, 1995, Title 15, ch. 36, contained only part 1, now repealed. Part 3 of that chapter became effective January 1, 1996.]

(b) Except as provided in subsection (3)(c), the payment, collection, and distribution of taxes on oil and natural gas production occurring before January 1, 1996, must be made according to the provisions of the laws referred to in subsection (3)(a) governing the tax in effect on the last day of the tax period in which the activity, enterprise, or product being taxed was engaged in, took place, or was produced and sold.

(c) [Section 19] [15-36-325, now repealed] applies to the payment, collection, and distribution of the local government severance tax for oil and natural gas produced and sold after December 31, 1994, and before January 1, 1996.

(d) All taxes collected pursuant to audit or collected after the date the tax is payable under the laws referred to in subsection (3)(a) must be distributed according to the statute governing allocation of the tax in effect on the date when the tax liability was incurred."

1993 Special Session Amendment: Chapter 9 near middle of (1), (2), and (3), after "amount of", substituted "taxes levied on new production, production from horizontally completed wells, and incremental production" for "interim production and new production taxes levied", inserted reference to subsection (2)(c), and after "new production" inserted "and production from horizontally completed wells"; at end of (1), after "amount of", substituted "taxes levied on new production, production from horizontally completed wells, and incremental production" for "interim production and new production taxes levied"; and made minor changes in style. Amendment effective December 17, 1993.

Report Required: Section 21, Ch. 9, Sp. L. November 1993, provided: "The board of oil and gas conservation shall report at least once a year to the revenue oversight committee [now revenue and transportation interim committee] regarding the implementation of [this act]. The reports must include but are not limited to information regarding:

(1) the methods used to determine production decline rates;

(2) rules adopted to implement [this act];

(3) the number of enhanced recovery projects completed or anticipated to be completed in a year; and

(4) the number of horizontal wells completed or anticipated to be completed in a year and the method of recovery from the horizontal wells."

Severability: Section 23, Ch. 9, Sp. L. November 1993, was a severability clause.

Effective Date — Applicability: Section 24, Ch. 9, Sp. L. November 1993, provided: "[This act] is effective on passage and approval [approved December 17, 1993] and applies to oil production from new or expanded enhanced recovery projects and to tax years that begin after December 31, 1993."

1993 Amendment: Chapter 10 in (2) and (3), after "15-23-612" (now repealed), inserted "multiplied by 60%"; and made minor changes in style.

1989 Special Session Amendment: At end of first sentence of (1) inserted "multiplied by 60%, plus the value of any other production occurring after December 31, 1988, multiplied by 60%"; in

(2) and (3), after "15-23-612", inserted "plus the value of any other production occurring after December 31, 1988, multiplied by 60%"; and made minor changes in phraseology. Amendment effective August 11, 1989, and applies retroactively to net proceeds taxes, severance taxes, and local government taxes on oil and gas, other than interim production and new production, produced after December 31, 1988.

1987 Amendment: In (1), (2), and (3), before "new production taxes", inserted "interim production and" and after "multiplied by 60%" inserted "plus the amount of value represented by new production exempted from tax as provided in 15-23-612" (now repealed).

Effective Date — Applicability — 1987 Enactment: Section 28, Ch. 655, L. 1987, provided: "This act is effective on passage and approval [approved April 13, 1987] and applies retroactively, within the meaning of 1-2-109, to taxable quarters beginning on or after April 1, 1987. The tax rate and filing method applicable to a well that qualifies as interim production under section 10 but which did not qualify as new production under 15-23-601 [now repealed] prior to the applicability date of this act does not change for tax periods prior to the applicability date."

1985 Amendment: In (1), (2), and (3), near middle, before "taxable value", inserted "total of the"; in (1), (2), and (3) inserted "plus the amount of new production taxes levied divided by the appropriate tax rates described in 15-23-607(2)(a) or (2)(b) [now repealed] and multiplied by 60%"; and in second sentence of (1) near beginning, inserted "and the amount of new production taxes levied".

1981 Amendment: Increased 9% to 11.25% wherever it appears; and increased 18% to 22.5% wherever it appears.

7-14-2525. Refunding agreements and refunding bonds authorized.

Compiler's Comments

2001 Amendment: Chapter 29 in (1) after "exceeds" substituted "1.4% of the total assessed value of taxable property, determined as provided in 15-8-111" for "22.5% of the total of the taxable value of the property" and after "county" deleted "as adjusted in 7-14-2524"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1999 Amendments — Composite Section: Chapters 285, 426, and 556 in (1) near middle after "county" substituted "as adjusted in 7-14-2524" for "plus the value provided by the department of revenue under 15-36-324(13)". Chapter 285 amendment effective July 1, 2000. Chapter 426 and Ch. 556 amendments effective January 1, 2000.

Saving Clause: Section 29, Ch. 285, L. 1999, was a saving clause.

Section 36, Ch. 556, L. 1999, was a saving clause.

Severability: Section 30, Ch. 285, L. 1999, was a severability clause.

Section 37, Ch. 556, L. 1999, was a severability clause.

Applicability: Section 43, Ch. 426, L. 1999, provided: "[This act] applies to tax years beginning after December 31, 1999."

Section 39(2), Ch. 556, L. 1999, provided that this section applies to fiscal years beginning after June 30, 2000.

1997 Amendment: Chapter 466 in (1) substituted "15-36-324(13)" for "15-36-324(10)"; and made minor changes in style. Amendment effective April 30, 1997.

1995 Amendment: Chapter 451 in (1), after "plus the", substituted "value provided by the department of revenue under 15-36-324(10)" for previous formula (see 1995 Session Law for text). Amendment effective January 1, 1996.

Applicability: Section 55, Ch. 451, L. 1995, provided: "(1) [This act] applies to oil and natural gas produced and sold on or after January 1, 1996.

(2) (a) [Sections 21 through 26] [7-1-2111, 7-7-2101, 7-7-2203, 7-14-2524, 7-14-2525, and 7-16-2327] apply to county fiscal years beginning after June 30, 1996.

(b) [Sections 38 through 46] [20-9-104, 20-9-141, 20-9-161, 20-9-331, 20-9-333, 20-9-501, 20-9-507, 20-10-144, and 20-10-146] apply to school fiscal years beginning after June 30, 1996.

(3) (a) An operator is subject to provisions of Title 15, chapter 23, parts 1 and 6 [part 6 now repealed]; Title 15, chapter 36; Title 15, chapter 38; and Title 82, chapter 11, part 1, as those laws read on December 31, 1995, for all oil and natural gas produced and sold by the operator before

January 1, 1996. [On December 31, 1995, Title 15, ch. 36, contained only part 1, now repealed. Part 3 of that chapter became effective January 1, 1996.]

(b) Except as provided in subsection (3)(c), the payment, collection, and distribution of taxes on oil and natural gas production occurring before January 1, 1996, must be made according to the provisions of the laws referred to in subsection (3)(a) governing the tax in effect on the last day of the tax period in which the activity, enterprise, or product being taxed was engaged in, took place, or was produced and sold.

(c) [Section 19] [15-36-325, now repealed] applies to the payment, collection, and distribution of the local government severance tax for oil and natural gas produced and sold after December 31, 1994, and before January 1, 1996.

(d) All taxes collected pursuant to audit or collected after the date the tax is payable under the laws referred to in subsection (3)(a) must be distributed according to the statute governing allocation of the tax in effect on the date when the tax liability was incurred."

1993 Special Session Amendment: Chapter 9 near middle of (1), after "amount of", substituted "taxes levied on new production, production from horizontally completed wells, and incremental production" for "interim production and new production taxes levied", inserted reference to subsection (2)(c), and after "new production" inserted "and production from horizontally completed wells"; and made minor changes in style. Amendment effective December 17, 1993.

Report Required: Section 21, Ch. 9, Sp. L. November 1993, provided: "The board of oil and gas conservation shall report at least once a year to the revenue oversight committee [now revenue and transportation interim committee] regarding the implementation of [this act]. The reports must include but are not limited to information regarding:

(1) the methods used to determine production decline rates;

(2) rules adopted to implement [this act];

(3) the number of enhanced recovery projects completed or anticipated to be completed in a year; and

(4) the number of horizontal wells completed or anticipated to be completed in a year and the method of recovery from the horizontal wells."

Severability: Section 23, Ch. 9, Sp. L. November 1993, was a severability clause.

Effective Date — Applicability: Section 24, Ch. 9, Sp. L. November 1993, provided: "[This act] is effective on passage and approval [approved December 17, 1993] and applies to oil production from new or expanded enhanced recovery projects and to tax years that begin after December 31, 1993."

1989 Special Session Amendment: In (1), after "15-23-612" (now repealed), inserted "multiplied by 60%, plus the value of any other production occurring after December 31, 1988, multiplied by 60%"; and made minor change in phraseology. Amendment effective August 11, 1989, and applies retroactively to net proceeds taxes, severance taxes, and local government taxes on oil and gas, other than interim production and new production, produced after December 31, 1988.

1987 Amendment: In (1), before "new production taxes", inserted "interim production and" and after "multiplied by 60%" inserted "plus the amount of value represented by new production exempted from tax as provided in 15-23-612".

Effective Date — Applicability — 1987 Enactment: Section 28, Ch. 655, L. 1987, provided: "This act is effective on passage and approval [approved April 13, 1987] and applies retroactively, within the meaning of 1-2-109, to taxable quarters beginning on or after April 1, 1987. The tax rate and filing method applicable to a well that qualifies as interim production under section 10 but which did not qualify as new production under 15-23-601 [now repealed] prior to the applicability date of this act does not change for tax periods prior to the applicability date."

1985 Amendment: In (1), near middle of lead-in language, before "taxable value", inserted "total of the" and after "property therein", inserted "plus the amount of new production taxes levied divided by the appropriate tax rates described in 15-23-607(2)(a) or (2)(b) [now repealed] and multiplied by 60%".

1981 Amendment: Increased 18% to 22.5% in (1).

Collateral References

Counties *key* 175.

7-14-2526. Choice of form of bonds.

Compiler's Comments

1997 Amendment: Chapter 459 deleted second sentence that read: "Amortization bonds shall be issued in preference to serial bonds"; and made minor changes in style.

7-14-2531. Definition of term "single purpose".

Compiler's Comments

1985 Amendment: Deleted former (3) that read: "Nothing contained in this section shall be construed as amending or repealing 7-16-2201 through 7-16-2205".

Part 26
Establishment, Alteration, and Abandonment of County Roads

Part Case Notes

Statutory Requirements to Be Followed for Creation of County Road: The Pedersons contended that because the county had constructed their road, maintained it, and accepted a right-of-way easement for the road, the county's actions were tantamount to acceptance of the road as a county road. The Supreme Court held that state law required the County Commissioners to make an affirmative decision to establish a county road and that in the present case, there was no record of any action taken by the Board; therefore, a county road could not have been established. Pederson v. Dawson County, 2000 MT 339, 303 M 158, 17 P3d 393, 57 St. Rep. 1441 (2000).

Public Highway Established Pursuant to 1895 Law — Mere Nonuse by County Not Considered Abandonment —- Inapplicability of Prescriptive Easement and Reverse Adverse Possession: The District Court found that the Tucker Gulch Road was clearly defined and in use by the public for at least 27 years prior to enactment of sec. 2600, The Codes and Statutes of Montana (1895), which declared all highways and roads then used by the public as public highways. However, the court went on to hold that it was not a petitioned county road and that there was a prescriptive easement by the public over the road that had been lost through abandonment and by reverse adverse possession when a new road was relocated near the old one. The District Court properly found that Tucker Gulch Road was a public highway; however, mere nonuse or lack of maintenance by the county was insufficient to indicate a clear intent to abandon the road without notice and a public hearing. Moreover, the county's failure to respond to several quiet title actions in which the county was not served and the county's adoption of a resolution naming the road did not indicate an intent to abandon. Abandonment cannot be established by mere implication. The Supreme Court cited Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106 (1992), for the general rule that title to a public road may not be obtained by adverse possession. The Supreme Court also cited Granite County v. Komberec, 245 M 252, 800 P2d 166 (1990), and affirmed the District Court's finding that there was not a public prescriptive easement along the relocated new road because most of the nonpermissive use of the new road was by occasional recreationists. The District Court's conclusion that creation of the easement was not specific and that the easements were designed for the access of the owners for activities associated with residential living was in error, however, absent evidence in the access agreement or survey establishing such a restriction. Thus, the grant of unrestricted access to landowners who had owned a mine adjoining the property in question was not in error. McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794, 57 St. Rep. 855 (2000), distinguishing Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993).

Abandonment of State Highway — Statements by State Field Supervisor Contemporaneous With Removal of Asphalt Held Not Evidence of Official Act by State Evidencing Clear Intent to Abandon Easement — Asphalt Alone Not "Highway": DeVoe brought a declaratory judgment action against the state, claiming that the removal of asphalt from a curving intersection and statements by a supervisor of a crew removing the old roadway evidenced an intent by the state to abandon its easement granted in 1937. DeVoe argued that statements by James Williams, the state's field project manager in charge of removal of the asphalt from the section of highway on the state's easement claimed by DeVoe to have been abandoned, showed that the state intended to abandon the easement. The Supreme Court held that the statements by Williams, to the effect that the state might give up the easement, were evidence of an intent to abandon but did not constitute evidence of an official act by the state indicating a clear intent to abandon the 1937 easement. The Supreme Court also noted that a "highway" is defined as including the highway

right-of-way and that, for this reason, removal of asphalt does not constitute removal of the highway. The Supreme Court held that the District Court properly granted summary judgment against DeVoe because the District Court properly found that the easement was still subject to highway-related uses. DeVoe v. St., 281 M 356, 935 P2d 256, 54 St. Rep. 207 (1997).

Abandonment of County Road — Discretion in County Commission:

Following remand of Baertsch, infra, the landowners appealed the District Court decision establishing the county's 100-foot right-of-way. The Supreme Court affirmed on all issues, holding that the trial court properly determined that: (1) procedural requirements for creating the right-of-way by statute were met; (2) the County Commission, in granting the petition for the right-of-way in 1890, was obviously granting its contents, which was a request for a 100-foot right-of-way; (3) mere nonuse of the right-of-way, even for extended periods of time, was insufficient in itself to indicate an intent to abandon the public property; (4) the public road could not be obtained by adverse possession; (5) failure to apply equitable estoppel did not create a manifest injustice to the landowners; and (6) because the county was not properly a party to the prior litigation, res judicata did not apply. Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106, 49 St. Rep. 1162 (1992), followed in DeVoe v. St., 281 M 356, 935 P2d 256, 54 St. Rep. 207 (1997).

After the decision in Ingram-Clevenger, infra, essentially the same landowners filed their complaint in this action, contending that: (1) the county road in its entirety was never properly dedicated; (2) the county abandoned all that portion of the road right-of-way not actually used for roadway and barrow pits; (3) the landowners obtained title to the disputed portion of the right-of-way by adverse possession; and (4) the county's claim was barred by equitable estoppel. The county raised the defense of res judicata, and the District Court concluded that res judicata was applicable. On appeal, the Supreme Court held that the issues in the two cases were not the same, noting that in Ingram-Clevenger the title to the road was not involved whereas in this case the claims were related to the title and could not properly have been presented as part of the proceedings for vacation of the road. As a result, the present case was not barred under a theory of res judicata, merger, the rule against splitting causes of action, or the doctrine of equitable estoppel. The case was remanded for a trial of the issues on the merits. Baertsch v. Lewis & Clark County, 223 M 206, 727 P2d 504, 43 St. Rep. 1660 (1986).

This part provides that the abandonment of a county road is discretionary with the Board of County Commissioners; thus, unless discretion is manifestly abused, mandamus will not lie. Although the provisions of 7-14-2103(3) appear to mandate the abandonment of a road upon proper petition, this part, being more specific, governs and the provisions of 7-14-2103(3) may be interpreted to conform with this part. Ingram-Clevenger, Inc. v. Lewis & Clark County, 194 M 43, 636 P2d 1372, 38 St. Rep. 1696 (1981).

Adverse Possession Inapplicable to Title to Public Roads: The general rule in Montana law is that title to public roads may not be obtained by adverse possession. Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106, 49 St. Rep. 1162 (1992), following Billings v. Pierce Packing Co., 117 M 255, 161 P2d 636 (1945).

Statutory Requirements to Be Followed: Madison County attempted to establish a county road across defendants' land. The county invoked eminent domain. Section 70-30-108 requires compliance with the statutory provisions relating to the establishment of county roads. Title 7, ch. 14, generally requires a chain of events involving: (1) the filing of a proper petition with the county; (2) the option of the county surveying a specific route; (3) the county determination of the affected landowners and assessment of their damages; (4) the county offer of an award of damages; and (5) if the award is rejected, the beginning of condemnation proceedings. In this case the county did not receive a proper petition. The county offered damages for one proposed route but began condemnation on a different route for which no offer was made. The proceedings did not comply with the statutes and were not cured by 7-14-2609. The county may not ignore the mandates of the statutes or they would be of no consequence. Madison County v. Elford, 203 M 293, 661 P2d 1266, 40 St. Rep. 457 (1983).

Equitable Estoppel — Not Applicable to Road Abandonment: County officers gave erroneous information on how to petition for abandonment of a county road. Although the public has a right to rely on the advice of public officers, the doctrine of equitable reliance was not applicable. Because the public interest in the disposal of public lands merits a higher consideration than the reliance on statements made by public officers, road abandonment requires substantial compliance with statutory requirements. Chennault v. Sager, 187 M 455, 610 P2d 173, 37 St. Rep. 857 (1980), distinguished, in cases involving a private right of action, in Quirin v. Weinberg, 252 M 386, 830 P2d 537, 49 St. Rep. 331 (1992), and followed in Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106, 49 St. Rep. 1162 (1992).

Part Attorney General's Opinions

"Discontinue" Clarified: The term "discontinue", as used in Title 7, ch. 14, parts 26 and 41, is synonymous with the terms "abandon" and "vacate". 40 A.G. Op. 23 (1983).

7-14-2601. Petition to establish, alter, or abandon a county road.

Case Notes

County Right-of-Way Considered Easement — Injunction Proper Remedy to Ensure Access to Right-of-Way: Jefferson County filed a complaint for a temporary injunction, an order allowing entry upon land to survey McCarty Creek Road, which passed through McCauley's land to public land beyond, and an order setting a show cause hearing. The District Court issued the injunction allowing the survey and set a date for hearing. At the hearing, the court found extensive documentary evidence, dating back to 1883, confirming the existence of McCarty Creek Road and, in its final order, determined that the road, as it crossed McCauley's property, was a dedicated and established county road. The court further enjoined McCauley from interfering with access or obstructing ingress and egress on the road. The Supreme Court affirmed, finding substantial credible evidence to support the District Court's determination and finding no abuse of discretion in enjoining McCauley from interfering with the public use of McCarty Creek Road. Jefferson County v. McCauley Ranches, 1999 MT 333, 297 M 392, 994 P2d 11, 56 St. Rep. 1329 (1999), following Bolinger v. Bozeman, 158 M 507, 493 P2d 1062 (1972), Reid v. Park County, 192 M 231, 627 P2d 1210, 38 St. Rep. 631 (1981), and Bailey v. Ravalli County, 201 M 138, 653 P2d 139, 39 St. Rep. 2010 (1982), and distinguishing Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), Knudson v. McDunn, 271 M 61, 894 P2d 295 (1995), and Lurie v. Sheriff, 284 M 207, 944 P2d 205, 54 St. Rep. 847 (1997).

Contempt Order Against County for Failure to Follow Proper Procedures Annulled: The lower court found the county in contempt for abandoning and changing a portion of a road without following the procedures suggested in an earlier court order. The Supreme Court stated that not all of the record had been before the lower court. An examination of the entire record indicated that the county had tried to follow the procedures set out in statute and the earlier court order. The Supreme Court annulled the contempt order and suggested that the parties might want to move to have the injunction against changing or abandoning the relevant portion of the road dissolved. State ex rel. Fallon County v. District Court, 245 M 382, 801 P2d 610, 47 St. Rep. 2187 (1990).

Quiet Title Action — Record Taken as a Whole: A landowner filed an action to quiet title to a county road established 80 years earlier, claiming that defects in the 1902 proceedings prevented establishment of a statutorily created 60-foot-wide public highway and that the existing public road was acquired by prescriptive use and was limited to the greatest width actually used. The record contained the actual petition to establish a road, signed by more than 20 residents of the area, including the appellant's predecessor in interest. The District Court decreed the road to be a 60-foot-wide declared county right-of-way, and the Supreme Court affirmed. The county is not required to prove on the face of the record that public officials had jurisdiction to create a public road if the record, taken as a whole, shows that a public road was created. Sheldon v. Flathead County, 218 M 270, 707 P2d 540, 42 St. Rep. 1573 (1985). See also O'Neill v. St., 225 M 364, 732 P2d 1330, 44 St. Rep. 305 (1987).

Abandoned Public Road to Revert to Abutting Property Owners: An action was filed to quiet title to a county road that had been established as a public road in 1909. The certificate of dedication of the 1909 plat stated that the streets therein were "granted and dedicated to the use of the public forever". In 1944, pursuant to section 1635, R.C.M. 1935, a petition for county road closure was filed. That same year the petition was granted by the County Commissioners. After 1944, neither the plaintiffs nor their predecessors in interest paid any taxes on the roadway and no portion of the roadway was fenced into the lands now belonging to the plaintiffs until 1980. The court quieted title in the plaintiffs, ruling that the 1909 plat dedication was the equivalent of a right-of-way deed under which the public acquired only the right-of-way and the incidents necessary to its enjoyment and that upon abandonment the fee in the street reverted to the abutting landowners, with each abutting landowner taking fee from the edge of his property to the center of the street. Bailey v. Ravalli County, 201 M 138, 653 P2d 139, 39 St. Rep. 2010 (1982), followed in Herreid v. Hauck, 254 M 496, 839 P2d 571, 49 St. Rep. 884 (1992).

Proceedings to Abandon Public Roadway Not to Be Questioned When More Than Thirty Years Have Elapsed Since Abandonment: In 1944, a roadway was abandoned by the County Commissioners pursuant to proceedings instituted under section 1635, R.C.M. 1935. In its review of the District Court's 1981 decision to quiet title to the roadway in the abutting property owners, the Supreme Court ruled that even though the record does not affirmatively show that

the statutory notice requirements were met, in the absence of any question being raised by abutting landowners or the county over a period of more than 30 years, the proceedings cannot now be questioned. Bailey v. Ravalli County, 201 M 138, 653 P2d 139, 39 St. Rep. 2010 (1982).

Quiet Title Action — Petition to Establish Road: A landowner brought an action to quiet title to a road crossing his property. Despite jurisdictional defects, such as failure to require production of a copy of the petition establishing the road or proof that the petition was signed by 10 qualified petitioners, the record taken as a whole showed that a public road was created. Reid v. Park County, 192 M 231, 627 P2d 1210, 38 St. Rep. 631 (1981), followed in Jefferson County v. McCauley Ranches, 1999 MT 333, 297 M 392, 994 P2d 11, 56 St. Rep. 1329 (1999).

Insufficient Petition to Abandon — Number of Signatures: A petition for abandonment of a county road without the necessary number of signatures does not substantially comply with statutes on abandonment. Thus, the County Commissioners were without authority to act with respect to the abandonment. Chennault v. Sager, 187 M 455, 610 P2d 173, 37 St. Rep. 857 (1980).

Petition by District Freeholders Affected — Majority in District Required: When the only persons signing a petition for abandonment of a county road were the four freeholders residing on land adjacent to the road, their petition was insufficient. "A majority of the freeholders of the road district" cannot be construed "a majority of those directly affected", even though the road district in this instance consisted of an entire county containing 40,000 residents. Chennault v. Sager, 187 M 455, 610 P2d 173, 37 St. Rep. 857 (1980).

Substantial Compliance: Under former law, technical strictness in complying with the statute was not required, only substantial compliance. Oates v. Knutson, 182 M 195, 595 P2d 1181, 36 St. Rep. 1011 (1979).

Attorney General's Opinions

"Discontinue" Clarified: The term "discontinue", as used in Title 7, ch. 14, parts 26 and 41, is synonymous with the terms "abandon" and "vacate". 40 A.G. Op. 23 (1983).

Collateral References

Highways *key* 29, 72(2), 77(2).

39A C.J.S. Highways §§48, 96, 101, 118, 130.

39 Am. Jur. 2d Highways, Streets, and Bridges §§35, 135, 139, 143, 146.

7-14-2602. Contents of petition.

Case Notes

Substantial Compliance: Under former law, technical strictness in complying with the statute was not required, only substantial compliance. Oates v. Knutson, 182 M 195, 595 P2d 1181, 36 St. Rep. 1011 (1979).

Collateral References

Highways *key* 29, 72(2), 77(2).

39A C.J.S. Highways §§49, 101, 118.

7-14-2603. Investigation of request concerning road — decision.

Case Notes

Substantial Compliance: Under former law, technical strictness in complying with the statute was not required, only substantial compliance. Oates v. Knutson, 182 M 195, 595 P2d 1181, 36 St. Rep. 1011 (1979).

7-14-2606. Survey of road.

Collateral References

39A C.J.S. Highways §68.

Eminent domain: right to enter land for preliminary survey or examination. 29 ALR 3d 1104.

7-14-2607. Damages resulting from establishment or alteration of road.

Law Review Articles

Easements and Market Value, Cromwell, 17 Mont. L. Rev. 143 (1956).

Collateral References

Eminent domain: consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages. 59 ALR 3d 534.

7-14-2615. Abandonment or vacation of county roads.

Compiler's Comments

1999 Amendment: Chapter 107 inserted (3) prohibiting board from abandoning county road or right-of-way accessing public land unless another road or right-of-way provides substantially same access; inserted (4) prohibiting board from abandoning road or right-of-way accessing private land benefiting two or more landowners unless all agree; and made minor changes in style. Amendment effective March 18, 1999.

Case Notes

Public Highway Established Pursuant to 1895 Law — Mere Nonuse by County Not Considered Abandonment —- Inapplicability of Prescriptive Easement and Reverse Adverse Possession: The District Court found that the Tucker Gulch Road was clearly defined and in use by the public for at least 27 years prior to enactment of sec. 2600, The Codes and Statutes of Montana (1895), which declared all highways and roads then used by the public as public highways. However, the court went on to hold that it was not a petitioned county road and that there was a prescriptive easement by the public over the road that had been lost through abandonment and by reverse adverse possession when a new road was relocated near the old one. The District Court properly found that Tucker Gulch Road was a public highway; however, mere nonuse or lack of maintenance by the county was insufficient to indicate a clear intent to abandon the road without notice and a public hearing. Moreover, the county's failure to respond to several quiet title actions in which the county was not served and the county's adoption of a resolution naming the road did not indicate an intent to abandon. Abandonment cannot be established by mere implication. The Supreme Court cited Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106 (1992), for the general rule that title to a public road may not be obtained by adverse possession. The Supreme Court also cited Granite County v. Komberec, 245 M 252, 800 P2d 166 (1990), and affirmed the District Court's finding that there was not a public prescriptive easement along the relocated new road because most of the nonpermissive use of the new road was by occasional recreationists. The District Court's conclusion that creation of the easement was not specific and that the easements were designed for the access of the owners for activities associated with residential living was in error, however, absent evidence in the access agreement or survey establishing such a restriction. Thus, the grant of unrestricted access to landowners who had owned a mine adjoining the property in question was not in error. McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794, 57 St. Rep. 855 (2000), distinguishing Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993).

Court Jurisdiction: The District Court did not follow proper statutory procedure for obtaining jurisdiction to abandon or order the abandonment of a road; therefore, it did not have jurisdiction to order County Commissioners to abandon the road and could not hold the Commissioners in contempt for violating the order. Bd. of County Comm'rs v. District Court, 203 M 44, 659 P2d 266, 40 St. Rep. 284 (1983).

Attorney General's Opinions

Notice Requirement — Road Abandonment: Before abandonment of a county road, actual notice must be given to all landowners of record affected thereby. An abandonment order is effective only as to interested parties properly notified. 37 A.G. Op. 130 (1978).

Collateral References

Highways *key* 79.

39A C.J.S. Highways §§130 through 135.

39 Am. Jur. 2d Highways, Streets, and Bridges §§138, 143.

7-14-2616. Procedure to discontinue street.

Compiler's Comments

2001 Amendment: Chapter 354 in (3) in first sentence substituted "as provided in 7-1-2121" for "or posted in three public places" and deleted former second sentence that read: "Such notice must be published in a newspaper or posted at least 1 week before the petition is acted on"; and made minor changes in style. Amendment effective October 1, 2001.

Case Notes

Closed for School Purposes: Erection of fence by school board on city-owned land adjacent to street in such a manner as to block neither vehicular nor pedestrian traffic would not be a discontinuance, closing, or vacation of all or part of street and would not fall within natural import of language "closed for school purposes" as used in this section, so that approval by 75% of

lot owners on street was not required. State ex rel. Smart v. Big Timber, 165 M 328, 528 P2d 688 (1974).

Evidence of Public Detriment: Where the record did not show that the Commissioners made a finding of fact that a street could be closed without detriment to the public interest but it did show a detriment to abutting landowners, to the city, and to the public interest generally, the petition for discontinuance should have been denied. Miller v. Schrock, 135 M 409, 340 P2d 154 (1959).

Collateral References

Highways *key* 75.
39A C.J.S. Highways §§113, 116, 117.
39 Am. Jur. 2d Highways, Streets, and Bridges §146.

7-14-2621. Establishment and alteration of stock lanes.

Compiler's Comments

2001 Amendment: Chapter 125 in (3) in first sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Part 27
Local Improvement Districts

Part Collateral References

40 C.J.S. Highways §§284 through 292.
70A Am. Jur. 2d Special or Local Assessments §§39, 40.

7-14-2701. Development of county roads.

Compiler's Comments

1993 Amendment: Chapter 42 in (1), after "board", substituted "may" for "shall".

7-14-2702. Petition for opening or improving road.

Collateral References

39 Am. Jur. 2d Highways, Streets, and Bridges §35; 70A Am. Jur. 2d Special or Local Assessments §123, et seq.

7-14-2704. Resolution of public interest.

Compiler's Comments

1993 Amendment: Chapter 42 in (1), after "board", substituted "may" for "shall"; and made minor changes in style.

Attorney General's Opinions

Commissioners Required to Pass Resolution of Public Interest: The Board of County Commissioners is required to pass a resolution of public interest upon the receipt of a proper petition, under this section, requesting the creation of a local improvement district for a county road. The Board may not hold a hearing for the purpose of making an independent determination of the public interest. (See 1993 amendment.) 41 A.G. Op. 41 (1986).

Collateral References

Authority of zoning commission to impose, as condition of allowance of special exception, permit, or variance, requirements as to highway and traffic changes. 49 ALR 3d 492.

7-14-2706. Notice of meeting.

Compiler's Comments

1985 Amendment: Substituted "published as provided in 7-1-2121" for "printed in the newspaper published nearest to the vicinity of the road. The notice shall be published for 3 consecutive weeks prior to the time of the meeting", and after "The notice shall state", deleted "the time and place of the meeting and".

Collateral References

70A Am. Jur. 2d Special or Local Assessments §145, et seq.

7-14-2707. Meeting procedure — election of committee of supervisors.

Collateral References
70A Am. Jur. 2d Special or Local Assessments §123, et seq.

7-14-2710. Creation of local improvement district.

Compiler's Comments
1993 Amendment: Chapter 42 in (1), after "board", substituted "may" for "shall"; and made minor changes in style.

Attorney General's Opinions
County Commissioners — No Discretion in Creation of District: The Board may not refuse to create a local improvement district which has been properly petitioned when the requirements of this section have been met. (See 1993 amendment.) 41 A.G. Op. 41 (1986).

Collateral References
70A Am. Jur. 2d Special or Local Assessments §115.

7-14-2711. Division of local improvement district into parts.

Collateral References
70A Am. Jur. 2d Special or Local Assessments §119.

7-14-2716. Award of contract by local improvement district.

Compiler's Comments
2001 Amendment: Chapter 181 in (1) in first sentence after "18-1-102" deleted "18-1-112"; and made minor changes in style. Amendment effective October 1, 2001.
Applicability: Section 28, Ch. 181, L. 2001, provided: "[This act] applies to contracts for which the contracting government entity begins the contracting process after October 1, 2001."

7-14-2731. Assessment and lien upon lands benefited by road.

Collateral References
70A Am. Jur. 2d Special or Local Assessments §§92 through 113, 178 through 186.

7-14-2733. Sharing of road costs with county.

Attorney General's Opinions
Circumstances Allowing County In-Kind Share of Costs: Pursuant to 7-14-2714, the county may construct or improve the road and thereby meet its share of the costs by providing in-kind services, otherwise the county's share must be paid from county funds. 41 A.G. Op. 41 (1986).
County Share From Road Fund or General Fund: The county's share of the costs of the improvement may be paid either from the county road fund or from the general fund. 41 A.G. Op. 41 (1986).

7-14-2735. Lien arising from assessments.

Compiler's Comments
1993 Special Session Amendment: Chapter 27 in (2), at end, substituted "register" for "roll"; and made minor changes in style. Amendment effective January 1, 1994.
Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Collateral References
70A Am. Jur. 2d Special or Local Assessments §§178 through 186.

7-14-2738. Preparation of assessment register.

Compiler's Comments
1993 Special Session Amendment: Chapter 27 in (1) substituted "department of revenue" for "county assessor"; in (2) substituted "department" for "assessor" and "register" for "roll"; and made minor changes in style. Amendment effective January 1, 1994.
Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

7-14-2739. Notice of preparation of assessment register.

Compiler's Comments
1993 Special Session Amendment: Chapter 27 in two places substituted "register" for "roll"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1985 Amendment: Substituted "as provided in 7-1-2121" for "for 3 consecutive weeks in the newspapers in which notice of invitations for bids for the contract was published".

7-14-2740. Hearing on assessment register.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in first sentence, after "board", deleted "and the assessor" and at end of second sentence substituted "register" for "roll"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

7-14-2742. Correction of errors — approval of assessment register.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (2), at end, substituted "register" for "roll"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

7-14-2743. Levy of assessments.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in first sentence substituted "department of revenue" for "assessor" and "register" for "roll" and inserted last sentence relating to entry of amounts levied and assessed; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

7-14-2744. Mode of payment of assessment — immediate payment.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (1) and (4)(a) substituted "register" for "roll"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

7-14-2745. Mode of payment of assessment — installment payments.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (3), at end, substituted "register" for "roll"; in (4), near beginning after "The board", deleted "and the assessor"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1987 Amendment: In (2) substituted "as provided in 17-5-102" for "not to exceed the limitations of 17-5-102, per annum".

1983 Amendment: Made 1981 amendment permanent. (Amendment was to terminate July 1, 1983—sec. 21, Ch. 500, L. 1981.)

1981 Amendment: Substituted "interest, not to exceed the limitations of 17-5-102" for "6% interest" in (2).

7-14-2755. Notice of use of bonds.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (2)(a) substituted "register" for "roll"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

Part 28
Ferries and Wharves

7-14-2801. General powers of county relating to ferries.

Compiler's Comments

1999 Amendment: Chapter 584 in (1) and (2) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Case Notes

Use of Funds and Acceptance of Bids — Administrative Functions: The use of funds and acceptance of bids by a Board of County Commissioners are not subject to referendum as they concern administrative rather than legislative functions. Chouteau County v. Grossman, 172 M 373, 563 P2d 1125 (1977).

Collateral References

Ferries *key* 5.
36A C.J.S. Ferries §§7(1), 8.
35 Am. Jur. 2d Ferries §§13, 14.

7-14-2803. Establishment and operation of public ferry or wharf upon petition.

Compiler's Comments

2001 Amendment: Chapter 125 in first sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Ferry as Incident of Highway: That a Board of County Commissioners had no express authority until 1909 to issue bonds for and establish public ferries is immaterial because a ferry is an incident or movable portion of a highway where it crosses a stream. Reid v. Lincoln County, 46 M 31, 125 P 429 (1912).

Collateral References

Ferries *key* 5; Wharves *key* 5.
36A C.J.S. Ferries §§7(1), 8; 94 C.J.S. Wharves §3.
35 Am. Jur. 2d Ferries §§13, 14.

7-14-2804. Acquisition of property for public ferries and wharves.

Compiler's Comments

Section Not Codified: Section 16-1117, R.C.M. 1947, was not codified in the MCA, because it was redundant with this section. This section has not been repealed and is still valid law. Citation may be made to sec. 2, Ch. 33, L. 1909. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Collateral References

Ferries *key* 22.
36A C.J.S. Ferries §15.
35 Am. Jur. 2d Ferries §§25, 26.

7-14-2805. Establishment and operation of public ferry or wharf by county upon its own motion.

Case Notes

Operation of Ferry a Proprietary Function: The county operated an aerial basket carrier to transport the public across a river in the winter season when the county ferry was inoperable. The county was found to be performing a proprietary function in operating the carrier and hence was liable for the plaintiff's injuries sustained while attempting to board the carrier. (Section 1, Ch. 38, L. 1943, declared such operation by the county to be a governmental function.) Jacoby v. Chouteau County, 112 M 70, 112 P2d 1068 (1941), distinguished with regard to functions of the Montana State Hospital in Murphy v. St., 248 M 82, 809 P2d 16, 48 St. Rep. 335 (1991).

Collateral References
Ferries *key* 11, 12, 15.
36A C.J.S. Ferries §11(2).
35 Am. Jur. 2d Ferries §15.

7-14-2806. Rules and rates for public ferry or wharf.

Collateral References
Ferries *key* 27, 31.
36A C.J.S. Ferries §14.
35 Am. Jur. 2d Ferries §28.
Liability of wharf owner or operator for personal injuries to invitees or licensees resulting from condition of premises or operation of equipment. 34 ALR 4th 572.

7-14-2807. Tax levy for public ferry — combined ferry and bridge fund.

Compiler's Comments
2001 Amendment: Chapter 574 in (1) substituted "tax on the taxable value of all taxable property" for "special tax, not to exceed 2 mills on the dollar, on the taxable property". Amendment effective July 1, 2001.
1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.
Severability: Section 172, Ch. 584, L. 1999, was a severability clause.
Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.
1989 Amendment: At beginning of (1) inserted "If a county owns or operates a public ferry"; and inserted (2) authorizing combination of revenue from bridge and ferry levies. Amendment effective July 1, 1989.

Collateral References
Ferries *key* 30.

7-14-2822. Notice of application to operate ferry.

Compiler's Comments
2001 Amendment: Chapter 354 in first sentence inserted "as provided in 7-1-2121" and in second sentence inserted "Publication must be made"; deleted former (2) that read: "(2) by posting three notices in three public places in the township for 4 successive weeks"; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References
Ferries *key* 14.
36A C.J.S. Ferries §11(1).
35 Am. Jur. 2d Ferries §18.

7-14-2823. Hearing and decision on application.

Compiler's Comments
1987 Amendment: Near end of (2)(a) and (2)(c) inserted "on" to clarify meaning.
1985 Amendment: In (2)(a) before "bond", deleted "penal".

Collateral References
Ferries *key* 14.
36A C.J.S. Ferries §11(1).
35 Am. Jur. 2d Ferries §19.

7-14-2824. Preference for landowner.

Collateral References
Ferries *key* 12.
36A C.J.S. Ferries §10.
35 Am. Jur. 2d Ferries §16.

7-14-2825. Establishment of new ferry near existing ferry.

Collateral References
35 Am. Jur. 2d Ferries §20.

7-14-2826. Regulation of ferry operation — penalties.

Compiler's Comments

1987 Amendment: In second sentence of (4), after "collected", inserted "except as provided in 3-10-601".

Collateral References

Ferries *key* 27, 28, 34.
36A C.J.S. Ferries §§22 through 24, 26, 27, 32.
35 Am. Jur. 2d Ferries §§29, 30.

7-14-2827. Surety bond required.

Collateral References

Ferries *key* 30 ½.
36A C.J.S. Ferries §§29, 31.
35 Am. Jur. 2d Ferries §22.

7-14-2829. Acquisition of land for ferry.

Compiler's Comments

2001 Amendment: Chapter 125 at end inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Collateral References

Ferries *key* 22.
36A C.J.S. Ferries §15.
35 Am. Jur. 2d Ferries §§25, 26.

7-14-2830. Procedure to administer license tax.

Collateral References

Ferries *key* 30.
36A C.J.S. Ferries §24.

7-14-2831. Use of penalties.

Collateral References

Ferries *key* 34.
36A C.J.S. Ferries §32.
35 Am. Jur. 2d Ferries §30.

Part 29
Road Improvement Districts

7-14-2901. Road improvement district — purpose — benefited property defined.

Compiler's Comments

1999 Amendment: Chapter 319 in (2) near middle after "provide for the" substituted "construction" for "road's" and at end inserted "of the proposed public road or a public road that does not meet the standards of 7-14-2111 or 7-14-2112" and deleted former second sentence that read: "The county surveyor must determine that it would be physically impractical to improve the road to standard county road specifications." Amendment effective October 1, 1999.

7-14-2902. Creation of road improvement district — resolutions — hearing.

Compiler's Comments

2001 Amendment: Chapter 354 deleted former (2)(a)(i) that read: "(i) be posted at three places within the proposed district"; and made minor changes in style. Amendment effective October 1, 2001.

7-14-2907. Cost of road improvement districts — property owner assessments.

Compiler's Comments

1993 Amendment: Chapter 269 inserted (1)(d) allowing each piece of land to be assessed an equal amount of the cost of the improvement.

Part 41
General Provisions Related to Municipal Trafficways and Public Grounds

Part Attorney General's Opinions

"Discontinue" Clarified: The term "discontinue", as used in Title 7, ch. 14, parts 26 and 41, is synonymous with the terms "abandon" and "vacate". 40 A.G. Op. 23 (1983).

7-14-4101. Municipal authority to establish, alter, and maintain trafficways and public grounds.

Case Notes

City Authority to Plant Trees: Plaintiff filed suit against the city to prevent the planting of trees in the boulevard area of the sidewalk in front on his property. The District Court dismissed plaintiff's complaint for failure to state a cause of action because the City Council has broad discretion under this section to alter and maintain city streets and avenues, including the planting of trees. A statement by the City Council Public Works Committee that no trees would be planted if plaintiff objected did not create a contract binding on the city. The elements of a contract are missing here, and there was no action by the City Council as required by 7-5-4121 to create a contract. Duncan v. Missoula, 239 M 201, 779 P2d 519, 46 St. Rep. 1619 (1989).

Limited Power to Vacate: The power of a city to vacate, discontinue, or close a street is limited by 7-14-2616. State ex rel. Smart v. Big Timber, 165 M 328, 528 P2d 688 (1974).

Issuance of License Conditional on Removal of Encroachment: Although a town has express authority to compel the removal of encroachments upon public property within its boundaries, it may do so indirectly under 7-21-4101 by tying the removal of a house encroaching on an alley to the issuance of a license to operate a mobile home court. Barnes v. Belgrade, 164 M 467, 524 P2d 1112 (1974).

Method of Issuing Bonds: When an indebtedness is incurred for the paving, repairing, and widening of streets, the accepted method of issuing bonds is by means of a special assessment and the creation of a special improvement district under 7-12-4131. Dietrich v. Deer Lodge, 124 M 8, 218 P2d 708 (1950).

No Power to Incur Indebtedness: This section does not give a City or Town Council the power to incur indebtedness or issue bonds for street purposes. Dietrich v. Deer Lodge, 124 M 8, 218 P2d 708 (1950).

Street Work Within Exclusive Jurisdiction of City: With relation to work to be done on the streets of a city, such streets are within the exclusive jurisdiction of the municipality through its Council. State ex rel. Butte v. Healy, 105 M 227, 70 P2d 437 (1937).

Collateral References

Municipal Corporations *key* 269.

63 C.J.S. Municipal Corporations §§1042, 1048; 64 C.J.S. Municipal Corporations §1818.

39 Am. Jur. 2d Highways, Streets, and Bridges §§32, 72, 75, 77, 130, 138.

7-14-4102. Regulation of trafficways and public grounds.

Compiler's Comments

1995 Amendment: Chapter 287 in (6), after "sliding", inserted "skateboarding, rollerblading"; and made minor changes in style.

Case Notes

Municipality's Authority to Adopt Ordinance Limiting University Students' Rights to Park on City Streets: A university student association challenged the legality of a city ordinance limiting parking in residential areas near the university to residents of those areas. The Supreme Court held that municipalities have the power to regulate parking and that regulating parking to relieve congestion in certain residential neighborhoods was a reasonable exercise of governmental authority. Assoc. Students v. Missoula, 261 M 231, 862 P2d 380, 50 St. Rep. 1301 (1993).

Equitable Estoppel — Municipal Corporations: After a building permit was issued and construction began, it was discovered that the building encroached upon a city street. Relying on the assurance of the City Council that the building would not have to be removed, the builder resumed construction. Later the City Council ordered the building removed. Although the doctrine of equitable estoppel is applied to municipal corporations with great caution and only in exceptional cases, all six elements were present in this case. Boulder v. Bullock, 193 M 493, 632 P2d 716, 38 St. Rep. 1344 (1981).

Issuance of License Conditional on Removal of Encroachment: Although a town has express authority to compel the removal of encroachments upon public property within its boundaries, it may do so indirectly under 7-21-4101 by tying the removal of a house encroaching on an alley to the issuance of a license to operate a mobile home court. Barnes v. Belgrade, 164 M 467, 524 P2d 1112 (1974).

State Law and Ordinance Covering Same Subject: Since state traffic laws in effect in 1951 covered offenses both within and without municipalities, a city ordinance prohibiting drunken driving and providing for a penalty was void. An ordinance punishing an act made penal by an existing state law must yield to the state law. Billings v. Herold, 130 M 138, 296 P2d 263 (1956).

Parking Meters: The state has given the cities and towns a broad and comprehensive power over the streets within their limits. The use of parking meters as an aid in regulating motor vehicle traffic is a valid exercise of this power. Glodt v. Missoula, 121 M 178, 190 P2d 545 (1948).

Collateral References

Municipal Corporations *key* 660, 661, 691, 703.

64 C.J.S. Municipal Corporations §§1687, 1747, 1748, 1762 through 1764, 1775, 1818.

7A Am. Jur. 2d Automobiles and Highway Traffic §15.

Validity, construction, and application of state or local enactments regulating parades. 80 ALR 5th 255.

Validity and construction of zoning regulations relating to illuminated signs. 30 ALR 5th 549.

Governmental tort liability for injury to roller skater allegedly caused by sidewalk or street defects. 58 ALR 4th 1197.

Liability of highway authorities arising out of motor vehicle accident allegedly caused by failure to erect or properly maintain traffic control device at intersection. 34 ALR 3d 1008.

Authorization, prohibition, or regulation by municipality of the sale of merchandise on streets or highways, or their use for such purpose. 14 ALR 3d 896.

Liability of municipality for injury or death resulting from temporary condition or obstruction in street in connection with holiday, entertainment, parade, or other special event. 84 ALR 2d 508.

Duty and liability of municipality as regards barriers for protection of adult pedestrians who may unintentionally deviate from street or highway into marginal or external hazard. 44 ALR 2d 633.

7-14-4103. Regulation of motor vehicles.

Case Notes

State Law and Ordinance Covering Same Subject: Since state traffic laws in effect in 1951 covered offenses both within and without municipalities, a city ordinance prohibiting drunken driving and providing for a penalty was void. An ordinance punishing an act made penal by an existing state law must yield to the state law. Billings v. Herold, 130 M 138, 296 P2d 263 (1956).

Law Review Articles

Control of Air Pollution From Mobile Sources Through Inspection and Maintenance Programs, Reitze & Needleman, 30 Harv. J. on Legis. 409 (1993).

Collateral References

Municipal Corporations *key* 703.

64 C.J.S. Municipal Corporations §§1762 through 1767.

7A Am. Jur. 2d Automobiles and Highway Traffic §15; 39 Am. Jur. 2d Highways, Streets, and Bridges §§199, 203, 251, 254, 273.

Validity, construction, and application of criminal statutes specifically directed against racing of automobiles on public streets or highways (drag racing). 24 ALR 3d 1286.

Delegation of legislative power to regulate speed. 87 ALR 546.

7-14-4104. Prevention of obstructions on trafficways and public grounds.

Case Notes

Implied Power to Compel Observance: This section carries with it the implied power of the officers and employees of a municipality to compel its observance. Lazich v. Butte, 116 M 386, 154 P2d 260 (1944).

Collateral References

Municipal Corporations *key* 691 through 700.

64 C.J.S. Municipal Corporations §§1747, 1748.

39 Am. Jur. 2d Highways, Streets, and Bridges §273.

Liability of municipality for act of employee engaged in sprinkling or cleaning streets. 156 ALR 692.

7-14-4105. Lighting and cleaning of trafficways and public grounds.

Case Notes

Property Owner's Liability — Removal of Snow: A city ordinance which requires a property owner to keep the adjoining sidewalks free from snow and ice under penalty of fine is not intended for the protection of the individual by the owner. Rather, the owner is aiding the city in discharging the city's primary duty. Failure to comply with the ordinance with consequent injury to a pedestrian does not give rise to a cause of action against the owner. Steen v. Grenz, 167 M 279, 538 P2d 16 (1975); Childers v. Deschamps, 87 M 505, 290 P 261 (1930).

Electric Lighting System Owned by Corporation: Under this section, 69-4-101, and the sections authorizing special improvement districts, an improvement district may be created for the purpose of maintaining an electric lighting system and furnishing electrical current to the system even though the system is owned by an individual or corporation. Marchi v. Brackman, 130 M 228, 299 P2d 761 (1956).

Nuisance Action Improper: A claim under this section that parking meters are a nuisance and obstruction necessitating removal by the city is improper, as this section merely authorizes a city to clean and enforce cleaning of streets. Glodt v. Missoula, 121 M 178, 190 P2d 545 (1948).

Garbage Removal Within Police Power: The authority of cities to remove garbage and to provide a special tax against the property from which it is removed to meet the cost falls within the police power in the interest of public health. N. Pac. Ry. v. Lutey, 104 M 321, 66 P2d 785 (1937).

Duty of City — Sidewalks: If a city ordinance requires the abutting owner to keep a sidewalk in repair, the city's duty to the public is not affected; it merely makes the abutting owner a joint agent with the city for the performance of the city's duties. Headley v. Hammond Bldg., Inc., 97 M 243, 33 P2d 574 (1934).

Nuisance Created by City's Disposal of Garbage: Although a city has the power to regulate the removal and disposition of garbage, it does not have the right to so deposit it as to create a condition injurious to health or offensive to the senses and thus interfere with the comfortable enjoyment of life and property. Lennon v. Butte, 67 M 101, 214 P 1101 (1923).

Removal of Snow and Ice by Occupant: An ordinance required the occupant of premises to keep adjoining sidewalks free of ice and snow. As the remedy against the occupant is merely cumulative and not inconsistent with the power granted, a city has the right to proceed against the occupant as well as the owner. Helena v. Kent, 32 M 279, 80 P 258 (1905).

Attorney General's Opinions

Authority to Tax for Garbage Removal Services: A city does not have authority under 7-14-4106(1) to impose a tax for city garbage removal services; rather, 7-6-4401 provides this authority. 38 A.G. Op. 30 (1979).

(Annotator's Note: Section 7-14-4106(1), MCA 1978, contained a typographical error that was determinative of this aspect of the opinion. The error was corrected in the Official Report of the Code Commissioner—1979 at page 8. Section 7-14-4106(1) does indeed authorize a city to impose a tax for city garbage removal services.)

Collateral References

Municipal Corporations *key* 272, 670, 673, 677, 704.

64 C.J.S. Municipal Corporations §§1698, 1704, 1775.

39 Am. Jur. 2d Highways, Streets, and Bridges §§79, 86 through 88, 405; 56 Am. Jur. 2d Municipal Corporations §§455 through 457, 461, 462.

Snow removal operations as within doctrine of governmental immunity from tort liability. 92 ALR 2d 796.

Municipal liability for injuries from snow and ice on sidewalk. 39 ALR 2d 782.

Liability for injuries caused by defective street light equipment. 19 ALR 2d 344.

7-14-4106. Payment for cost of removing waste.

Compiler's Comments

2001 Amendment: Chapter 574 near end substituted "charge" for "tax"; and deleted former (2) that read: "(2) The city or town council may further, until full liquidation is realized, include in such tax an amount not to exceed 20% of any floating indebtedness consisting of valid outstanding warrants drawn and issued against the fund or funds used to defray the expense of removing such matter, existing at the close of business on June 30, 1943, together with not to

exceed such per centum of the current interest thereon from such last-mentioned date. The money derived from such portion of such levy and assessment for such additional amount, if included in such tax, may only be expended toward liquidating such floating indebtedness, together with the interest thereon, and not otherwise"; and made minor changes in style. Amendment effective July 1, 2001.

Case Notes

Assessment of All Property Within City: It is not always possible to ascertain from what property garbage in the streets arises. Whether all of the property in a city derives a benefit from its removal is doubtful; however, its removal is necessary for the public health. If the levy in question covers too much property, the assessment is unlawful in part only. N. Pac. Ry. v. Lutey, 104 M 321, 66 P2d 785 (1937).

Garbage Removal Within Police Power: The authority of cities to remove garbage and to provide a special tax against the property from which it is removed to meet the cost falls within the police power in the interest of public health. N. Pac. Ry. v. Lutey, 104 M 321, 66 P2d 785 (1937).

Tax Similar to Special Assessment: The special tax provided for by this section in essence requires property owners to pay for services rendered. It is similar to a special assessment in that the city must determine what property should be assessed. Such a determination, in the absence of fraud or manifest mistake, is conclusive. N. Pac. Ry. v. Lutey, 104 M 321, 66 P2d 785 (1937).

Attorney General's Opinions

Authority to Tax for Garbage Removal Services: A city does not have authority under this section to impose a tax for city garbage removal services; rather, 7-6-4401 provides this authority. 38 A.G. Op. 30 (1979).

(Annotator's Note: Section 7-14-4106(1), MCA 1978, contained a typographical error that was determinative of this aspect of the opinion. The error was corrected in the Official Report of the Code Commissioner—1979 at page 8. Section 7-14-4106(1) does indeed authorize a city to impose a tax for city garbage removal services.)

7-14-4107. Maintenance of trafficways.

Compiler's Comments

1983 Amendment: Near beginning of section, after "town council" substituted "may" for "has power to"; after "for the" substituted "maintenance" for "sprinkling"; near middle of section, after "town and" substituted "may fix" for "to fix the"; and at end of section, inserted references to Title 7, ch. 12, part 44.

Case Notes

Burden on County to Show Material Fact Regarding Height of Hedge — Nonconforming Use Not Proved — Summary Judgment Improper: A municipal code provision, passed in 1978, regulated, for traffic safety purposes, the height of hedges that could be grown on corners of intersections at 3 feet, but also permitted the existence of nonconforming uses prior to 1978. Ramirez was injured in a vehicle accident at an intersection where the hedge was taller than 5 feet and sought to hold the county accountable for failing its duty to enforce the ordinance. In granting summary judgment to the county, the District Court held the hedge to be a prior nonconforming use, noting that the hedge had been there since at least 1959. The Supreme Court reversed, finding that the county had offered no proof that the hedge was either taller than 3 feet in 1978 or had not been trimmed since 1978. The county did not meet its burden of showing the absence of this genuine issue of material fact; thus, summary judgment was improper. Ramirez v. Hatch, 1999 MT 107, 294 M 316, 979 P2d 1281, 56 St. Rep. 441 (1999).

Sprinkling as Maintenance — Liability of City: Because the sprinkling of streets is related more to the maintenance of the streets than to public health, it is a corporate rather than a governmental function. A city is therefore liable for injuries arising from the negligence of the driver of a sprinkling truck. Griffith v. Butte, 72 M 552, 234 P 829 (1925).

Collateral References

Municipal Corporations *key* 674.

64 C.J.S. Municipal Corporations §1699.

Governmental liability for failure to reduce vegetation obscuring view at railroad crossing or at street or highway intersection. 22 ALR 4th 624.

7-14-4108. Authority to contract for road work when federal funds involved.

Compiler's Comments

1995 Amendment — Phrase Change: Section 6, Ch. 75, L. 1995, directed the Code Commissioner to change references in the MCA to Highway Commission to Transportation Commission. In this section, the Code Commissioner has made the change in the last sentence. Amendment effective July 1, 1995.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

7-14-4109. Power to order certain improvements without creation of special improvement district.

Compiler's Comments

1983 Amendments: Chapter 457, in (5)(b), substituted "pursuant to 17-5-102" for "of up to 6% a year". This amendment is effective July 1, 1983.

Chapter 526, in (3), after "owner" inserted "and to any purchaser under contract for deed". This amendment is effective October 1, 1983.

Case Notes

Sidewalk Along State Highway Within Department's Jurisdiction: A city cannot levy a special assessment for a sidewalk installed by the city along a state highway without the involvement of the Department of Highways (now Department of Transportation). Palffy v. Bozeman, 168 M 108, 540 P2d 955 (1975).

Attorney General's Opinions

Purchase of Sidewalk, Curb, or Gutter Warrants by City Officials Prohibited: An elected or appointed city official may not purchase a sidewalk, curb, or gutter warrant without violating the prohibition against city officers' purchasing city warrants. These warrants are not covered by the exceptions of 2-2-204, nor are they held by a city officer for services rendered or evidence of the funded indebtedness of the city. 38 A.G. Op. 79 (1980).

7-14-4110. Assessments for costs.

Compiler's Comments

1983 Amendment: In (1), increased payment term from 8 to 12 years.

Case Notes

Sidewalk Along State Highway Within Department's Jurisdiction: A city cannot levy a special assessment for a sidewalk installed by the city along a state highway without the involvement of the Department of Highways (now Department of Transportation). Palffy v. Bozeman, 168 M 108, 540 P2d 955 (1975).

7-14-4111. Determination of alley approach.

Collateral References

39 Am. Jur. 2d Highways, Streets, and Bridges §5.

7-14-4112. Change of name of street.

Collateral References

Municipal Corporations *key* 651 ½.

64 C.J.S. Municipal Corporations §1654.

39 Am. Jur. 2d Highways, Streets, and Bridges §24.

7-14-4114. Procedure to discontinue streets.

Compiler's Comments

2001 Amendment: Chapter 354 in (3) in first sentence after "must be published" deleted "or posted in three public places" and in second sentence substituted "as provided in 7-1-4127" for "in a newspaper or posted at least 1 week before the petition is acted on"; and made minor changes in style. Amendment effective October 1, 2001.

1989 Amendment: In (1), in middle of introductory phrase after "town", deleted "upon the petition in writing of all owners of lots on the street or alley" and at end inserted "upon"; inserted (1)(a) and (1)(b) concerning petitions; and in (2), after "school purposes", inserted clause relating to discontinuance of street or alley and at end, after "closed", deleted "will be required".

Section Not Codified: The last paragraph of section 11-2801, R.C.M. 1947, a validation clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 36, L. 1945.

Case Notes

Authority to Permanently Close: The City Commission had authority to make a temporary closure permanent without a further petition when the original petition requested that action be taken "on a trial basis until a final determination has been made by the City Commission that the overall effect . . . has been beneficial". This language gave the Commission continuing authority after the closure on a temporary basis. Wynia v. Great Falls, 183 M 458, 600 P2d 802, 36 St. Rep. 1589 (1979).

Closure Versus Vacation: Closure and vacation are not synonymous. The former merely alters the use of a street, while the latter effects the vacation of the city's legal interest in the street. Therefore, a city may close a street without meeting the notice requirements of 7-3-4448 if it complies with the notice requirements of this section, and in such a case the requirement of 7-3-4448 that the right of access be maintained does not apply. Further, there is no reversion to the lot owners of half the closed street since the city retains its rights in the street. Wynia v. Great Falls, 183 M 458, 600 P2d 802, 36 St. Rep. 1589 (1979).

Percentage of Signatures Required — Closure for School Purposes: When the petition for closure requested the closure of four segments of a street, the required number of signatures was 75% of the lot owners of the whole part of the street to be closed and not 75% of the lot owners abutting on a particular closed segment. The whole part of the street to be closed was determined by looking at the total effect of the simultaneous closure of the four segments. Wynia v. Great Falls, 183 M 458, 600 P2d 802, 36 St. Rep. 1589 (1979).

Restriction of Access by Street Closure Not Compensable: The abutting lot owners do not suffer compensable damage when a street closure restricts their access to their property as long as some "adequate and reasonable" means of access are preserved. Wynia v. Great Falls, 183 M 458, 600 P2d 802, 36 St. Rep. 1589 (1979).

Collateral References

Municipal Corporations *key* 657.

64 C.J.S. Municipal Corporations §§1665, 1666, 1670.

39 Am. Jur. 2d Highways, Streets, and Bridges §§138, 143, 146.

7-14-4121. Maintenance and regulation of public grounds.

Collateral References

Municipal Corporations *key* 721.

64 C.J.S. Municipal Corporations §1818.

7-14-4122. Construction and maintenance of sidewalks, curbs, and gutters.

Case Notes

Liability of City for Actions of Executive Branch Officers of City With Self-Governing Powers: Although this section gives city councils the power to regulate and repair sidewalks, the section does not apply when a city has adopted a charter that provides for separate branches of government and delegates different duties to each branch. When a charter gave the executive branch the power to enforce the ordinance pertaining to sidewalk repair, any negligent acts or omissions connected with the maintenance of sidewalks were attributable to the executive branch and neither the city's legislative body nor its agents were implicated by the executive's failure to repair the sidewalks. Accordingly, the city was not immune from suit under 2-9-111 for the negligent maintenance of a city sidewalk. Woods v. Billings, 248 M 254, 811 P2d 534, 48 St. Rep. 421 (1991).

Lack of Notice: An assessment levied in 1908 to pay for the expense incurred by a city in the construction of a sidewalk without first giving the owner of the abutting property notice and affording him an opportunity to construct it himself, as required by the statute and an ordinance of the city then in force, was invalid and constituted no lien on the property. Murray v. Helena, 65 M 485, 211 P 197 (1922).

Collateral References

64 C.J.S. Municipal Corporations §1662.

39 Am. Jur. 2d Highways, Streets, and Bridges §§75, 77.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from defect or obstruction on roadside parkway or parking strip. 98 ALR 3d 439.

Liability of municipality for injuries caused cyclist by defects in sidewalk. 88 ALR 2d 1423.

Liability for injury on parking or strip between sidewalk and curb. 19 ALR 2d 1053, §6 superseded by 98 ALR 3d 439.

7-14-4123. Regulation of sidewalks.

Collateral References

Municipal Corporations *key* 677, 704.

64 C.J.S. Municipal Corporations §1775.

Municipal liability for injuries from snow and ice on sidewalk. 39 ALR 2d 782.

Liability of municipal corporation to pedestrian for slippery condition of sidewalk caused by deposits of earth or mud thereon. 16 ALR 2d 1290.

Joinder as defendants, in tort action based on condition of sidewalk or highway, of municipal corporation and abutting property owner or occupant. 15 ALR 2d 1293.

Part 42
Establishment and Change of Street Grade

Part Case Notes

Subway Under Railroad Tracks: A city ordered a railroad company to construct a subway under its tracks on the city's main street. Two businesses were situated on the railroad's right-of-way adjacent to the main street whose means of ingress and egress would be destroyed by the lowering of the grade. Because the main street had existed for 50 years and had been paved and improved, the grade could not be changed without first complying with this part. State ex rel. Miles City v. N. Pac. Ry., 88 M 529, 295 P 257 (1930).

7-14-4201. Establishment and alteration of street grade.

Collateral References

Municipal Corporations *key* 656.

63 C.J.S. Municipal Corporations §1046.

39 Am. Jur. 2d Highways, Streets, and Bridges §§56 through 59.

7-14-4202. Payment of damages resulting from change of grade.

Case Notes

Change of Grade Outside City or Town: This section should not be construed to mean that no compensation may be awarded for a change of grade when the highway involved is located outside the limits of a city or town. St. Highway Comm'n v. Keneally, 142 M 256, 384 P2d 770 (1963).

Collateral References

Eminent domain: use or improvement of highway as establishing grade necessary to entitle abutting owner to compensation on subsequent change. 2 ALR 3d 985.

Damages for change of grade in widening street. 64 ALR 1527.

7-14-4203. Determination of damages.

Case Notes

Attempt to Agree Before Appraisers Appointed: Before a city may appoint a board of appraisers it should appear that the city and the property owner tried but were unable to agree on the amount of damages. State ex rel. Butte v. District Court, 48 M 614, 139 P 791 (1914).

Part 43
Municipal Regulation of Railways and Street Railroads

7-14-4301. Regulation of railways.

Case Notes

Railroad Right-of-Way — Extent of Uses: When the grant of a right-of-way is made to a railroad company without restrictions, it contemplates not merely the railroad as it may be established in the first instance but the railroad with all its necessary appurtenances as it may from time to time come necessarily to be. The construction and use of coal docks by the railroad company within its right-of-way are therefore proper. Smith v. N. Pac. Ry., 50 M 539, 148 P 393 (1915).

Commercial Railroad Distinguished From Street Railroad: A mining company's railroad used for carriage of its and the public's supplies, ore, and merchandise is not a commercial railroad as distinguished from a street railroad. Kipp v. Davis-Daly Copper Co., 41 M 509, 110 P 237 (1910).

Mining Company's Railroad as Public Use: A city may permit the use of its streets in any manner and for any purpose reasonably incident to public travel. Because modes of public travel change, the owner of adjacent property is presumed to have received compensation when the way was created for changing public uses. The use of a mining company's railroad for carriage of its and the public's supplies, ore, and merchandise which otherwise would be transported by teams is a public use. Kipp v. Davis-Daly Copper Co., 41 M 509, 110 P 237 (1910).

Collateral References

Municipal Corporations *key* 680(6).

65 Am. Jur. 2d Railroads §§28, 368.

Vibrations not accompanied by blasting or explosion as constituting nuisance. 103 ALR 5th 157.

7-14-4302. Regulation of lighting for railway right-of-way — crossings.

Case Notes

Change of Grade Resulting From Railroad Crossing: Before a city may order the construction of a subway street crossing necessitating a change in the grade of the street, it must comply with 7-14-4201, et seq. State ex rel. Miles City v. N. Pac. Ry., 88 M 529, 295 P 257 (1930).

Not Applicable to Street Railroads: Because this section does not apply to street railroads, an ordinance requiring a street railway company to light its track within the corporate limits without expense to the city is void. Helena Light & Ry. v. Helena, 47 M 18, 130 P 446 (1913).

7-14-4303. Authorization for and regulation of street railroads.

Case Notes

Authority Over Street Railroads: This section and 7-5-4101 confer all the powers necessary for the policing of street railroads. Helena Light & Ry. v. Helena, 47 M 18, 130 P 446 (1913).

Railroads and Street Railroads Distinguished: The frequent use in the laws of this state of the prefix "street" before "railroads" or "railways" indicates the legislative intention to maintain a distinction between railroads and street railroads. In construing enactments pertaining to railroads, they should not be held to apply to street railroads unless the intention is apparent. Helena Light & Ry. v. Helena, 47 M 18, 130 P 446 (1913).

Collateral References

Municipal Corporations *key* 680(7).

Part 44
Municipal Bus Services

7-14-4402. Limit on indebtedness to provide bus service.

Compiler's Comments

2001 Amendment: Chapter 29 in first sentence after "exceed" substituted "the debt limitation established in 7-7-4201" for "28% of the total taxable value of the property of the city or town subject to taxation as ascertained by the last assessment for state and county taxes"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1981 Amendment: Increased 18% to 28%.

7-14-4403. Operation of municipal busline.

Compiler's Comments

1983 Amendment: Deleted former (2), which read: "(2) Such operations shall be subject to all the provisions of (Title 69, chapter 12) except that:

(a) such municipality may be issued a certificate of public convenience and necessity without proof of the existence of public convenience and necessity; and

(b) the municipality shall be exempt from the payment of fees provided by 69-12-421 and 69-12-422."

Collateral References

Liability of motorbus carrier to passenger injured through fall while alighting at place other than regular bus stop. 7 ALR 4th 1031.

Power of municipal corporation to limit exclusive use of designated lanes or street to buses and taxicabs. 43 ALR 3d 1394.

7-14-4404. Tax levy for contracts to operate bus service.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 495 at end of second to last sentence substituted "at an election held pursuant to 15-10-425" for "either at the regular annual election held in the city or town or at a special election that is held in conjunction with a regular or primary election and that is called for that purpose by the council of the city or town". Amendment effective October 1, 2001.

Chapter 574 in second sentence near middle substituted "15-10-420" for "law" and at end substituted "as provided in 15-10-425" for "either at the regular annual election held in the city or town or at a special election that is held in conjunction with a regular or primary election and that is called for that purpose by the council of the city or town. The additional levy may not exceed 1 1/2 mills." Amendment effective July 1, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

1995 Amendment: Chapter 387 in second sentence, near end before "called", inserted "that is held in conjunction with a regular or primary election and that is" and in third sentence, after "levy", deleted "in excess of the levy now allowed by law"; and made minor changes in style.

Part 45
Municipal Parking

7-14-4501. Acquisition, construction, and maintenance of parking areas.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Collateral References

Municipal Corporations *key* 678.

Validity of regulation providing for reserved parking spaces or parking priority on publicly owned property for members of a designated group. 70 ALR 3d 1323.

Municipal establishment or operation of off-street public parking facilities. 8 ALR 2d 373.

7-14-4511. Provision of parking meters in smaller municipalities — ordinance required.

Collateral References

Permissible use of funds from parking meters. 83 ALR 2d 625.

Installation or operation of parking meters as within governmental immunity from tort liability. 33 ALR 2d 761.

7-14-4512. Referendum on parking meters prior to enacting ordinance.

Compiler's Comments

1995 Amendment: Chapter 387 in first sentence, near end before "called", inserted "that is held in conjunction with a regular or primary election and that is"; and made minor changes in style.

Section Not Codified: Section 11-1017, R.C.M. 1947, a validation clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 3, Ch. 91, L. 1949.

Part 46
Parking Commissions

7-14-4601. Findings and purpose.

Collateral References

56 Am. Jur. 2d Municipal Corporations §§214, 442.

7-14-4603. Creation of parking commission authorized.

Collateral References

Provision of parking facilities as exercise of governmental or proprietary function. 8 ALR 2d 397.

7-14-4609. Appointment of commission.

Compiler's Comments

1999 Amendment: Chapter 189 at beginning of (1) and (2) inserted exception clause; inserted (3) authorizing city to appoint board of trustees of coterminous business improvement district to serve as area's parking commission members; and made minor changes in style. Amendment effective October 1, 1999.

7-14-4610. Term of office.

Compiler's Comments

1999 Amendment: Chapter 189 at beginning of (1) and (2) inserted exception clause; inserted (3) establishing same term of office for business improvement district trustee also serving as parking commissioner; and made minor changes in style. Amendment effective October 1, 1999.

7-14-4622. Powers of parking commission related to provision of parking services.

Compiler's Comments

2001 Amendment: Chapter 125 in (2) at beginning inserted "subject to 7-14-4626" and substituted "as provided in Title 70, chapter 30, any property" for "any property in accordance with the applicable provisions of law of eminent domain"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Appeal of Condemnation Award Before Final Judgment: An award in a condemnation action may not be appealed to the District Court until the District Court Clerk serves notice of the Commissioners' award and a copy of their report upon the proper parties pursuant to 70-30-303. Prior to this, a property owner's motion to dismiss the condemnation action because of a Parking Commission's failure to pay the condemnation award is improper. Bozeman Parking Comm'n v. First Trust Co. of Mont., 190 M 107, 619 P2d 168, 37 St. Rep. 1610 (1980).

Collateral References

60 C.J.S. Motor Vehicles §§26 through 28.

7-14-4626. Limitation on power of eminent domain.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) at beginning deleted "Notwithstanding the provisions of 7-14-4622(2)" and inserted reference to parking commission; in (2) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

7-14-4630. Notice for bids to lease parking facility.

Compiler's Comments

1985 Amendment: In (1) inserted "as provided in 7-1-2121", and after "inviting bids", deleted "with two or more insertions thereof, not less than 5 days apart, in a newspaper of general circulation printed and published in such city or city and county. The publication shall be commenced not less than 15 days prior to the date set in the notice for the opening of bids. If there be no newspaper of general circulation printed or published therein, notice shall be given by posting copies of said notice inviting bids in at least three public places in the city or city and county not less than 15 days prior to the date set in the notice for the opening of bids."

7-14-4641. Authority to issue revenue bonds.

Collateral References

64 C.J.S. Municipal Corporations §§1902, 1907.

7-14-4642. Election required to issue revenue bonds.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), near middle, inserted "held in conjunction with a regular or primary election"; and made minor changes in style.

Collateral References

64 C.J.S. Municipal Corporations §1920.

7-14-4644. Restrictions on use of reserve to make payments on revenue bonds.

Compiler's Comments

2001 Amendment: Chapter 574 in second sentence near middle inserted "subject to 15-10-420" and at end deleted "and shall not be subject to any limitation of rate or amount provided in any other law"; and made minor changes in style. Amendment effective July 1, 2001.

7-14-4647. Interest on revenue bonds.

Collateral References

64 C.J.S. Municipal Corporations §1940.

7-14-4651. Redemption of revenue bonds.

Collateral References

64 C.J.S. Municipal Corporations §1954.

7-14-4654. Exemption from certain state taxes.

Compiler's Comments

2000 Amendment by Referendum: Chapter 9 near end deleted references to gift taxes and inheritance taxes; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

Part 47
Pedestrian Malls and Offstreet Parking Facilities

7-14-4703. Provision for payment of damages due to creation of pedestrian mall.

Compiler's Comments

1999 Amendment: Chapter 584 in second sentence inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-14-4711. Authorization for improvement districts for pedestrian malls, offstreet parking, parkings, and parkways.

Case Notes

Acquisition of Private Property Authorized: With no ambiguity, 7-12-4131, this section, and 7-14-4714 authorize the acquisition of private property, and purchase is not excluded, for special improvement districts for the purposes specifically authorized. The financing is authorized by assessment or revenue bond sales. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

Public Offstreet Parking Facility Appropriate for Special Improvement District: Property within the vicinity of a public offstreet parking facility in a downtown area derives a special benefit from the parking facility sufficient to justify special assessments. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

Collateral References

56 Am. Jur. 2d Municipal Corporations §§214, 442.

Municipal establishment or operation of off-street public parking facilities. 8 ALR 2d 373.

7-14-4712. Procedure upon receipt of petition from all property owners within proposed district.

Compiler's Comments

2003 Amendment: Chapter 277 near middle of second sentence after "7-12-4108 through" inserted "7-12-4110, 7-12-4112 through". Amendment effective July 1, 2003.

2001 Amendment: Chapter 354 in last sentence inserted "7-12-4108". Amendment effective October 1, 2001.

1995 Amendment: Chapter 229 near end of first sentence, after "pursuant to", substituted "7-14-4711 through 7-14-4723" for "the following provisions" and after "publication" deleted "and posting"; inserted second sentence concerning bonds secured by revolving fund; and made minor changes in style. Amendment effective March 24, 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

7-14-4713. Estimates of expenses — tax levy.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of (2) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Case Notes

Public Offstreet Parking Facility Appropriate for Special Improvement District: Property within the vicinity of a public offstreet parking facility in a downtown area derives a special benefit from the parking facility sufficient to justify special assessments. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

7-14-4714. Manner of financing district for pedestrian mall or offstreet parking.

Compiler's Comments

1993 Amendment: Chapter 453 at end substituted "in Title 7, chapter 7, part 44" for "for the construction of water or sewer systems as set forth in 7-13-4321 through 7-13-4324, 7-13-4328, 7-13-4329, and 7-13-4341 through 7-13-4345".

Case Notes

Acquisition of Private Property Authorized: With no ambiguity, 7-12-4131, 7-14-4711, and this section authorize the acquisition of private property, and purchase is not excluded, for special improvement districts for the purposes specifically authorized. The financing is authorized by assessment or revenue bond sales. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

Public Offstreet Parking Facility Appropriate for Special Improvement District: Property within the vicinity of a public offstreet parking facility in a downtown area derives a special benefit from the parking facility sufficient to justify special assessments. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

7-14-4731. Authorization for improvement districts to lease and operate offstreet parking facilities.

Case Notes

Public Offstreet Parking Facility Appropriate for Special Improvement District: Property within the vicinity of a public offstreet parking facility in a downtown area derives a special benefit from the parking facility sufficient to justify special assessments. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

Collateral References

Meaning of term "garage" as used in zoning regulation. 11 ALR 3d 1187.

7-14-4732. Procedure upon receipt of petition for creation of offstreet parking district.

Compiler's Comments

2003 Amendment: Chapter 277 in (1) near middle of second sentence after "7-12-4108 through" inserted "7-12-4110, 7-12-4112 through". Amendment effective July 1, 2003.

2001 Amendment: Chapter 354 in (1) in last sentence inserted "7-12-4108". Amendment effective October 1, 2001.

1995 Amendment: Chapter 229 in (1), near end of first sentence after "publication", deleted "and posting" and inserted second sentence concerning bonds secured by revolving fund; near

end of (2) substituted "publish the resolution" for "cause the same to be published and posted"; and made minor changes in style. Amendment effective March 24, 1995.

Applicability: Section 16, Ch. 229, L. 1995, provided: "[This act] applies to all special improvement districts and rural special improvement districts created after [the effective date of this act] and, at the option of the city, town, or county, to bonds and warrants issued after [the effective date of this act], if the district was created before [the effective date of this act]." Effective March 24, 1995.

Collateral References

Municipal establishment or operation of off-street public parking facilities. 8 ALR 2d 373.

7-14-4734. Expense estimate — assessments and tax levy.

Compiler's Comments

2001 Amendment: Chapter 574 deleted former (3) that read: "(3) An assessment for district purposes against the property within the district may not exceed 12 mills upon each dollar of taxable valuation in any tax year." Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (2) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Case Notes

Public Offstreet Parking Facility Appropriate for Special Improvement District: Property within the vicinity of a public offstreet parking facility in a downtown area derives a special benefit from the parking facility sufficient to justify special assessments. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

7-14-4736. Participation by municipality.

Compiler's Comments

1997 Amendment: Chapter 42 near middle, after "resolution", deleted "summarily" and near end deleted reference to 7-12-4103; and made minor changes in style. Amendment effective March 12, 1997.

Part 48
Air Transportation

7-14-4801. Acquisition of landing fields and parking areas for aircraft.

Compiler's Comments

2001 Amendment: Chapter 125 in first sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Section Not Codified: Part of section 11-986, R.C.M. 1947, was not codified in the MCA, because it was redundant with 7-14-4501. This provision has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 147, L. 1947. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Collateral References

63 C.J.S. Municipal Corporations §1058.

Power of municipality to acquire airport. 99 ALR 173; 83 ALR 333; 69 ALR 316.

Part 49
Easements and Rights-of-Way

7-14-4901. Purchase of historic easement across county land for benefit of private land.

Compiler's Comments

Effective Date: Section 6(1), Ch. 107, L. 1997, provided that this section is effective on passage and approval. Approved March 18, 1999.

CHAPTER 15
HOUSING AND CONSTRUCTION

Part 21
County Housing Authorities

Part Compiler's Comments

Sections Not Codified: Section 35-101, R.C.M. 1947, a short title designation, was not codified in the MCA. This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 140, L. 1935.

Sections 35-301 through 35-303 and 35-305 through 35-307, R.C.M. 1947, providing for housing authorities for persons engaged in World War II activities or industries, were not codified in the MCA. These sections have not been repealed and are still valid law. Citation may be made to sec. 1 through 3 and 5 through 7, Ch. 215, L. 1943.

Sections 35-408 through 35-414, R.C.M. 1947, providing for emergency war and veterans' housing facilities, were not codified in the MCA. These sections have not been repealed and are still valid law. Citation may be made to sec. 1 through 7, Ch. 9, L. 1955. Section 6, Ch. 9, L. 1955, was amended by sec. 1, Ch. 17, L. 1959, and sec. 1, Ch. 231, L. 1961.

Part Attorney General's Opinions

No County Authority to Provide Housing to Low-Income Elderly: A county with general government powers does not have the authority under Art. XI, sec. 4, Mont. Const., or 7-8-2102 to construct or maintain an apartment complex for elderly low-income citizens that does not otherwise constitute a boarding or nursing home under 7-34-2301 and that does not constitute a public building under 7-8-2102. Instead, a county or municipal housing authority should be created under Title 7, ch. 15, parts 21 or 44, to provide such housing. 42 A.G. Op. 20 (1987).

Part Law Review Articles

Real Estate Tax Problems of Low-Income Homeowners, 28 Clearinghouse Rev. 275 (1994).

The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control, Green, 43 Cath. U.L. Rev. 681 (1994).

Low-Income Housing Tax Credit Basics and Financing, Schwartz & Lemond, 21 Real Est. L.J. 336 (1993).

The Need for Affordable Housing: the Constitutional Viability of Inclusionary Zoning, Williams, 26 J. Marshall L. Rev. 75 (1992).

Local Government & Impact Fees, Babcock, 4 J. Land Use & Envtl. L. 167 (1989).

New Developments and Future Trends in Local Government, 17 Stetson L. Rev. 573 (1988).

The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action, Shultz & Groy, 1988 Utah L. Rev. 569 (1988).

Part Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §10.

Suability, and liability, for torts, of public housing authority. 61 ALR 2d 1246.

Constitutionality, construction, and application of statutes or governmental projects for improvement of housing conditions. 172 ALR 966; 130 ALR 1069.

7-15-2101. Findings and policy.

Compiler's Comments

Section Not Codified: Section 35-135, R.C.M. 1947, a purpose section, was not codified in the MCA, because it was in part redundant with this section and in part obsolete. This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 138, L. 1935. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Case Notes

Legislative Finding of "Public Purpose" Upheld: Legislation having for its purpose the eradication of slums and the substitution of safe and sanitary dwellings is well within the definition of "public purpose". The Legislature having so declared, it is not the duty or the prerogative of the Supreme Court to interfere with that finding in the absence of a clear showing that the determination was wrong. Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

Attorney General's Opinions

County Housing Authority — Implicit Power to Finance Rehabilitation of Private Dwellings: A county housing authority has implicit statutory power to administer the Community

Development Block Grant (CDBG) program for the rehabilitation of privately owned housing, and a general power county government may therefore administer the CDBG program through a county housing authority. This conclusion is reached because the Legislature recognizes the existence of substandard housing in rural as well as urban areas, and the constitution mandates the resolution of reasonable doubts in favor of local government power. 40 A.G. Op. 17 (1983).

General Government Power County — No Power to Finance Rehabilitation of Private Dwellings: A county with general government powers has no inherent authority to administer a program for the rehabilitation of privately owned housing funded under the Community Development Block Grant program since no statutes expressly confer this power on general power county governments. 40 A.G. Op. 17 (1983).

Collateral References

Health and Environment *key* 32.

7-15-2103. Notice of hearing on petition.

Compiler's Comments

1985 Amendment: Substituted "as provided in 7-1-2121" for "at least 10 days preceding the day on which the hearing is to be held, in a newspaper having a general circulation in the county or, if there be no such newspaper, by posting such a notice in at least three public places within the county at least 10 days preceding the day on which the hearing is to be held."

7-15-2105. Decision of board of county commissioners.

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §§15, 18, 19.

7-15-2106. Criteria for determining if unsafe or unsanitary dwelling accommodations exist.

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §19.

7-15-2111. Area of operation of county housing authority — inclusion of municipalities.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), in second sentence near end, inserted "election held in conjunction with a regular or primary election"; and made minor changes in style.

Attorney General's Opinions

Power of Municipal and County Housing Authorities to Enter Into Interlocal Agreements: The Missoula Housing Authority may not enter into an interlocal agreement with Ravalli and Mineral Counties to administer federal rent subsidy programs beyond its jurisdictional boundaries. However, it may so administer via cooperative agreements with other housing authorities. 39 A.G. Op. 37 (1981).

7-15-2112. Administration and operation of county housing authority — application of municipal laws.

Attorney General's Opinions

County Housing Authority — Implicit Power to Finance Rehabilitation of Private Dwellings: A county housing authority has implicit statutory power to administer the Community Development Block Grant (CDBG) program for the rehabilitation of privately owned housing, and a general power county government may therefore administer the CDBG program through a county housing authority. This conclusion is reached because the Legislature recognizes the existence of substandard housing in rural as well as urban areas, and the constitution mandates the resolution of reasonable doubts in favor of local government power. 40 A.G. Op. 17 (1983).

Power of Municipal and County Housing Authorities to Enter Into Interlocal Agreements: The Missoula Housing Authority may not enter into an interlocal agreement with Ravalli and Mineral Counties to administer federal rent subsidy programs beyond its jurisdictional boundaries. However, it may so administer via cooperative agreements with other housing authorities. 39 A.G. Op. 37 (1981).

7-15-2115. Authorization for payment of rentals in lieu of taxes.

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §31.

7-15-2121. Authorization for rural housing projects.

Compiler's Comments

1985 Amendment: Near end of section after "housing for", substituted "rural residents" for "farmers".

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §§5, 29.

7-15-2122. Operation of rural housing projects.

Compiler's Comments

1985 Amendment: Near end of (1) before "of low income", substituted "rural residents" for "farmers".

Part 41
General Provisions Related to Municipal Housing and Construction

Part Case Notes

Equitable Estoppel Defense Defeated — Failure of Counterclaim to State Claim for Which Relief May Be Granted: The city of Whitefish sought and obtained a permanent injunction against Troy Town Pump, Inc. (Town Pump), requiring removal of a sign that violated the city's ordinance. Town Pump's defense was that the city's approval of the original building plan equitably estopped the city's claim. Alternatively, Town Pump counterclaimed for the costs of remodeling the building. In order for the city to obtain a permanent injunction, it first had to overcome Town Pump's counterclaim that it was equitably estopped from doing so. The city successfully defeated the counterclaim. Absent a legal theory upon which to base damages, the city could not be held liable, so the District Court did not err in dismissing Town Pump's counterclaim for damages on grounds that it failed to state a claim for which relief could be granted. Whitefish v. Troy Town Pump, Inc., 2001 MT 58, 304 M 346, 21 P3d 1026 (2001).

Revocation of Prior City Approval of Building Plan Based on Incorrect Conclusion That Proposed Fascia Did Not Constitute Sign — Equitable Estoppel Inapplicable — Jurisdiction Properly Retained: The city of Whitefish adopted a master plan that included a policy providing that commercial signs are a blighting factor and that contained strict limits on the size and character of signs. Troy Town Pump, Inc. (Town Pump), submitted blueprints to the city for a new exterior, referred to as a fascia, that included lettering above an awning. The city manager reviewed the blueprints for the design before it was installed and, believing that only the written words but not the entire awning constituted a sign, approved the design and issued a building permit. When installed, the awning consisted of a band of translucent, raspberry-colored material 4 feet 11 inches high, extending about 162 feet across the entire length of the front of the building. Four rows of white fluorescent light tubes located behind the awning extended the entire length of the material and lit it from behind, and four neon lights were placed in front of the awning, which ran horizontally the entire length of the front of the building and approximately 42 feet along the rear of the building. The City Council concluded that the entire awning constituted a sign that violated the city ordinance because it was too big and directed Town Pump to remove the lighting. When Town Pump refused, the city sought an injunction prohibiting Town Pump from operating the lighting. Town Pump's defense was that the city's claims were barred under the doctrine of equitable estoppel, because the design had already been reviewed and the building permit issued. During a bench trial, the city manager testified that if he had realized that the fascia would create a lighting scheme that dwarfed the lettering and far exceeded general lighting needs, he would not have approved the building permit. The District Court issued a permanent injunction requiring removal of all lighting and reserved jurisdiction to determine whether the entire awning constituted a sign within the meaning of the ordinance, thereby justifying further injunctive relief. In a subsequent order, the court granted the city's motion for judgment on the pleadings on the counterclaim on grounds that the counterclaim failed to state a claim upon which relief could be granted. Town Pump appealed. The Supreme Court held that original approval of the building permit was based on an incorrect misrepresentation of law, not fact, that the fascia did not constitute a sign. Thus, Town Pump failed to establish the first element of equitable estoppel, which requires a misrepresentation of fact. Further examination revealed that Town Pump failed to establish even one element of equitable estoppel, dooming its defense to the city's request for an injunction. The city's broad definition of sign was intended to include not only traditional signs, but also embellishments

intended to draw attention to a traditional sign or to the business itself, so the District Court did not abuse its discretion in ordering removal of the lighting. Further, under the city's broad request for relief, the court did not err in retaining jurisdiction to allow the city to return to court after the lighting was removed to consider an order requiring removal of the awning. The court simply exercised its discretion in a manner that allowed it to grant all relief necessary in the matter. Whitefish v. Troy Town Pump, Inc., 2001 MT 58, 304 M 346, 21 P3d 1026 (2001).

Arbitrary Denial of Building Permit by City Council — City, City Council, and Individual Council Members Liable: In an action under 43 U.S.C. 1983, the court of appeals upheld the District Court's holding that the Billings City Council's refusal to issue a building permit after the applicant had satisfied all the requirements for issuing the permit was an arbitrary and capricious action that deprived the applicant of his substantive due process rights. The city, City Council, and individual members of the City Council have no immunity from such action and are all liable for damages. Bateson v. Geisse, 857 F2d 1300 (9th Cir. 1988).

7-15-4102. Findings and policy with regard to unsanitary and unsafe private dwellings.

Attorney General's Opinions

County Housing Authority — Implicit Power to Finance Rehabilitation of Private Dwellings: A county housing authority has implicit statutory power to administer the Community Development Block Grant (CDBG) program for the rehabilitation of privately owned housing, and a general power county government may therefore administer the CDBG program through a county housing authority. This conclusion is reached because the Legislature recognizes the existence of substandard housing in rural as well as urban areas, and the constitution mandates the resolution of reasonable doubts in favor of local government power. 40 A.G. Op. 17 (1983).

General Government Power County — Not to Enter Agreement With City to Rehabilitate Rural Dwellings: A county with general government powers and a city generally may not enter into an interlocal agreement under which the county could administer the Community Development Block Grant project for the rehabilitation of privately owned housing because neither is statutorily authorized to rehabilitate dwellings outside the city limits. 40 A.G. Op. 17 (1983).

Law Review Articles

Lead Poisoning in Children: A Proposed Legislative Solution to Municipal Liability for Furnishing Lead-Contaminated Water, Bellia, 68 Notre Dame L. Rev. 399 (1992).

Collateral References

Health and Environment *key* 32.

Municipal liability for negligent performance of building inspector's duties. 24 ALR 5th 200.

Requirement of removal of lead-based paint under provisions of Lead-Based Paint Poisoning Prevention Act (42 USCS §4822). 70 ALR Fed. 358.

7-15-4103. Authorization for municipalities to furnish assistance in the rehabilitation of private dwellings.

Attorney General's Opinions

County Housing Authority — Implicit Power to Finance Rehabilitation of Private Dwellings: A county housing authority has implicit statutory power to administer the Community Development Block Grant (CDBG) program for the rehabilitation of privately owned housing, and a general power county government may therefore administer the CDBG program through a county housing authority. This conclusion is reached because the Legislature recognizes the existence of substandard housing in rural as well as urban areas, and the constitution mandates the resolution of reasonable doubts in favor of local government power. 40 A.G. Op. 17 (1983).

General Government Power County — Not to Enter Agreement With City to Rehabilitate Rural Dwellings: A county with general government powers and a city generally may not enter into an interlocal agreement under which the county could administer the Community Development Block Grant project for the rehabilitation of privately owned housing because neither is statutorily authorized to rehabilitate dwellings outside the city limits. 40 A.G. Op. 17 (1983).

7-15-4124. Entrances and safety exits for buildings.

Collateral References

62 C.J.S. Municipal Corporations §254.

Part 42
Urban Renewal

Part Compiler's Comments

Section Not Codified: Section 11-3919(part), R.C.M. 1947, a severability clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 19, Ch. 195, L. 1959.

Part Law Review Articles

The Community Reinvestment Act—Asset or Liability?, Cohen, 75 Marq. L. Rev. 599 (1992.)

Part Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §10.

Validity, construction, and effect of statutes providing for urban redevelopment by private enterprise. 44 ALR 2d 1414.

7-15-4202. Existence of blighted areas and resulting problems — statement of policy.

Collateral References

Health and Environment *key* 32.

What constitutes "blighted area" within urban renewal and redevelopment statutes. 45 ALR 3d 1096.

7-15-4204. Interpretation.

Compiler's Comments

2001 Amendment: Chapter 125 at end of first sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Attorney General's Opinions

Tax Increment Fund Grant to Private Nonprofit Corporation: Under 7-15-4282, a municipality is authorized to provide for tax increment financing as part of its plan for urban renewal. The grant of tax increment funds to a private nonprofit corporation for construction of a parking lot for use by a public fine arts museum was not prohibited because the grant was essentially for a public purpose. 42 A.G. Op. 89 (1988).

7-15-4206. Definitions.

Compiler's Comments

1999 Amendment — Code Commissioner Change: Chapter 582 in definition of blighted area in (o) inserted "listed in this subsection (2)"; in definition of bonds inserted "pursuant to part 43 or this part"; in definition of urban renewal plan in (a) substituted "and the growth policy if one has been adopted pursuant to Title 76, chapter 1" for "or parts thereof for the municipality as a whole" and in (b)(ii) inserted "including changes to the growth policy if one has been adopted pursuant to Title 76, chapter 1"; and made minor changes in style. Amendment effective October 1, 1999.

Pursuant to sec. 34, Ch. 582, L. 1999, in (18)(a) the code commissioner deleted reference to a comprehensive plan.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

Collateral References

What constitutes a "blighted area" within urban renewal statutes. 45 ALR 3d 1096.

7-15-4207. Prohibition against discrimination.

Compiler's Comments

1997 Amendment: Chapter 472 substituted "disability" for "handicap"; and made minor changes in style.

7-15-4208. Encouragement of private enterprise.

Law Review Articles

The Role of Incentive in Government and Private Behavior, Friedman, 29 San Diego L. Rev. 1 (1992).

Collateral References

Validity, construction, and effect of statutes providing for urban redevelopment by private enterprise. 44 ALR 2d 1414.

7-15-4210. Resolution of necessity required to utilize provisions of part.

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §15.

7-15-4213. Review of urban renewal plan by planning commission.

Compiler's Comments

1999 Amendment — Code Commissioner Change: Chapter 582 at end of (1) inserted "and with the growth policy if a growth policy has been adopted pursuant to Title 76, chapter 1"; and made minor changes in style. Amendment effective October 1, 1999.

Pursuant to sec. 34, Ch. 582, L. 1999, in (1) the code commissioner deleted references to a comprehensive plan and made appropriate grammatical changes.

Saving Clause: Section 35, Ch. 582, L. 1999, was a saving clause.

Transition: Section 36, Ch. 582, L. 1999, provided: "A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001."

7-15-4215. Notice of hearing on urban renewal plan.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) near beginning substituted "as provided in 7-1-4127" for "once each week for 2 consecutive weeks, not less than 10 or more than 30 days prior to the date of the hearing, in a newspaper having a general circulation in the urban renewal area of the municipality"; and made minor changes in style. Amendment effective October 1, 2001.

1983 Amendment: Near end of (1), after "owners" inserted "or purchasers under contracts for deed".

7-15-4218. Voter approval of urban renewal plan required when general obligation bonds to be used.

Compiler's Comments

1981 Amendment: Substituted "governing municipal general obligation bonds under chapter 7, part 42" for "of [7-7-4221 through 7-7-4233]".

7-15-4234. Urban renewal agency to be administered by appointed board of commissioners.

Attorney General's Opinions

Urban Renewal Agency Commissioner — Loss of Office Caused by Change of Residency: Under 2-16-501, a member of a board of commissioners of an urban renewal agency loses his seat on the board if he ceases to be a resident of the municipality that created the board. 41 A.G. Op. 1 (1985).

7-15-4237. Annual report.

Compiler's Comments

1991 Amendment: Near middle of (1) substituted "September 30" for "March 31" and at end, before "year", substituted "fiscal" for "calendar"; and at end of (2), before "year", substituted "the fiscal" for "such calendar". Amendment effective April 16, 1991.

7-15-4253. Relocation of displaced families.

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §25.

Validity, construction, and application of state relocation assistance laws. 49 ALR 4th 491.

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 USCS §§4601-4655). 33 ALR Fed. 9.

7-15-4255. Authority to provide or contract for services related to urban renewal.

Attorney General's Opinions

Tax Increment Fund Grant to Private Nonprofit Corporation: Under 7-15-4282, a municipality is authorized to provide for tax increment financing as part of its plan for urban renewal. The grant of tax increment funds to a private nonprofit corporation for construction of a parking lot for use by a public fine arts museum was not prohibited because the grant was essentially for a public purpose. 42 A.G. Op. 89 (1988).

7-15-4258. Acquisition and administration of real and personal property.

Compiler's Comments

2001 Amendment: Chapter 125 in (1)(a) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1991 Amendment: In (1)(c), after "real", inserted "or personal"; inserted (1)(e) concerning development agreement with owner of real property in urban renewal area; inserted (2) concerning development agreement provisions and excluding property acquisition by municipality under development agreement; and in (4), near middle after "project", inserted language concerning development agreement. Amendment effective April 16, 1991.

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §22.

7-15-4259. Exercise of power of eminent domain.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Section Not Codified: Part of section 11-3907(h), R.C.M. 1947, was not codified in the MCA, because it was redundant with this section. This provision has not been repealed and is still valid law. Citation may be made to sec. 7, Ch. 195, L. 1959. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Case Notes

"Area" Concept — Taking: The "area" concept of taking, that so long as a city establishes boundaries of an urban renewal district it need not prove necessity for taking individual properties, does not prevail if it is shown that the property is not reasonably necessary to the clearance of the blighted area and prevention of recurrence of blight. Helena v. DeWolf, 162 M 57, 508 P2d 122 (1973).

No Conclusive Presumption of Public Use: Condemnation by a city for urban renewal of a blighted area does not create a conclusive presumption of public use and necessity as provided by 7-5-4106. Helena v. DeWolf, 162 M 57, 508 P2d 122 (1973).

Showing of Necessity to Take Property: A city sought to condemn property for parking facilities designed to serve structures to be built by private enterprise. Because the city was unable to predict when such structures would be built, if at all, a showing of necessity to take property for an urban renewal project was not made. Helena v. DeWolf, 162 M 57, 508 P2d 122 (1973).

Law Review Articles

Reengineering Regulation to Avoid Takings, Merriam, 33 Urb. Law. 1 (2001).

Property Rights and Democracy: Philosophical and Economic Considerations, Riedinger, 22 Cap. U.L. Rev. 893 (1993).

Land-Use Litigation: Takings and Due Process Claims, Roberts & Shearer, 24 Urb. Law. 833 (1992).

The Impacts and Issues Surrounding the Regulatory Confiscation of Real Property, 2 B.Y.U. J. Pub. L. Rev. 99 (1988).

The Supreme Court Takes on Takings: Recent Inverse Condemnation Decisions, Meltz, 33 Fed. B. News & J. 346 (1988).

Collateral References

Eminent Domain *key* 18.5.

Eminent domain: Validity of "freezing" ordinances or statutes preventing prospective condemner from improving, or otherwise changing, the condition of his property. 36 ALR 3d 751.

Current Condemnation Law; Takings, Compensation & Benefits, Ackerman, A.B.A. (1994).

7-15-4261. Exemption from taxation for certain property.

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §27.

7-15-4263. Procedure to dispose of property to private persons.

Compiler's Comments

2001 Amendment: Chapter 354 in (2)(b) substituted "published as provided in 7-1-4127" for "by publication once each week for 3 consecutive weeks in a newspaper having a general circulation in the community"; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §4.

7-15-4267. Cooperation by public bodies.

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §12.

7-15-4281. Financial authority in connection with urban renewal.

Compiler's Comments

1999 Amendment: Chapter 584 at end of (1)(a) inserted "for the purposes of this part and enter into and carry out contracts in connection with the financial assistance"; at end of (1)(a)(iii) after "private" deleted "for the purposes of this part and enter into and carry out contracts in connection therewith"; at beginning of (1)(b)(ii) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Law Review Articles

Housing Incentives, a National Perspective, Newman & Feola, 21 Urb. Law. 307 (1989).

Collateral References

64 C.J.S. Municipal Corporations §1836.

7-15-4282. Authorization for tax increment financing.

Compiler's Comments

1989 Amendment: Near beginning inserted "or industrial district ordinance, adopted pursuant to 7-15-4299".

Attorney General's Opinions

Segregation of Mill Levy Revenue From Application as Incremental Taxable Value: If a tax increment provision exists in a municipality's urban renewal plan, the municipality will receive revenue for use in the urban renewal area attributable to application of a county water and sewer district's property tax levy upon the incremental taxable value. 43 A.G. Op. 13 (1989).

Tax Increment Fund Grant to Private Nonprofit Corporation: Under this section, a municipality is authorized to provide for tax increment financing as part of its plan for urban renewal. The grant of tax increment funds to a private nonprofit corporation for construction of a parking lot for use by a public fine arts museum was not prohibited because the grant was essentially for a public purpose. 42 A.G. Op. 89 (1988).

7-15-4283. Definitions related to tax increment financing.

Compiler's Comments

2003 Amendment: Chapter 114 in definition of aerospace transportation and technology district after "aerospace transportation" inserted "and"; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 269 inserted definitions of aerospace transportation and technology district and aerospace transportation and technology infrastructure development

project; in definitions of base taxable value, incremental taxable value, tax increment, and taxing body inserted reference to aerospace transportation and technology district; and made minor changes in style. Amendment effective April 6, 1999.

Severability: Section 9, Ch. 269, L. 1999, was a severability clause.

1989 Amendment: Near beginning inserted "and 7-15-4297 through 7-15-4299"; near middle of definition of base taxable value and near end of definition of incremental taxable value inserted "or industrial district"; inserted definitions of industrial district, industrial infrastructure development project, and municipality; and near middle of definition of tax increment and at end of definition of taxing body inserted "or industrial district".

7-15-4284. Filing of tax increment provisions of urban renewal plan or industrial district ordinance.

Compiler's Comments

1989 Amendment: In two places in (1) inserted "or industrial district ordinance"; near beginning of (2) inserted "industrial district ordinance"; and made minor changes in phraseology.

7-15-4285. Determination and report of original, actual, and incremental taxable values.

Compiler's Comments

1989 Amendment: Near middle inserted "or industrial district".

7-15-4286. Procedure to determine and disburse tax increment.

Compiler's Comments

1997 Amendment: Chapter 422 in (2)(a), near end, substituted "against property must be paid" for "against property as defined in 7-15-4292(6)(a) shall be paid"; and made minor changes in style. Amendment effective July 1, 1997.

1991 Amendment: Near middle of (2)(a), after "district", inserted exception clause for University System mills. Amendment effective April 16, 1991.

1989 Amendment: In three places in (1) and in (2)(a) inserted "or industrial district".

Attorney General's Opinions

Segregation of Mill Levy Revenue From Application as Incremental Taxable Value: If a tax increment provision exists in a municipality's urban renewal plan, the municipality will receive revenue for use in the urban renewal area attributable to application of a county water and sewer district's property tax levy upon the incremental taxable value. 43 A.G. Op. 13 (1989).

7-15-4288. Costs that may be paid by tax increment financing.

Compiler's Comments

2003 Amendment: Chapter 114 in (11) near middle after "transportation" inserted "and". Amendment effective October 1, 2003.

1999 Amendment: Chapter 269 at end of introductory clause, in (4), (7), two places in (10), and two places in (11) inserted reference to aerospace transportation and technology infrastructure development project or district; in (4), after "bridges" inserted "spaceports for reusable launch vehicles with associated runways and launch, recovery, fuel manufacturing, and cargo holding facilities"; at end of (9) inserted "or the needs of an aerospace transportation and technology infrastructure development project in the aerospace transportation and technology district"; and made minor changes in style. Amendment effective April 6, 1999.

Severability: Section 9, Ch. 269, L. 1999, was a severability clause.

1993 Amendment: Chapter 500 inserted (12) allowing the acquisition, construction, or improvement of facilities or equipment for reducing, preventing, abating, or eliminating pollution to be paid by tax increment financing; and made minor changes in style.

1991 Amendment: In (4), after "improvement of", inserted "infrastructure or industrial infrastructure, which includes", after "streets" inserted "roads", after "sewage treatment facilities" inserted "storm sewers", after "water treatment facilities" inserted "natural gas lines, electrical lines, telecommunications lines, rail lines, rail spurs, bridges", and before "buildings" substituted "publicly owned" for "public"; in (11) inserted "through industrial infrastructure development projects"; and made minor change in style.

1989 Amendment: At end of introductory clause inserted "or industrial infrastructure development project"; in (4) inserted "sewer lines, sewage treatment facilities" and "water treatment facilities"; inserted (6) relating to acquisition of deficient areas; inserted (7) relating to administrative management costs; inserted (8) relating to assemblage of land; inserted (9)

relating to compilation and analysis of information on infrastructure needs; inserted (10) relating to connection to outside existing infrastructure; and inserted (11) relating to direct assistance to certain industries.

1981 Amendment: Inserted (5) relating to costs allowed under 7-15-4233.

Attorney General's Opinions

Segregation of Mill Levy Revenue From Application as Incremental Taxable Value: If a tax increment provision exists in a municipality's urban renewal plan, the municipality will receive revenue for use in the urban renewal area attributable to application of a county water and sewer district's property tax levy upon the incremental taxable value. 43 A.G. Op. 13 (1989).

Tax Increment Fund Grant to Private Nonprofit Corporation: Under 7-15-4282, a municipality is authorized to provide for tax increment financing as part of its plan for urban renewal. The grant of tax increment funds to a private nonprofit corporation for construction of a parking lot for use by a public fine arts museum was not prohibited because the grant was essentially for a public purpose. 42 A.G. Op. 89 (1988).

7-15-4290. Use of property taxes and other revenues for payment of bonds.

Compiler's Comments

1989 Amendment: Near beginning, after "tax increment", inserted "derived from an urban renewal area"; near end of first sentence inserted reference to 7-15-4288; inserted second sentence relating to use of tax increment from industrial district; and in (2) inserted "or industrial district" and "or an industrial infrastructure development project".

1987 Amendment: At end of (1), after "based", inserted language allowing other revenue to be used for bond payments.

Applicability: Section 3, Ch. 615, L. 1987, provided: "This act does not apply to bonds issued before the effective date of this act." Effective April 27, 1987.

7-15-4292. Termination of tax increment financing — exception.

Compiler's Comments

1997 Amendment: Chapter 422 deleted (5) and (6) that read: "(5) (a) If a municipality issues bonds secured in whole or in part by a tax increment provision after the 10th year following a tax increment provision adopted after January 1, 1980, or after the 12th year following a tax increment provision adopted before January 1, 1980, it is not entitled to the full distribution provided in 20-9-360(2).

(b) The state treasurer shall reduce the distribution to the municipality in each fiscal year after the fiscal year in which the bonds referred to in subsection (5)(a) are issued by an amount equal to the increased taxable value of the project property multiplied by the total number of mills levied and assessed for school district purposes against the property in the previous calendar year. The department of revenue shall certify to the state treasurer by September 1 of each year the increased taxable value of the project property.

(c) If the municipality issues more than one bond series after January 1, 1991, the distribution to the municipality as provided in 20-9-360(2) is reduced, as determined in subsection (5)(b), by the sum of the amounts of each bond issue.

(6) For the purposes of subsection (5):

(a) "project property" is the value of property within an urban renewal area affected by an urban renewal project to be financed in whole or in part from the proceeds of the bonds issued pursuant to subsection (5)(a), certified by the municipality to the department of revenue at the time the bonds are issued and identified by a tax identification number. Property is affected by an urban renewal project if the property:

(i) is to be acquired or improved as part of the urban renewal project;

(ii) is located on property that is to be acquired or improved as part of the urban renewal project;

(iii) is contiguous to, or located on property contiguous to, property referred to in subsection (6)(a)(i) or (6)(a)(ii), including adjacent property separated by a road, stream, street, or railroad; or

(iv) is included in an agreement between a person and the municipality in connection with the urban renewal project for the issuance of the bonds and if under the agreement, the person undertakes to develop or redevelop the property.

(b) "increased taxable value" means the difference between the taxable value of the project property for the current fiscal year and the taxable value of the project property for the fiscal

year in which the bonds were issued"; and made minor changes in style. Amendment effective July 1, 1997.

1991 Amendment: Near beginning of (1)(a) extended termination date for tax increment from 10th to 15th year after its adoption and near end extended termination date from 12th to 17th year; at beginning of (4) substituted "Bonds secured in whole or in part by a tax increment provision" for "No bonds with tax increment provisions for the repayment thereof", near middle of first sentence extended anniversary of tax increment from 10th to 15th, near end of first sentence extended anniversary of tax increment from 12th to 17th, and at end inserted sentence concerning conditions for issuing additional bonds; inserted (5) concerning distribution by State Treasurer to municipality in each fiscal year after fiscal year bonds are issued; inserted (6) defining project property and increased taxable value; and made minor changes in style. Amendment effective April 16, 1991.

1989 Amendment: Near middle of (3) inserted "or the industrial district".

1985 Amendment: At end of (1)(a) inserted "or, if the tax increment provision was adopted prior to January 1, 1980, upon the 12th year following adoption"; made minor phraseology changes throughout (1); and at end of (4) substituted "the 10th anniversary of tax increment provisions adopted after January 1, 1980, and the 12th anniversary of tax increment provisions adopted prior to January 1, 1980" for "10 years after April 29, 1977".

7-15-4293. Adjustment of base taxable value following change of law.

Compiler's Comments

2003 Amendment Not Codified: Because of the temporary nature of the changes made by sec. 1, Ch. 525, L. 2003, the code commissioner has not codified the following amendments: Section 1, Ch. 525, inserted (2) that read: "(2) In cases of tax increment financing districts that were created on or after January 1, 1998, and before July 1, 2001, for which bonds were not issued, a municipality may adjust the base taxable value to account for a loss of taxable value resulting from a statutory change if the municipality has given notice of and has held a hearing on the proposed change"; and made minor changes in style. Amendment effective April 26, 2003, and terminates June 30, 2003.

2001 Amendment: Chapter 574 at end substituted "estimate the base taxable value so that the tax increment resulting from the increased incremental value is sufficient to pay all principal and interest on the bonds as those payments become due" for "calculate the base taxable value as it would have been on the date of the original determination had the change been in effect on that date. The governing body may adjust the base taxable value to that value reported by the department of revenue, under the provisions of 7-15-4287." Amendment effective July 1, 2001.

1989 Amendment: Near beginning inserted "or an industrial district".

1981 Amendment: Inserted "administrative, or judicial" before "change in the method" near the beginning of the first sentence; inserted "or the taxable valuation of property if the change in taxable valuation is based on conditions existing at the time the base year was established" after "the tax exemption status of property" in the first sentence; substituted "change" for "statutory changes" near the end of the first sentence.

7-15-4296. Aerospace transportation and technology districts.

Compiler's Comments

Clarification of Bonding: Section 1, Ch. 589, L. 2001, further amended Sec. 1, Ch. 6, Sp. L. May 2000, to provide: "Authorization of bonds. (1) The board of examiners is authorized to issue and sell general obligation bonds in an amount not exceeding $20 million ~~for aerospace transportation and technology infrastructure development projects, as defined in 7-15-4283, except as provided in subsection (2) of this section,~~ in accordance with the terms and in the manner required by Title 17, chapter 5, part 8, ~~and upon the authority granted to the board by this section~~ for the purpose of financing infrastructure improvements as enumerated in 7-15-4288 and equipment for aerospace transportation and technology projects recommended by the department of commerce in accordance with the authority granted to the board by this section. The bonds are in addition to any other authorization to the board to issue and sell general obligation bonds and subject to the conditions set forth in this section.

(2) ~~For purposes of the general obligation bonds authorized in this section, 7-15-4288(5) and (7) are excluded from the definition of aerospace transportation and technology infrastructure development projects. Bond proceeds are appropriated to the department of commerce for assisting in funding authorized aerospace transportation and technology infrastructure development projects.~~ The department of commerce may request the board of examiners to issue the bonds for one or more specified projects ~~for a single or multiple entities~~ in one or more series,

but the total amount of bonds issued may not exceed $20 million. Bond proceeds are appropriated to the department, and the department is authorized to construct the infrastructure improvements or acquire the equipment, to contract with the city or county in which a project is located, to contract with a certified community lead organization, as defined in 90-1-116, or to contract with the developer of an approved project for the construction of the infrastructure improvement or the acquisition of equipment upon a determination that it is in the best interest of the project. The plans and specifications for the infrastructure and equipment to be financed from the proceeds of the bonds must be approved by and be acceptable to the department following a review of the plans and specifications of the infrastructure by the architecture and engineering division of the department of administration, but the design and construction of the infrastructure and the acquisition of equipment for approved projects are not, with the exception of Title 18, chapter 2, part 4, subject to the public procurement requirements contained in Title 18. ~~The portions of aerospace transportation and technology infrastructure development projects that are~~ Infrastructure and equipment financed with bond proceeds ~~are~~ are owned by the state, and ~~may be leased to the local government creating the tax increment financing district or to the entity for whom the project is created at a fair value, taking into consideration job creation and overall tax revenue generated by the project~~ the use must be governed by a development agreement between the state and the developer of the project. The agreement may provide for the use of the infrastructure and equipment at less than fair market value, taking into consideration the number of jobs to be created by the project, the salary range of the jobs, the amount of capital contributed by the developer, and the projected tax revenue to be received by the state and local governments from the project over the term of the lease or use agreement. For purposes of this section, state and local governments may not provide telecommunications or other services in competition with private providers unless private providers cannot provide the services.

(3) It is the intent of the legislature that debt service payments for the bonds authorized by this section will be covered by the totality of the taxes generated by the aerospace transportation and technology ~~infrastructure~~ development projects to be calculated by an economic impact analysis of the projects on state tax revenue. Prior to requesting the board of examiners to issue the bonds, the department of commerce shall determine that the developer of a proposed project has the financial ability to construct and implement the project based upon audited financial statements. When requesting the board ~~of examiners~~ to issue the bonds, the department ~~of commerce~~ shall present to the department of administration for presentation to the board ~~of examiners~~ the following:

(a) evidence satisfactory to the board that each aerospace transportation and technology ~~infrastructure~~ development project has committed itself to locate its project in Montana ~~and has acquired a site for the project~~; and

(b) a certificate signed by the director of the office of budget and program planning that the tax revenue to be received by the state from each aerospace transportation and technology ~~infrastructure~~ development project over the term of the bonds will be sufficient to pay the principal amount of ~~and interest on~~ and interest on the bonds issued to assist with the specific project.

(4) For the purposes of this section, "equipment" means machinery used in the design, manufacture, repair, and maintenance of aerospace transportation and technology projects." Amendment effective May 5, 2001.

Section 1, Ch. 6, Sp. L. May 2000, amended sec. 5, Ch. 269, L. 1999, to provide: "Authorization of bonds. (1) The board of examiners is authorized to issue and sell general obligation bonds in an amount not exceeding $20 million for aerospace transportation and technology infrastructure development projects, as defined in 7-15-4283, except as provided in subsection (2) of this section, in accordance with the terms and in the manner required by Title 17, chapter 5, part 8, and upon the authority granted to the board by this section. The bonds are in addition to any other authorization to the board to issue and sell general obligation bonds and subject to the conditions set forth in this section.

(2) For purposes of the general obligation bonds authorized in this section, 7-15-4288(5) and (7) ~~is~~ are excluded from the definition of aerospace transportation and technology infrastructure development projects. Bond proceeds are appropriated to the department of commerce for assisting in funding authorized aerospace transportation and technology infrastructure development projects. The department may request the board of examiners to issue the bonds for specified projects for a single or multiple entities, but the total amount of bonds issued may not exceed $20 million. The portions of aerospace transportation and technology infrastructure development projects that are financed with bond proceeds are owned by the state and may be

leased to the local government creating the tax increment financing district or to the entity for whom the project is created at a fair value, taking into consideration job creation and overall tax revenue generated by the project. For purposes of this section, state and local governments may not provide telecommunications or other services in competition with private providers unless private providers cannot provide the services.

(3) It is the intent of the legislature that debt service payments for the bonds authorized by this section will be covered by the ~~increased taxes paid to the state~~ totality of the taxes generated by the ~~venture star~~ aerospace transportation and technology infrastructure development ~~project~~ projects to be calculated by an economic impact analysis of the projects on state tax revenue. When requesting the board of examiners to issue the bonds, the department of commerce shall present to the department of administration for presentation to the board of examiners the following:

(a) evidence satisfactory to the board that ~~venture star~~ each aerospace transportation and technology infrastructure development project has committed itself to locate its project in Montana and has acquired a site for the project; and

(b) a certificate signed by the director of the office of budget and program planning that the tax revenue to be received by the state from ~~the venture star~~ each aerospace transportation and technology infrastructure development project will be sufficient to pay the principal of and interest on the bonds." Amendment effective May 18, 2000.

Bond Authorization: Section 5, Ch. 269, L. 1999, provided: "(1) The board of examiners is authorized to issue and sell general obligation bonds in an amount not exceeding $20 million for aerospace transportation and technology infrastructure development projects, as defined in 7-15-4283, except as provided in subsection (2) of this section, in accordance with the terms and in the manner required by Title 17, chapter 5, part 8, and upon the authority granted to the board by this section. The bonds are in addition to any other authorization to the board to issue and sell general obligation bonds and subject to the conditions set forth in this section.

(2) For purposes of the general obligation bonds authorized in this section, 7-15-4288(5) and (7) is excluded from the definition of aerospace transportation and technology infrastructure development projects.

(3) It is the intent of the legislature that debt service payments for the bonds authorized by this section will be covered by the increased taxes paid to the state by the venture star project. When requesting the board of examiners to issue the bonds, the department of commerce shall present to the department of administration for presentation to the board of examiners the following:

(a) evidence satisfactory to the board that venture star has committed itself to locate its project in Montana and has acquired a site for the project; and

(b) a certificate signed by the director of the office of budget and program planning that the tax revenue to be received by the state from the venture star project will be sufficient to pay the principal of and interest on the bonds."

Severability: Section 9, Ch. 269, L. 1999, was a severability clause.

Effective Date: Section 10, Ch. 269, L. 1999, provided that this section is effective on passage and approval. Approved April 6, 1999.

7-15-4297. Short title.

Compiler's Comments

Preamble: The preamble to Ch. 712, L. 1989, provided: "WHEREAS, the State of Montana wishes to encourage the attraction and retention of secondary, value-adding industrial manufacturing that uses Montana timber, mineral, oil and gas, coal, and agricultural resources in the production of products in the state; and

WHEREAS, secondary, value-adding industries are those industries that transform raw resources into processed substances from which industrial or consumer products may be manufactured; and

WHEREAS, secondary, value-adding industries, in order to be competitive in today's world economy, require expensive infrastructure that is beyond the means of most Montana communities; and

WHEREAS, Montana law currently provides certain property tax benefits to new and expanding industries, including secondary, value-adding industries, but has little to directly encourage the development of needed industrial infrastructure to attract secondary, value-adding industries; and

WHEREAS, additional creative use of Montana's current tax laws could encourage increased investment in secondary, value-adding industries in the state through the use of tax increment

financing for infrastructure improvements in areas in which the infrastructure would be available for secondary, value-adding industrialization."

Part 43
Urban Renewal
Continued

Part Law Review Articles

The Local Government Capital Improvements Financing Game: Who Plays, Who Pays, and Who Stays: Symposium, Leitner, 25 Urb. Law. 481 (1993).

7-15-4301. Authorization to issue urban renewal bonds, industrial infrastructure development bonds, aerospace transportation and technology infrastructure development bonds, and refunding bonds.

Compiler's Comments

1999 Amendment: Chapter 269 in two places in (1)(a) and in two places in (2) inserted references to aerospace transportation and technology infrastructure development projects; and made minor changes in style. Amendment effective April 6, 1999.

Severability: Section 9, Ch. 269, L. 1999, was a severability clause.

1989 Amendment: In two places in (1)(a) and in two places in (2) inserted references to industrial infrastructure development projects.

1987 Amendment: At end of first sentence in (2), after "7-15-4292", inserted language allowing use of revenues for urban renewal projects.

Applicability: Section 3, Ch. 615, L. 1987, provided: "This act does not apply to bonds issued before the effective date of this act." Effective April 27, 1987.

Collateral References

64 C.J.S. Municipal Corporations §1908.

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §32.

7-15-4302. Authorization to issue general obligation bonds.

Compiler's Comments

1989 Amendment: Near middle of (1) and near beginning of (3) inserted "or an industrial infrastructure development project"; and near end of (3) inserted "or industrial district ordinance".

Collateral References

64 C.J.S. Municipal Corporations §1908.

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §32.

7-15-4304. Presumption of regularity of bond issuance.

Compiler's Comments

1989 Amendment: Near middle inserted "or industrial infrastructure development project".

7-15-4322. Details relating to urban renewal bonds.

Compiler's Comments

1995 Amendment: Chapter 423 in (2)(a) and (2)(b) reduced sale price from 98% of par to 97% of par; and made minor changes in style. Amendment effective April 13, 1995.

Applicability: Section 53, Ch. 423, L. 1995, provided: "[This act] applies to bonds issued under the provisions of [this act] after [the effective date of this act]." Effective April 13, 1995.

1987 Amendment: Near beginning of (1) substituted "as provided in 17-5-102" for "at such rate or rates not exceeding the limitation of 17-5-102".

1983 Amendment: Made 1981 amendment permanent. (Amendment was to terminate July 1, 1983—sec. 21, Ch. 500, L. 1981.)

1981 Amendment: Substituted "the limitation of 17-5-102" for "9% a year" near the middle of (1).

7-15-4324. Special bond provisions when tax increment financing is involved.

Compiler's Comments

1999 Amendment: Chapter 584 in middle of (1) and (2) after "increment" inserted "payments in lieu of taxes or other amounts agreed to be paid by the property owners in a district"; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Part 44
Municipal Housing Authorities

Part Compiler's Comments

Sections Not Codified: Section 35-101, R.C.M. 1947, a short title designation, was not codified in the MCA. This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 140, L. 1935.

Sections 35-140 and 35-141, R.C.M. 1947, obsolete sections, were not codified in the MCA. These sections have not been repealed and are still valid law. Citation may be made to sec. 6 and 7, Ch. 138, L. 1935.

Sections 35-301 through 35-303 and 35-305 through 35-307, R.C.M. 1947, providing for housing authorities for persons engaged in World War II activities or industries, were not codified in the MCA. These sections have not been repealed and are still valid law. Citation may be made to sec. 1 through 3 and 5 through 7, Ch. 215, L. 1943.

Sections 35-408 through 35-414, R.C.M. 1947, providing for emergency war and veterans' housing facilities, were not codified in the MCA. These sections have not been repealed and are still valid law. Citation may be made to sec. 1 through 7, Ch. 9, L. 1955. Section 6, Ch. 9, L. 1955, was amended by sec. 1, Ch. 17, L. 1959, and sec. 1, Ch. 213, L. 1961.

Part Case Notes

General Municipal Statutes Not Applicable to Housing Authority: After the City Council exercises its discretion to empower the Mayor to appoint Commissioners and proceed with incorporation of a housing authority, appropriates money for the authority's first-year expenses, and does other acts of similar import, the general municipal statutes cease to have any further application to the authority, it being under the exclusive control of 7-15-4401, et seq., and 7-15-4501, et seq. State ex rel. Great Falls Housing Authority v. Great Falls, 110 M 318, 100 P2d 915 (1940).

Exemption From State and Local Taxation: Because the property and securities of a housing authority are essentially public property, they qualify for the exemption from state and local taxation under Art. VIII, sec. 5, Mont. Const. Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

Part Attorney General's Opinions

No County Authority to Provide Housing to Low-Income Elderly: A county with general government powers does not have the authority under Art. XI, sec. 4, Mont. Const., or 7-8-2102 to construct or maintain an apartment complex for elderly low-income citizens that does not otherwise constitute a boarding or nursing home under 7-34-2301 and that does not constitute a public building under 7-8-2102. Instead, a county or municipal housing authority should be created under Title 7, ch. 15, parts 21 or 44, to provide such housing. 42 A.G. Op. 20 (1987).

General Government Power County — Interlocal Agreement With Municipal Housing Authority: If a city has created a municipal housing authority, the municipal housing authority and county may enter an interlocal agreement under which the county may administer the Community Development Block Grant project for the rehabilitation of privately owned housing within 10 miles of the city limits. 40 A.G. Op. 17 (1983).

Part Collateral References

63 C.J.S. Municipal Corporations §1061.

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §10.

Validity and construction of statute or ordinance establishing rent control benefit or rent subsidy for elderly tenants. 5 ALR 4th 922.

Constitutionality, construction, and application of statutes or governmental projects for improvement of housing conditions. 172 ALR 966; 130 ALR 1069.

7-15-4401. Findings and policy.

Compiler's Comments

Section Not Codified: Section 35-135, R.C.M. 1947, was not codified in the MCA, because it was redundant in part with this section and in part obsolete. This section has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 138, L. 1935. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Case Notes

Legislative Finding of "Public Purpose" Upheld: Legislation having for its purpose the eradication of slums and the substitution of safe and sanitary dwellings is well within the definition of "public purpose". The Legislature having so declared, it is not the duty or the prerogative of the Supreme Court to interfere with that finding in the absence of a clear showing that the determination was wrong. Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

Attorney General's Opinions

Power of Municipal and County Housing Authorities to Enter Into Interlocal Agreements: The Missoula Housing Authority may not enter into an interlocal agreement with Ravalli and Mineral Counties to administer federal rent subsidy programs beyond its jurisdictional boundaries. However, it may so administer via cooperative agreements with other housing authorities. 39 A.G. Op. 37 (1981).

Administration of Federal Rent Supplement Program — Purpose of Municipal Housing Authorities — Jurisdictional Area: Although there is no explicit statutory authority for a municipal housing authority to administer federal rent supplement funds, an authority may do so because the purpose of the federal program falls within the range of duties of a municipal housing authority. The federal program may not be administered outside an authority's 10-mile jurisdictional boundaries. 39 A.G. Op. 4 (1981).

Collateral References

Health and Environment *key* 32.

7-15-4402. Definitions.

Compiler's Comments

Section Not Codified: Section 35-136(part), R.C.M. 1947, was not codified in the MCA, because it was redundant with this section. This provision has not been repealed and is still valid law. Citation may be made to sec. 2, Ch. 138, L. 1935. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Attorney General's Opinions

Housing Authority as "Political Subdivision": For purposes of the Interlocal Cooperation Act (7-11-101, et seq.), a housing authority is a "political subdivision" and may enter into interlocal agreements. 39 A.G. Op. 37 (1981).

7-15-4404. Notice of hearing on petition.

Compiler's Comments

2001 Amendment: Chapter 354 substituted "published at the city's expense as provided in 7-1-4127" for "given at the city's expense by publishing a notice at least 10 days preceding the day on which the hearing is to be held, in a newspaper having a general circulation in the city and said surrounding area or, if there be no such newspaper, by posting such a notice in at least three public places within the city at least 10 days preceding the day on which the hearing is to be held"; and made minor changes in style. Amendment effective October 1, 2001.

7-15-4406. Decision of city council.

Compiler's Comments

1989 Amendment: In (2) increased from five to seven the number of commissioners authorized for appointment; and made minor changes in phraseology.

7-15-4408. Voter approval required to create housing authority.

Compiler's Comments

1995 Amendment: Chapter 387 near end inserted "held in conjunction with a regular or primary election"; and made minor changes in style.

7-15-4411. Effect of filing and recording application.

Compiler's Comments

Section Not Codified: Section 35-109(part), R.C.M. 1947, was not codified in the MCA, because it was redundant with this section. This provision has not been repealed and is still valid law. Citation may be made to sec. 9, Ch. 140, L. 1935. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

7-15-4413. Boundaries of municipal housing authority.

Attorney General's Opinions

General Government Power County — Interlocal Agreement With Municipal Housing Authority: If a city has created a municipal housing authority, the municipal housing authority and county may enter an interlocal agreement under which the county may administer the Community Development Block Grant project for the rehabilitation of privately owned housing within 10 miles of the city limits. 40 A.G. Op. 17 (1983).

Power of Municipal and County Housing Authorities to Enter Into Interlocal Agreements: The Missoula Housing Authority may not enter into an interlocal agreement with Ravalli and Mineral Counties to administer federal rent subsidy programs beyond its jurisdictional boundaries. However, it may so administer via cooperative agreements with other housing authorities. 39 A.G. Op. 37 (1981).

Administration of Federal Rent Supplement Program — Purpose of Municipal Housing Authorities — Jurisdictional Area: Although there is no explicit statutory authority for a municipal housing authority to administer federal rent supplement funds, an authority may do so because the purpose of the federal program falls within the range of duties of a municipal housing authority. The federal program may not be administered outside an authority's 10-mile jurisdictional boundaries. 39 A.G. Op. 4 (1981).

7-15-4415. Cooperation between housing authorities.

Attorney General's Opinions

Department of Commerce Authorized to Administer Housing Assistance Payments Program — No Restriction in Area Served by Municipal Housing Authority: The Montana Department of Commerce fits the description of a public housing authority under regulations of the United States Department of Housing and Urban Development (HUD) and is authorized to contract with HUD to administer HUD's Housing Assistance Payments Program, including federal Section 8 certificate and voucher programs. The restriction in 7-15-4414 applies only to municipal housing authorities operating in the same geographic location and therefore does not restrict the administration of federal Section 8 housing programs in the same area by an authorized state agency. 44 A.G. Op. 23 (1992).

Power of Municipal and County Housing Authorities to Enter Into Interlocal Agreements: The Missoula Housing Authority may not enter into an interlocal agreement with Ravalli and Mineral Counties to administer federal rent subsidy programs beyond its jurisdictional boundaries. However, it may so administer via cooperative agreements with other housing authorities. 39 A.G. Op. 37 (1981).

Administration of Federal Rent Supplement Program — Purpose of Municipal Housing Authorities — Jurisdictional Area: Although there is no explicit statutory authority for a municipal housing authority to administer federal rent supplement funds, an authority may do so because the purpose of the federal program falls within the range of duties of a municipal housing authority. The federal program may not be administered outside an authority's 10-mile jurisdictional boundaries. 39 A.G. Op. 4 (1981).

7-15-4416. Cooperation among governmental units and housing authorities.

Case Notes

Municipal Statutes Inapplicable: This section and 7-15-4440(1) are in direct conflict with some of the statutes relating to municipalities and were intended to supersede such statutes in housing authority matters. State ex rel. Great Falls Housing Authority v. Great Falls, 110 M 318, 100 P2d 915 (1940).

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §12.

7-15-4417. Initial funding of housing authority.

Compiler's Comments

Section Not Codified: Section 35-136(part), R.C.M. 1947, was not codified in the MCA, because it was redundant with this section. This provision has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 138, L. 1935. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

Case Notes

Appropriation of Funds by City Mandatory: A city may not refuse to make an appropriation for a housing authority's first-year expenses and overhead on the grounds that it has no funds

appropriated for that purpose or no funds not otherwise appropriated. Funds required to be expended under this section constitute "mandatory expenditures required by law" within the meaning of 7-6-4251 (now repealed). State ex rel. Helena Housing Authority v. Helena, 108 M 347, 90 P2d 514 (1939).

Donation of Funds by City — Constitutionality: City funds may constitutionally be donated to a housing authority as the city is performing, indirectly through a public agency created by the state, one of the primary functions of municipal government. State ex rel. Helena Housing Authority v. Helena, 108 M 347, 90 P2d 514 (1939); Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

Estimate Within City's Discretion: A city has discretion in making the estimate of the housing authority's first-year expenses and overhead and will not be overruled absent a clearly arbitrary abuse of this discretion. State ex rel. Helena Housing Authority v. Helena, 108 M 347, 90 P2d 514 (1939).

Collateral References

64 C.J.S. Municipal Corporations §1836.

7-15-4431. Appointment of commissioners.

Compiler's Comments

2001 Amendment: Chapter 197 in first sentence of (2) after "must be" substituted "directly assisted by" for "tenants of" and at end inserted "and are known as resident commissioners", deleted former second through fourth sentences that read: "One tenant commissioner shall represent family tenants, and one tenant commissioner shall represent elderly tenants and tenants with disabilities. Nominees for tenant commissioner shall submit to the city clerk a petition signed by not less than 25 adult tenants of the authority or 25% of the adult tenants of the authority, whichever is greater. The city clerk shall submit a list of the tenant nominees to the mayor for appointment to the housing authority", and in second sentence substituted "resident" for "tenant" and at end inserted exception clause. Amendment effective October 1, 2001.

1997 Amendment: Chapter 472 in second sentence of (2) substituted "tenants with disabilities" for "handicapped tenants"; and made minor changes in style.

1989 Amendment: In (1) raised from five to seven the number of commissioners comprising an authority; inserted (2) setting out tenant commissioner requirements and explaining the nominating process; and made minor changes in phraseology.

Attorney General's Opinions

Tenant's Eligibility as Commissioner: A tenant of a housing authority is ineligible to serve as a commissioner of that housing authority. (See 1989 and 2001 amendments.) 37 A.G. Op. 110 (1978).

7-15-4432. Term of office.

Compiler's Comments

2001 Amendment: Chapter 197 at beginning of (1) inserted "Subject to subsection (2)"; at beginning of first sentence of (2) substituted "resident" for "tenant"; and made minor changes in style. Amendment effective October 1, 2001.

1989 Amendment: Inserted (2) establishing terms for tenant commissioners; and made minor changes in phraseology.

7-15-4435. Control of conflict of interest.

Compiler's Comments

2001 Amendment: Chapter 197 at beginning of first sentence of (1) deleted "Except as provided in 7-15-4431"; and made minor changes in style. Amendment effective October 1, 2001.

1989 Amendment: At beginning of (1) inserted exception clause; and made minor changes in phraseology.

Attorney General's Opinions

Tenant's Eligibility as Commissioner: A tenant of a housing authority is ineligible to serve as a commissioner of that housing authority. (See 1989 and 2001 amendments.) 37 A.G. Op. 110 (1978).

7-15-4439. Conduct of business.

Compiler's Comments

1989 Amendment: In (1) substituted "A simple majority of commissioners constitutes a quorum" for "Three commissioners shall constitute a quorum"; and made minor changes in phraseology.

Collateral References

Abstention from voting of member of municipal council present at session as affecting requisite voting majority. 63 ALR 3d 1072.

7-15-4440. Certain laws controlling.

Case Notes

Municipal Statutes Inapplicable: This section and 7-15-4416 are in direct conflict with some of the statutes relating to municipalities and were intended to supersede such statutes in housing authority matters. State ex rel. Great Falls Housing Authority v. Great Falls, 110 M 318, 100 P2d 915 (1940).

7-15-4451. General powers of housing authority.

Case Notes

Contract With City for Slum Clearance: A contract between a city and a housing authority whereby the city agreed to eliminate unsafe and unsanitary dwellings in the city to an extent at least equal to the number of new dwelling units to be erected by the authority and to cooperate generally in the program of the authority was valid. Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

Attorney General's Opinions

Power of Municipal and County Housing Authorities to Enter Into Interlocal Agreements: The Missoula Housing Authority may not enter into an interlocal agreement with Ravalli and Mineral Counties to administer federal rent subsidy programs beyond its jurisdictional boundaries. However, it may so administer via cooperative agreements with other housing authorities. 39 A.G. Op. 37 (1981).

Administration of Federal Rent Supplement Program — Purpose of Municipal Housing Authorities — Jurisdictional Area: Although there is no explicit statutory authority for a municipal housing authority to administer federal rent supplement funds, an authority may do so because the purpose of the federal program falls within the range of duties of a municipal housing authority. The federal program may not be administered outside an authority's 10-mile jurisdictional boundaries. 39 A.G. Op. 4 (1981).

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §14.

Suability and liability of public housing authority for torts. 61 ALR 2d 1246.

7-15-4452. Exercise of powers.

Attorney General's Opinions

Power of Municipal and County Housing Authorities to Enter Into Interlocal Agreements: The Missoula Housing Authority may not enter into an interlocal agreement with Ravalli and Mineral Counties to administer federal rent subsidy programs beyond its jurisdictional boundaries. However, it may so administer via cooperative agreements with other housing authorities. 39 A.G. Op. 37 (1981).

Administration of Federal Rent Supplement Program — Purpose of Municipal Housing Authorities — Jurisdictional Area: Although there is no explicit statutory authority for a municipal housing authority to administer federal rent supplement funds, an authority may do so because the purpose of the federal program falls within the range of duties of a municipal housing authority. The federal program may not be administered outside an authority's 10-mile jurisdictional boundaries. 39 A.G. Op. 4 (1981).

7-15-4453. Strict compliance with laws and contracts required.

Attorney General's Opinions

Power of Municipal and County Housing Authorities to Enter Into Interlocal Agreements: The Missoula Housing Authority may not enter into an interlocal agreement with Ravalli and Mineral Counties to administer federal rent subsidy programs beyond its jurisdictional

boundaries. However, it may so administer via cooperative agreements with other housing authorities. 39 A.G. Op. 37 (1981).

Administration of Federal Rent Supplement Program — Purpose of Municipal Housing Authorities — Jurisdictional Area: Although there is no explicit statutory authority for a municipal housing authority to administer federal rent supplement funds, an authority may contract to administer the funds because the purpose of the federal program falls within the range of duties allocated to a municipal housing authority. The federal program may not be administered outside an authority's 10-mile jurisdictional area because there is no authority to bypass the 10-mile limit and because the commissioners are required to strictly comply with the provisions of law. 39 A.G. Op. 4 (1981).

Law Review Articles

Enforcement of Judgments Against States and Local Governments: Judicial Control Over the Power to Tax, La Pierre, 61 Geo. Wash. L. Rev. 299 (1993).

7-15-4454. General powers related to housing programs.

Case Notes

"Persons of Low Income": That this section authorizes the commissioners to determine who are "persons of low income" without providing a specific standard does not result in an unconstitutional delegation of legislative powers. Because housing authorities will be funded chiefly by federal programs, the federal restrictions will assure uniformity in the standard throughout the state. Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §§15, 18, 19.

Tenants' rights, under due process clause of federal constitution, to notice and hearing prior to imposition of higher rents or additional service charges for government-owned or government-subsidized housing. 28 ALR Fed. 739.

7-15-4455. Housing projects subject to planning, zoning, and building laws.

Case Notes

Subcontractor's Lien Against Housing Authority Improper: A subcontractor's mechanics' lien (now construction lien) for utility installation on a Montana Housing Authority project was improper. Even though Montana's mechanics' lien (now construction lien) laws are to be liberally construed to protect the rights of lien claimants and housing authorities may be sued, 7-15-4532 exempts Authority property from levy and sale by execution and 27-18-102 exempts it from attachment and execution. Bender v. Rookhuizen, 211 M 366, 685 P2d 343, 41 St. Rep. 1418 (1984).

Strict Conformance With General Laws Not Required: Considered in connection with 7-15-4440, this section can only mean that when the general laws are required to be generally applied they shall be so only when the application will not defeat the purpose of the housing authority law. State ex rel. Great Falls Housing Authority v. Great Falls, 110 M 318, 100 P2d 915 (1940).

7-15-4457. Federal financial assistance for low-rent housing for the elderly.

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §§6, 16.

7-15-4460. Powers of housing authority relating to acquisition and disposition of property.

Compiler's Comments

2001 Amendment: Chapter 125 in (1)(b) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Exemption From State and Local Taxation: Because the property and securities of a housing authority are essentially public property, they qualify for the exemption from state and local taxation under Art. VIII, sec. 5, Mont. Const. Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §22.

7-15-4462. Exercise of power of eminent domain.

Compiler's Comments

2001 Amendment: Chapter 125 deleted former (2)(b) that read: "(b) Any other applicable statutory provisions for the exercise of the power of eminent domain"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Constitutionality: Because housing projects to be carried out by a housing authority are devoted to a public purpose, the grant of power of eminent domain is constitutional. Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

7-15-4464. Authorization for payment of rentals in lieu of taxes.

Case Notes

Exemption From State and Local Taxation: Because the property and securities of a housing authority are essentially public property, they qualify for the exemption from state and local taxation under Art. VIII, sec. 5, Mont. Const. Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §31.

7-15-4466. Special powers and contract provisions when federal government involved.

Collateral References

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §§6, 16.

Part 45
Municipal Housing Authorities
Continued

Part Compiler's Comments

Sections Not Codified: Sections 35-201 through 35-203, R.C.M. 1947, validation clauses, were not codified in the MCA. These clauses have not been repealed and are still valid law. Citation may be made to sec. 1 through 3, Ch. 118, L. 1941.

7-15-4501. Authorization to issue bonds.

Collateral References

64 C.J.S. Municipal Corporations §§1836, 1908.

40 Am. Jur. 2d Housing Laws and Urban Redevelopment §32.

Exemption of property or bonds of housing authority from taxation. 152 ALR 239; 133 ALR 365.

7-15-4504. Bonds and other obligations to be fully negotiable.

Compiler's Comments

Section Not Codified: Section 35-143(part), R.C.M. 1947, was not codified in the MCA, because it was redundant with this section. This provision has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 218, L. 1943. See 1-2-208, stating that amendment to a codified provision is given effect over an uncodified provision.

7-15-4532. Limitations on remedies of obligees.

Case Notes

Subcontractor's Lien Against Housing Authority Improper: A subcontractor's mechanics' lien (now construction lien) for utility installation on a Montana Housing Authority project was improper. Even though Montana's mechanics' lien (now construction lien) laws are to be liberally construed to protect the rights of lien claimants and housing authorities may be sued, this section exempts Authority property from levy and sale by execution and 27-18-102 exempts it from attachment and execution. Bender v. Rookhuizen, 211 M 366, 685 P2d 343, 41 St. Rep. 1418 (1984).

CHAPTER 16
CULTURE, SOCIAL SERVICES, AND RECREATION

Part 1
General Provisions
Affecting Local Governments

7-16-101. Creation of funds for recreational and other activities of elderly by local governments.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) at end of first sentence substituted "levy on taxable property" for "levy of up to 1 mill on each dollar of taxable property". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Part 21
General Provisions
Affecting County Government

7-16-2101. Construction and maintenance of county cultural, social, and recreational facilities.

Collateral References

56 Am. Jur. 2d Municipal Corporations §202.

Maintenance of auditorium, community recreational center building, or the like as governmental or proprietary function. 47 ALR 2d 544.

7-16-2102. Authorization for tax levy for parks and certain cultural, social, and recreational facilities.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 495 in middle of (1) before "tax, not to exceed 2 mills" deleted "special"; in (2)(b) substituted "as provided in 15-10-425" for "substantially as follows:

[ ] FOR the imposition (or continued imposition) of a property tax, not to exceed 2 mills, for county parks and for county-owned cultural, social, and recreational facilities.

[ ] AGAINST the imposition (or continued imposition) of a property tax for county parks and for county-owned cultural, social, and recreational facilities"; and in (2)(c) after "levy the tax" deleted "for the 2 subsequent fiscal years". Amendment effective October 1, 2001.

Chapter 574 in (1) near middle substituted "a tax" for "a special tax, not to exceed 2 mills on each dollar of the taxable valuation for any 1 year"; in (2)(b) substituted "submitted as provided in 15-10-425" for "submitted substantially as follows:

[ ] FOR the imposition (or continued imposition) of a property tax, not to exceed 2 mills, for county parks and for county-owned cultural, social, and recreational facilities.

[ ] AGAINST the imposition (or continued imposition) of a property tax for county parks and for county-owned cultural, social, and recreational facilities"; and in (2)(c) after "tax" deleted "for the 2 subsequent fiscal years". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1985 Amendment: In (1), near beginning after "county commissioners" deleted "after a county-owned civic center, youth center, recreation center, or any combination of two or more thereof has been established" and near end after "equipping" deleted "such" and inserted "parks, cultural facilities, and any", after "recreation center" inserted "recreational complex", and after "combination" deleted "of two or more"; and inserted (2) relating to submitting levy to voters.

Exception for Levy Currently Authorized: Section 3, Ch. 639, L. 1985, provided: "Any property tax levied under the provisions of 7-16-2102(1) before October 1, 1985, continues to be authorized, and the amendments to 7-16-2102 enacted in section 1 of this act [1985 amendment to 7-16-2102] do not apply to such levies."

Attorney General's Opinions

Tax Not to Be Used Unless Facilities Owned by County: The tax authorized by this section may not be used to fund the county's participation in an interlocal agreement to operate recreational programs and facilities if the facilities to be employed do not belong to the county. However, such expense may be funded through the annual county mill levy. 38 A.G. Op. 51 (1979).

Collateral References

56 Am. Jur. 2d Municipal Corporations §202.

7-16-2103. Establishment of fund.

Compiler's Comments

1985 Amendment: In (1) substituted language relating to fund source, deposit, and use for: "All funds derived from the tax authorized by 7-16-2102, together with all revenue and income from such civic center, youth center, recreation center, or any combination of two or more thereof:

(a) shall constitute a separate fund called the civic-youth-recreation center fund;

(b) shall be deposited with the county treasurer; and

(c) shall not be used for any purposes except those of such civic center, youth center, recreation center, or any combination of two or more thereof".

7-16-2105. Acquisition of land by county for public recreational or cultural purposes.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) in first sentence inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1997 Amendment: Chapter 42 in (2) deleted reference to 7-16-2204. Amendment effective March 12, 1997.

1995 Amendment: Chapter 543 at end substituted "7-16-2204" (now repealed) for "7-16-2205"; and made minor changes in style.

Collateral References

Counties *key* 103.

20 C.J.S. Counties §165.

56 Am. Jur. 2d Municipal Corporations §§532, 533.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves. 35 ALR 3d 1293.

Liability of owner or operator of park or other premises on which baseball or other game is played, for injuries by ball to person on nearby street, sidewalk, or premises. 16 ALR 2d 1458.

7-16-2106. Limitation on use of lands.

Collateral References

Counties *key* 106.

7-16-2108. Authorization to levy tax and establish fund for establishment and maintenance of programs and employee training for day-care facilities.

Compiler's Comments

2001 Amendment: Chapter 574 near end of (1) substituted "levy on the taxable property" for "levy of up to 1 mill on each dollar of taxable property". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-16-2109. Single tax for county fair activities, county parks, and certain cultural, social, and recreational facilities — restriction.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 495 in (1) after "7-21-3410" deleted "before January 1, 1993"; in (2)(b) substituted "as provided in 15-10-425" for "substantially as follows:

[ ] FOR imposition (or continued imposition) of a property tax, not to exceed 3 ½ mills, for county fair activities, county parks, and county-owned cultural, social, and recreational facilities.

[ ] AGAINST imposition (or continued imposition) of a property tax, not to exceed 3 ½ mills, for county fair activities, county parks, and county-owned cultural, social, and recreational facilities"; and in (2)(c) after "levy the tax" deleted "for the 2 subsequent fiscal years". Amendment effective October 1, 2001.

Chapter 574 in (1) near middle of first sentence after "7-21-3410" deleted "before January 1, 1993" and after "single tax" deleted "that may not exceed 3 ½ mills on each dollar of the taxable valuation for any 1 year"; in (2)(b) substituted "submitted as provided in 15-10-425" for "submitted substantially as follows:

[ ] FOR imposition (or continued imposition) of a property tax, not to exceed 3 ½ mills, for county fair activities, county parks, and county-owned cultural, social, and recreational facilities.

[ ] AGAINST imposition (or continued imposition) of a property tax, not to exceed 3 ½ mills, for county fair activities, county parks, and county-owned cultural, social, and recreational facilities"; and in (2)(c) after "tax" deleted "for the 2 subsequent fiscal years". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Effective Date: Section 3, Ch. 48, L. 1993, provided: "[This act] is effective on passage and approval." Approved February 18, 1993.

Part 22
County Museums and Facilities for the Arts

Part Compiler's Comments

Property Donation Authorization: Section 1, Ch. 198, L. 1991, authorized the Yellowstone County Board of County Commissioners to donate the Yellowstone Art Center to the Yellowstone Art Center Foundation, contingent on continued use of the Center as an art museum and subject to other time and use considerations. Authorization effective March 27, 1991, and terminates July 1, 1992.

7-16-2201. Definition of museums.

Compiler's Comments

1989 Amendment: Substituted "exhibition, display, or performance of matters of historical, artistic, cultural, or scientific interest" for "exhibition of objects of historical interest or of interest in one or more of the arts and sciences"; and made minor change in grammar.

7-16-2202. Establishment and acquisition of museums and facilities for the arts and the humanities — grant programs for private, nonprofit museums and private, nonprofit facilities for the arts and the humanities.

Compiler's Comments

1993 Amendment: Chapter 440 inserted (4) allowing establishment of grant programs for museums and facilities for the arts and humanities; and made minor changes in style.

1989 Amendment: Inserted (3) relating to facilities for visual and performing arts; and made minor changes in grammar.

1985 Amendment: Inserted (2) authorizing contributions.

Attorney General's Opinions

County Authorized to Appropriate Money for Museum — City Authorized to Appropriate Money for Public Purpose — Constitutionality Analyzed: Pursuant to this section, a county, but not a city, is authorized to create a program to provide grants to private, nonprofit museums. However, pursuant to 7-1-4124, a city is allowed to grant money to public or private entities as

long as the grant is for a public purpose, such as a museum that would enhance the education and enjoyment of the general public, but that would not be merely for the gain of a private entity. The Attorney General declined to opine regarding the constitutionality of 7-1-4124 or this section, in light of the prohibition in Art. V, sec. 11(5), Mont. Const., against the appropriation of public funds for any private individual, private association, or private corporation not under control of the state, but did analyze that constitutional provision as it related to the question of county or city expenditures for grants to private museum programs, concluding that the constitutional prohibition applies only to the appropriation of public funds by the Legislature, not by local governmental entities. 48 A.G. Op. 12 (2000), overruling prior opinions to the contrary in 37 A.G. Op. 25 (1977), 37 A.G. Op. 105 (1978), and 39 A.G. Op. 25 (1981).

County Power — Revenue Sharing Funds: Under this section, counties may acquire already established museums or collections from private individuals or organizations by purchase, lease, or loan and may contract with private organizations for the management and operation of an established county museum. In either case, any relationship between a county and a nonprofit organization must be a contractual one, the terms of which are left to the reasonable exercise of the discretion of County Commissioners. Federal revenue sharing funds may be used in connection with these contracts. 37 A.G. Op. 105 (1978).

7-16-2203. Board of trustees.

Compiler's Comments

1995 Amendment: Chapter 543 near end inserted "subject to the provisions of 7-1-201 through 7-1-203"; deleted (2) that read: "(2) The board of county commissioners shall, at a public meeting, pass a resolution establishing the number of members on the board of trustees and the terms of the appointments. The board of trustees must consist of at least three members and no more than nine members, and the members of the board must be residents of the county"; and made minor changes in style.

1991 Amendment: Substituted (2) concerning establishment of number of members and terms of board of trustees for former (2) that read: "(2) The board consists of three responsible persons, electors and residents of the county. The initial terms of members must be staggered, with the term of one of the members expiring on June 30 of the next year, the term of the second member expiring on June 30 of the second year, and the term of the third member expiring on June 30 of the third year. The board shall, at its regular meeting in July of each year, appoint a member to the board of trustees to take the place of the member whose term expired on June 30 immediately preceding".

1989 Amendment: In (1), after first occurrence of "museum", inserted "facility for the arts", after second occurrence of "museum" inserted "facility", and at end substituted "for the administration of the county museum fund as provided in this part" for "for such museum or collection"; and made minor changes in grammar and phraseology.

7-16-2205. Authorization for mill levy.

Compiler's Comments

2001 Amendment: Chapter 574 in (1)(b) substituted "tax on the taxable valuation" for "tax not to exceed 2 mills on each dollar of the taxable valuation". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 in (1)(b) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1993 Amendment: Chapter 440 near middle of (1), after "contributing", inserted "or making a grant" and after "arts" inserted "and the humanities"; inserted (1)(a)(ii) allowing an annual appropriation for grant programs for museums and facilities for the arts and humanities; in (1)(b), after "appropriation", inserted "or grant program"; and made minor changes in style.

1989 Amendment: In (1) inserted "facility for the arts"; in (1)(a) substituted "of the museum, facility, or collection" for "thereof"; and made minor changes in grammar and phraseology.

1985 Amendment: In (1) substituted "any county owning, acquiring, or contributing to any museum or collection of exhibits as set forth in 7-16-2202" for "any county owning or acquiring any such museum or collection of exhibits"; and in (3) after "used", inserted "at the discretion of the board of county commissioners".

1983 Amendment: In (1)(b), increased the maximum mill levy for museums from 1 mill to 2 mills.

Attorney General's Opinions

Tax Levies for Support of Museums: A nonprofit corporation operating a museum or art gallery in the state is not eligible to receive revenue sharing or county tax funds. (See 1993 amendment.) 37 A.G. Op. 25 (1977).

Part 23
County Board of Park Commissioners

Part Attorney General's Opinions

Board — No Authority to Levy Tax: A County Park Board does not have the authority to levy a special tax for park purposes. 40 A.G. Op. 49 (1984).

Authority of Board of County Commissioners Over Parkland: A County Park Board may not sell county park property. However, a Board of County Commissioners may sell land that has been dedicated to the public for park purposes in accordance with procedures set out in 7-16-2324, and it may sell county land which has been used or purchased but not dedicated for park purposes subject to the limitations set out in 7-8-2211 through 7-8-2220. 36 A.G. Op. 38 (1975).

Duties of County Park Board: A County Park Board may expend its funds only for the improvement of any parkland to which the county holds legal title. However, Montana law does not require a County Park Board to develop every parcel of parkland or any particular parcel of parkland. 36 A.G. Op. 38 (1975).

Restriction of Use to Residents of a Particular Area: Generally, a County Park Board may not restrict the use of any county park to the residents of any particular area, although the history and circumstances of each park must be reviewed to determine whether there are any special circumstances that would create an exception to this general rule. Of course, no such restriction exception should be made without also considering whether the constitutional guarantee of equal protection under the law would be violated thereby. 36 A.G. Op. 38 (1975).

7-16-2301. Authorization for county board of park commissioners.

Compiler's Comments

1995 Amendment: Chapter 543 near middle substituted "each county" for "all counties" and at end inserted "subject to the provisions of 7-1-201 through 7-1-203"; and deleted (2) that read: "(2) Such board shall constitute a department of the county government with the powers provided in this part."

7-16-2322. Rules and ordinances to implement part.

Compiler's Comments

1991 Amendment: In (2)(b) substituted "46-1-202" for "46-1-201"; and made minor changes in style.

1985 Amendment: Inserted (2) relating to criminal offenses and employment and status of a park warden; and made minor changes in phraseology.

Attorney General's Opinions

Authority of Board of County Commissioners Over Parkland: A County Park Board may not sell county park property. However, a Board of County Commissioners may sell land that has been dedicated to the public for park purposes in accordance with procedures set out in 7-16-2324, and it may sell county land which has been used or purchased but not dedicated for park purposes subject to the limitations set out in 7-8-2211 through 7-8-2220. 36 A.G. Op. 38 (1975).

Duties of County Park Board: A County Park Board may expend its funds only for the improvement of any parkland to which the county holds legal title. However, Montana law does not require a County Park Board to develop every parcel of parkland or any particular parcel of parkland. 36 A.G. Op. 38 (1975).

Restriction of Use to Residents of a Particular Area: Generally, a County Park Board may not restrict the use of any county park to the residents of any particular area, although the history and circumstances of each park must be reviewed to determine whether there are any special circumstances that would create an exception to this general rule. Of course, no such restriction exception should be made without also considering whether the constitutional guarantee of equal protection under the law would be violated thereby. 36 A.G. Op. 38 (1975).

7-16-2323. Leasing of county land for nonpark purposes.

Collateral References

20 C.J.S. Counties §170.

7-16-2324. Sale, lease, or exchange of dedicated park lands.

Compiler's Comments

1995 Amendment: Chapter 468 in (1) and (4) substituted "76-3-621" for "76-3-606 and 76-3-607"; and made minor changes in style.

1995 Statement of Intent: The statement of intent attached to Ch. 468, L. 1995, provided: "It is the intent of the legislature that the department of commerce, local government assistance division, update its model subdivision rules to minimize the fiscal impacts to local governments in implementing this legislation."

Applicability: Section 13, Ch. 468, L. 1995, provided: "Funds in a park fund that exceed $10,000 as of [the effective date of this act] [October 1, 1995] must be used for park land acquisition and initial development. Funds in a park fund up to $10,000 as of [the effective date of this act] [October 1, 1995] may be used for park maintenance in accordance with a formally adopted park plan."

1985 Amendment: In (3)(d) inserted "as provided in 7-1-2121".

Case Notes

Writ of Certiorari Not Available — Appropriation of In-Lieu Funds: When the County Commission appropriated in-lieu park funds to a project not specifically authorized in the county outdoor recreation and open space plan, a Writ of Certiorari did not lie because the Commission, in appropriating money, was acting in a legislative, not judicial, capacity. There is no action more clearly legislative than that of appropriation of public funds. Burgess v. Gallatin County Comm'n, 215 M 503, 698 P2d 862, 42 St. Rep. 585 (1985).

Attorney General's Opinions

Park Board Partly Funded by County General Fund: The funding for the county park board's obligations is derived from the county general fund as well as from other specific sources as enumerated by 7-16-2328, 76-3-606 (now repealed), and this section. Since a specific separate tax levy is not authorized for the park fund, additional money must be appropriated from the county general fund authorized by 7-6-2501 if the revenue from sources other than taxation is insufficient to meet the necessary expenditures. 40 A.G. Op. 49 (1984).

Restriction on Use of Revenues Received From Sale of Park Lands and Donations: Revenues raised from sale of park lands and from cash donations in lieu of dedication of land for park purposes pursuant to 76-3-606 (now repealed) and this section are restricted in use to the purposes of purchase of additional lands or the initial development of parks and playgrounds. While these revenues are part of the park fund, they should be separated from unrestricted park fund revenues. 40 A.G. Op. 49 (1984).

Authority of Board of County Commissioners Over Parkland: A County Park Board may not sell county park property. However, a Board of County Commissioners may sell land that has been dedicated to the public for park purposes in accordance with procedures set out in this section, and it may sell county land which has been used or purchased but not dedicated for park purposes subject to the limitations set out in 7-8-2211 through 7-8-2220. 36 A.G. Op. 38 (1975).

Collateral References

20 C.J.S. Counties §170.

7-16-2327. Indebtedness for park purposes.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 7 in (2)(a)(i) substituted "15-36-324(14)" for "15-36-324(13)"; and made minor changes in style. Amendment effective October 1, 2001. The amendment by Ch. 29 rendered the amendment by Ch. 7 void.

Chapter 29 in (2)(a) after "exceed" substituted "0.79% of the total assessed value of taxable property, determined as provided in 15-8-111" for "13% of the total of the taxable value of the taxable property" and at end after "indebtedness" deleted "plus:

(i) the value provided by the department of revenue under 15-36-324(13);

(ii) an additional 50% of the taxable value of telecommunications property under 15-6-141 within the city or town for tax year 1999, multiplied by 13%, and an additional 50% of the taxable value attributable to electrical generation property under 15-6-141 within the county for tax year 1999, multiplied by 13%;

(iii) for fiscal year 2001, an additional 25% of the taxable value of class six property within the county for tax year 1999, multiplied by 13%, and an additional 60% of the taxable value of class eight property within the county for tax year 1999, multiplied by 13%;

(iv) for fiscal year 2002, an additional 50% of the taxable value of class six property within the county for tax year 1999, multiplied by 13%, and an additional 60% of the taxable value of class eight property within the county for tax year 1999, multiplied by 13%;

(v) for fiscal year 2003, an additional 75% of the taxable value of class six property within the county for tax year 1999, multiplied by 13%, and an additional 60% of the taxable value of class eight property within the county for tax year 1999, multiplied by 13%;

(vi) for fiscal years in which the tax rate for class eight property is 2%, an additional 100% of the taxable value of class six property within the county for tax year 1999, in each case of class six property, multiplied by 13%, and an additional 77% of the taxable value of class eight property within the county for tax year 1999, multiplied by 13%;

(vii) for fiscal years in which the tax rate for class eight property is 1%, an additional 94% of the taxable value of former class eight property within the county for tax year 1999, in each case of former class eight property, multiplied by 13%; and

(viii) for the fiscal year and succeeding fiscal years in which 15-6-138 is repealed, an additional 100% of the taxable value of former class eight property within the county for tax year 1999, in each case of former class eight property, multiplied by 13%"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1999 Amendments — Composite Section: (Version effective July 1, 2000) Chapter 285 at end of (2)(a) inserted "as ascertained by the last assessment for state and county taxes previous to the incurring of the indebtedness"; at end of (2)(a)(i) after "15-36-324(13)" deleted "as ascertained by the last assessment for state and county taxes previous to the incurring of the indebtedness"; inserted (2)(a)(iii) relating to fiscal year 2001; inserted (2)(a)(iv) relating to fiscal year 2002; inserted (2)(a)(v) relating to fiscal year 2003; inserted (2)(a)(vi) relating to fiscal years when class eight property tax rate is 2%; inserted (2)(a)(vii) relating to fiscal years when class eight property tax rate is 1%; inserted (2)(a)(viii) relating to fiscal years after repeal of 15-6-138; and made minor changes in style. Amendment effective July 1, 2000.

Chapter 426 in (2)(a)(i) at end deleted "ascertained by the last assessment for state and county taxes previous to the incurring of the indebtedness"; inserted (2)(a)(ii) relating to taxable value of telecommunications property; and made minor changes in style. Amendment effective January 1, 2000.

Chapter 556 inserted (2)(a)(ii) regarding taxable value attributable to electrical generation property; and made minor changes in style. Amendment effective January 1, 2000.

Saving Clause: Section 29, Ch. 285, L. 1999, was a saving clause.

Section 36, Ch. 556, L. 1999, was a saving clause.

Severability: Section 30, Ch. 285, L. 1999, was a severability clause.

Section 37, Ch. 556, L. 1999, was a severability clause.

Applicability: Section 43, Ch. 426, L. 1999, provided: "[This act] applies to tax years beginning after December 31, 1999."

Section 39(2), Ch. 556, L. 1999, provided that this section applies to fiscal years beginning after June 30, 2000.

1997 Amendment: Chapter 466 in (2) substituted "15-36-324(13)" for "15-36-324(10)". Amendment effective April 30, 1997.

1995 Amendments: Chapter 451 in (2)(a), after "plus the", substituted "value provided by the department of revenue under 15-36-324(10)" for previous formula (see 1995 Session Law for text). Amendment effective January 1, 1996.

Chapter 543 in (1), at end, substituted "in order to carry out its powers and duties" for "for the purposes of 7-16-2321(1) and (2)"; and made minor changes in style.

Applicability: Section 55, Ch. 451, L. 1995, provided: "(1) [This act] applies to oil and natural gas produced and sold on or after January 1, 1996.

(2) (a) [Sections 21 through 26] [7-1-2111, 7-7-2101, 7-7-2203, 7-14-2524, 7-14-2525, and 7-16-2327] apply to county fiscal years beginning after June 30, 1996.

(b) [Sections 38 through 46] [20-9-104, 20-9-141, 20-9-161, 20-9-331, 20-9-333, 20-9-501, 20-9-507, 20-10-144, and 20-10-146] apply to school fiscal years beginning after June 30, 1996.

(3) (a) An operator is subject to provisions of Title 15, chapter 23, parts 1 and 6 [part 6 now repealed]; Title 15, chapter 36; Title 15, chapter 38; and Title 82, chapter 11, part 1, as those laws read on December 31, 1995, for all oil and natural gas produced and sold by the operator before January 1, 1996. [On December 31, 1995, Title 15, ch. 36, contained only part 1, now repealed. Part 3 of that chapter became effective January 1, 1996.]

(b) Except as provided in subsection (3)(c), the payment, collection, and distribution of taxes on oil and natural gas production occurring before January 1, 1996, must be made according to the provisions of the laws referred to in subsection (3)(a) governing the tax in effect on the last day of the tax period in which the activity, enterprise, or product being taxed was engaged in, took place, or was produced and sold.

(c) [Section 19] [15-36-325, now repealed] applies to the payment, collection, and distribution of the local government severance tax for oil and natural gas produced and sold after December 31, 1994, and before January 1, 1996.

(d) All taxes collected pursuant to audit or collected after the date the tax is payable under the laws referred to in subsection (3)(a) must be distributed according to the statute governing allocation of the tax in effect on the date when the tax liability was incurred."

1993 Special Session Amendment: Chapter 9 near middle of (2), after "amount of", substituted "taxes levied on new production, production from horizontally completed wells, and incremental production" for "interim production and new production taxes levied", inserted reference to subsection (2)(c), and after "new production" inserted "and production from horizontally completed wells"; and made minor changes in style. Amendment effective December 17, 1993.

Report Required: Section 21, Ch. 9, Sp. L. November 1993, provided: "The board of oil and gas conservation shall report at least once a year to the revenue oversight committee [now revenue and transportation interim committee] regarding the implementation of [this act]. The reports must include but are not limited to information regarding:

(1) the methods used to determine production decline rates;

(2) rules adopted to implement [this act];

(3) the number of enhanced recovery projects completed or anticipated to be completed in a year; and

(4) the number of horizontal wells completed or anticipated to be completed in a year and the method of recovery from the horizontal wells."

Severability: Section 23, Ch. 9, Sp. L. November 1993, was a severability clause.

Effective Date — Applicability: Section 24, Ch. 9, Sp. L. November 1993, provided: "[This act] is effective on passage and approval [approved December 17, 1993] and applies to oil production from new or expanded enhanced recovery projects and to tax years that begin after December 31, 1993."

1989 Special Session Amendment: In (2)(a), after "15-23-612" (now repealed), inserted "plus the value of any other production occurring after December 31, 1988, multiplied by 60%"; and made minor changes in phraseology. Amendment effective August 11, 1989, and applies retroactively to net proceeds taxes, severance taxes, and local government taxes on oil and gas, other than interim production and new production, produced after December 31, 1988.

1987 Amendment: In (2)(a), before "new production taxes", inserted "interim production and" and after "multiplied by 60%" inserted "plus the amount of value represented by new production exempted from tax as provided in 15-23-612".

Effective Date — Applicability — 1987 Enactment: Section 28, Ch. 655, L. 1987, provided: "This act is effective on passage and approval [approved April 13, 1987] and applies retroactively, within the meaning of 1-2-109, to taxable quarters beginning on or after April 1, 1987. The tax rate and filing method applicable to a well that qualifies as interim production under section 10 but which did not qualify as new production under 15-23-601 [now repealed] prior to the applicability date of this act does not change for tax periods prior to the applicability date."

1985 Amendment: In (2)(a), near middle, before "taxable value", inserted "total of the" and after "county", inserted "plus the amount of new production taxes levied divided by the appropriate tax rates described in 15-23-607(2)(a) or (2)(b) [now repealed] and multiplied by 60%".

1981 Amendment: Substituted "must not at any time exceed 13% of the taxable value of the taxable property in the county" for "must not at any time exceed 3% of the value of the taxable property of the county" in (2)(a); and substituted "No money may" for "No money must" at the beginning of (2)(b).

Attorney General's Opinions

Board — No Authority to Levy Tax: A county park board does not have the authority to levy a special tax for park purposes. 40 A.G. Op. 49 (1984).

7-16-2328. Park fund to be maintained.

Attorney General's Opinions

Board — No Authority to Levy Tax: A county park board does not have the authority to levy a special tax for park purposes. 40 A.G. Op. 49 (1984).

Park Board Partly Funded by County General Fund: The funding for the county park board's obligations is derived from the county general fund as well as from other specific sources as enumerated by 7-16-2324, 76-3-606 (now repealed), and this section. Since a specific separate tax levy is not authorized for the park fund, additional money must be appropriated from the county general fund authorized by 7-6-2501 if the revenue from sources other than taxation is insufficient to meet the necessary expenditures. 40 A.G. Op. 49 (1984).

Restriction on Use of Revenues Received From Sale of Park Lands and Donations: Revenues raised from sale of park lands and from cash donations in lieu of dedication of land for park purposes pursuant to 7-16-2324 and 76-3-606 (now repealed) are restricted in use to the purposes of purchase of additional lands or the initial development of parks and playgrounds. While these revenues are part of the park fund, they should be separated from unrestricted park fund revenues. 40 A.G. Op. 49 (1984).

7-16-2329. Limitation on incurred liability.

Attorney General's Opinions

Board — No Authority to Levy Tax: A county park board does not have the authority to levy a special tax for park purposes. 40 A.G. Op. 49 (1984).

Part 24
County Park Districts

7-16-2403. Territory of county park district.

Compiler's Comments

1993 Amendment: Chapter 144 at end of first sentence inserted "or territory in more than one county"; and made minor changes in style.

7-16-2411. Creation of county park district.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 495 in (2)(b) after "the proposed" deleted "maximum"; in (7)(b) substituted "mill levy or maximum fee" for "maximum mill levy or fee"; and in (7)(d) substituted "as provided in 15-10-425" for "in conjunction with a regular or primary election, provided that at least 75 days have elapsed between the adoption of the resolution and the election". Amendment effective October 1, 2001.

Chapter 574 in (2)(b) near beginning after "proposed" deleted "maximum"; in (7)(b) after "set the" deleted "maximum"; and at end of (7)(d) substituted "held as provided in 15-10-425" for "held in conjunction with a regular or primary election, provided that at least 75 days have elapsed between the adoption of the resolution and the election". Amendment effective July 1, 2001.

1999 Amendments — Composite Section: Chapter 510 in (1)(a) and (3) substituted "10% or more" for "not less than 10%"; in (2)(b) after "district" inserted "or the proposed maximum fee on each household within the proposed district"; in (6)(b) after "levy" inserted "or proposed fee on each household within the proposed district"; in (7)(b) inserted "or fee on each household"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 584 at beginning of (2)(b) inserted reference to 15-10-420. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1995 Amendment: Chapter 387 in (7), in third sentence before "election", substituted "regular or primary" for "regularly scheduled"; and made minor changes in style.

1993 Amendment: Chapter 144 in (1)(a) reduced percentage from 15% to 10%; inserted (3) regarding petition requirements when territory lies in more than one county; in (4), near middle, inserted reference to subsection (3); deleted former (4) that read: "(4) The county governing body

shall schedule a public hearing on the creation of a county park district no earlier than 21 days or later than 45 days after the presentation of the petition or adoption of the resolution of intent to create a district. It shall cause to be published in the official county newspaper notice of the public hearing and the proposed boundary, mill levy, and number of members of the district commission"; inserted (5) regarding publication of petition text; in (7), at end, inserted provision that 75 days elapse between adoption of the resolution and the election when the election is held in conjunction with a regularly scheduled election; and made minor changes in style.

7-16-2412. Election on creation of district.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 495 in (3) substituted "as provided in 15-10-425" for "in substantially one of the following forms:

(a) [ ] FOR the creation of a county park district that may levy not more than .... mills of property tax for the operation of the district.

[ ] AGAINST the creation of a county park district.

(b) [ ] FOR the creation of a county park district that may assess a fee on each household of .... dollars for the operation of the district.

[ ] AGAINST the creation of a county park district"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 574 at end of (3) substituted "as provided in 15-10-425" for "in substantially one of the following forms:

(a) [ ] FOR the creation of a county park district that may levy not more than .... mills of property tax for the operation of the district.

[ ] AGAINST the creation of a county park district.

(b) [ ] FOR the creation of a county park district that may assess a fee on each household of .... dollars for the operation of the district.

[ ] AGAINST the creation of a county park district." Amendment effective July 1, 2001.

1999 Amendment: Chapter 510 at end of (3) substituted "one of the following forms" for "the following form"; inserted (3)(b) providing ballot language for assessment of household fee for county park district; and made minor changes in style. Amendment effective October 1, 1999.

1993 Amendment: Chapter 144 deleted former (4) that read: "(4) If a proposed county park district includes one or more municipalities or parts of municipalities, separate majorities on the question of forming the district are required of those voting who reside within each municipality and of those not residing within a municipality."

7-16-2413. Formation of county park district — appointment of initial commission.

Compiler's Comments

1993 Amendment: Chapter 144 in (1), at beginning, substituted "If a majority of the votes cast at the election in each municipality or part of a municipality and in the unincorporated territory of each county included in the proposed district approve the formation of the park district, the governing body of each county" for "If the question of forming a county park district is approved by the electorate of the district, the county governing body"; in (2), in first sentence, substituted "governing body of each county with territory included in the district" for "county governing body" and after "shall" inserted "jointly"; and made minor changes in style.

7-16-2421. Election or appointment of commissioners.

Compiler's Comments

1999 Amendment: Chapter 254 in (5) inserted first sentence authorizing cancellation of election when number of candidates is equal to or less than number of positions, inserted second sentence requiring election by acclamation of candidate filing petition, and deleted former third sentence that read: "If there are no petitions of nomination for members of the commission, no election need be held"; and in first sentence in (7) after "vacancy" substituted "occurring during the term of office" for "in the office". Amendment effective October 1, 1999.

1993 Amendment: Chapter 144 in (3), before "75 days", substituted "not earlier than 135 days or later than" for "at least"; inserted (4) regarding presentation of the petition if the district lies in more than one county; and in (7), at end, inserted "held pursuant to 20-3-304".

1989 Amendment: In (3) changed filing deadline to 75 days from 30 days.

7-16-2423. Powers of county park district commission.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 510 inserted (7) authorizing commission to establish household fee for park district operation; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 584 at beginning of (6) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1993 Amendment: Chapter 144 in (8), near beginning after "body", inserted "or bodies" and at end, after "county", inserted "or counties".

7-16-2431. District budget — property tax levy or fee on household.

Compiler's Comments

2001 Amendment: Chapter 574 in (2)(a) near middle substituted "taking into account" for "sufficient to raise" and deleted former second sentence that read: "The tax levied may not in any year exceed the maximum amount approved by the electorate in 7-16-2411 or 7-16-2432"; and in (4)(b) near middle of first sentence substituted "taking into account" for "that is sufficient to raise" and deleted former second sentence that read: "The fee assessed may not exceed the maximum amount approved by the electorate." Amendment effective July 1, 2001.

1999 Amendments — Composite Section: Chapter 510 inserted (2)(b) requiring county governing body to annually assess certified household fee approved by electorate for park district operation; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 584 at beginning of (2)(a) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1993 Amendment: Chapter 144 in (1), near middle, substituted "governing body of each county with territory included in the district" for "county governing body"; and made minor changes in style.

7-16-2433. Park district bonds authorized.

Compiler's Comments

2001 Amendment: Chapter 29 in (2) after "exceed" substituted "1.22% of the total assessed value of taxable property, determined as provided in 15-8-111" for "20% of the taxable value of the property"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

7-16-2442. Dissolution of county park district.

Compiler's Comments

2001 Amendment: Chapter 354 in (2) at end substituted "publish a notice of the hearing as provided in 7-1-2121" for "cause notice of the hearing to be published in the official county newspaper"; and in (3) at end of third sentence substituted "as provided in 7-1-2121" for "in the official county newspaper". Amendment effective October 1, 2001.

1995 Amendment: Chapter 387 in (4), in second sentence after "body", substituted "shall" for "may call a special election for such purposes, or it may"; and made minor changes in style.

7-16-2443. Effect of dissolution.

Compiler's Comments

2001 Amendment: Chapter 574 in (2)(a) near middle substituted "levy a fee on each household or a property tax" for "levy a property tax or a fee on each household, in an amount not to exceed the voted maximum authorized by the district" and near end after "district" inserted "in a sufficient amount"; and in (2)(b) before "amount" and in two places before "levy" deleted "maximum". Amendment effective July 1, 2001.

1999 Amendments — Composite Section: Chapter 510 in (2)(a) after "tax" inserted "or a fee on each household"; at end of (2)(b) inserted "if the obligations are bonds"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 584 in (2)(a) and (2)(b) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Part 41
General Provisions
Affecting Municipal Government

Part Case Notes

Municipal Parks Within Exclusive Control of City: Matters pertaining to creation and maintenance of public parks in cities are of purely local and private concern over which, under the doctrine of self-government, the municipalities have exclusive control. State ex rel. Gerry v. Edwards, 42 M 135, 111 P 734 (1910).

Part Collateral References

Exemption from taxation of municipally owned or operated stadium or auditorium. 16 ALR 2d 1376.

7-16-4101. Municipal authority to establish, alter, and maintain parks.

Case Notes

Land Dedicated for Park Purposes — Vacating Park: A city has the authority to vacate a public park located on land expressly dedicated for public park purposes where no reversionary clause is involved. Smith v. Hot Springs, 125 M 458, 240 P2d 249 (1952).

No Formal Action Required to Vacate: No formal action need be taken to vacate a public park. It may be accomplished by unequivocal acts showing a clear intent to abandon the use as a park, such as the erection of permanent structures for nonpark purposes. Smith v. Hot Springs, 125 M 458, 240 P2d 249 (1952).

Vacating Part of Park: A part of a public park may be vacated as well as the whole. Smith v. Hot Springs, 125 M 458, 240 P2d 249 (1952).

Land Deeded for Park Purposes — Reversionary Clause: Lands were deeded to a city for park purposes by deeds providing for reversion to the grantors if used for any other purpose. The lands may be used for some other purpose if the city obtains a waiver, quitclaim deed, or unconditional deed from the owner of the reversionary interest removing the restriction. The city then will own the lands in fee and may use the property as it sees fit. Lloyd v. Great Falls, 107 M 442, 86 P2d 395 (1938).

Collateral References

Municipal Corporations *key* 276.

63 C.J.S. Municipal Corporations §1057.

Construction of highway through park as violation of use to which park property may be devoted. 60 ALR 3d 581.

Power of municipal corporation to exchange its real property. 60 ALR 2d 220.

Nature of estate conveyed by deed for park or playground purposes. 15 ALR 2d 975.

7-16-4103. Authorization to establish various cultural, social, and recreational facilities.

Case Notes

Operating Swimming Pool Not Governmental Function: Municipal operation of a public swimming pool is a proprietary and not a governmental function. A municipality is liable, in a proper case, for tortious acts of its officers and employees in such operation. Felton v. Great Falls, 118 M 586, 169 P2d 229 (1946).

Attorney General's Opinions

Election Required to Issue Bonds to Furnish Swimming Pool: An election is required pursuant to 7-7-4221 to issue general obligation bonds for the purpose of furnishing a municipal swimming pool; however, there is no statutory requirement for an election to borrow money for that purpose by means other than issuing general obligation bonds. 41 A.G. Op. 73 (1986).

Collateral References

Municipal Corporations *key* 221, 276, 717.

56 Am. Jur. 2d Municipal Corporations §§202, 532, 533.

Liability of local government entity for injury resulting from use of outdoor playground equipment at municipally owned park or recreation area. 73 ALR 4th 496.

Liability of municipality owning public ballpark for injuries by ball to person on nearby premises. 91 ALR 3d 24; 16 ALR 2d 1458.

Validity of municipal admission tax for college sponsored events. 60 ALR 3d 1027.

Amusements: liability for injury from slide or chute. 69 ALR 2d 1067.

Municipal operation of bathing beach or swimming pool as governmental or proprietary function. 55 ALR 2d 1434.

Maintenance of auditorium, community recreational center building, or the like, by municipal corporation as governmental or proprietary function for purposes of tort liability. 47 ALR 2d 544.

7-16-4104. Authorization for municipal indebtedness for various cultural, social, and recreational purposes.

Compiler's Comments

2001 Amendment: Chapter 29 in (2)(a) after "exceed" substituted "0.9% of the total assessed value of taxable property, determined as provided in 15-8-111, within" for "16.5% of the taxable value of the taxable property of" and after "indebtedness" deleted "plus:

(i) for general obligation bonds to be issued during fiscal year 1998, an additional 22% of the taxable value of class eight property within the county for tax year 1995 and, for general obligation bonds to be issued during fiscal years 1999 through 2008, an additional 33% of the taxable value of class eight property within the city for tax year 1995, in each case of class eight property, multiplied by 16.5%;

(ii) an additional 50% of the taxable value of telecommunications property under 15-6-141 within the city or town for tax year 1999, multiplied by 16.5%, and an additional 50% of the taxable value attributable to electrical generation property under 15-6-141 within the city or town for tax year 1999, multiplied by 16.5%"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1999 Amendments — Composite Section: Chapter 136 in (2)(a)(i) inserted provisions allowing inclusion of class eight property in debt limit in amount of 22% for bonds issued in fiscal year 1998 and 33% for fiscal years 1999 through 2008; and made minor changes in style. Amendment effective March 23, 1999.

Chapter 426 in (2)(a)(ii) inserted language relating to taxable value of telecommunications property; and made minor changes in style. Amendment effective January 1, 2000.

Chapter 556 in (2)(a)(ii) inserted clause including 50% of taxable valuation attributable to electrical generation property multiplied by 16.5% in formula for total amount of indebtedness; and made minor changes in style. Amendment effective January 1, 2000.

Applicability: Section 43, Ch. 426, L. 1999, provided: "[This act] applies to tax years beginning after December 31, 1999."

Section 39(2), Ch. 556, L. 1999, provided that this section applies to fiscal years beginning after June 30, 2000.

Saving Clause: Section 36, Ch. 556, L. 1999, was a saving clause.

Severability: Section 37, Ch. 556, L. 1999, was a severability clause.

1997 Amendment: Chapter 459 in (1)(c), after "equipping", inserted "repairing, or rehabilitating"; and made minor changes in style.

1981 Amendment: Substituted "may not at any time exceed 16.5% of the taxable value" for "may not at any time exceed 3% of the value" in (2).

Attorney General's Opinions

Use of Open-Space Bond Proceeds: A city may use proceeds from bonds issued pursuant to Title 76, ch. 6, the Open-Space Land and Voluntary Conservation Easement Act, for the maintenance of open-space land acquired with bond proceeds and to fund the development of a

comprehensive plan (now growth policy) for purchase, use, development, and maintenance of open-space land. 47 A.G. Op. 8 (1997).

Election Required to Issue Bonds to Furnish Swimming Pool: An election is required pursuant to 7-7-4221 to issue general obligation bonds for the purpose of furnishing a municipal swimming pool; however, there is no statutory requirement for an election to borrow money for that purpose by means other than issuing general obligation bonds. 41 A.G. Op. 73 (1986).

Repair or Maintenance of Swimming Pool — City Not to Borrow Money: Section 7-16-4104, authorizing a city to incur indebtedness, does not include authority to do so for maintenance or repairs (see 1997 amendment). The Legislature intended that maintenance or repair of swimming pools be funded by tax levy under 7-16-4105 or by park funds under 7-16-4107; therefore, a city may not borrow money to maintain or repair a municipal swimming pool. 41 A.G. Op. 73 (1986).

7-16-4105. Authorization to levy tax for various cultural, social, and recreational facilities.

Compiler's Comments

2001 Amendment: Chapter 574 at end substituted "a tax on the taxable value of all taxable property in the city or town" for "an amount not exceeding 7 mills on the dollar on the taxable value of the property to be taxed in the city or town". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Attorney General's Opinions

Repair or Maintenance of Swimming Pool — City Not to Borrow Money: Section 7-16-4104, authorizing a city to incur indebtedness, does not include authority to do so for maintenance or repairs (see 1999 amendment). The Legislature intended that maintenance or repair of swimming pools be funded by tax levy under 7-16-4105 or by park funds under 7-16-4107; therefore, a city may not borrow money to maintain or repair a municipal swimming pool. 41 A.G. Op. 73 (1986).

Collateral References

Municipal Corporations *key* 420.

7-16-4106. Acquisition of property for athletic fields and civic stadiums.

Compiler's Comments

2001 Amendment: Chapter 125 in (1)(a) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Development and Use Agreement Not Precluding City From Entering Agreement for Construction Project on Public Property — Franchise Agreement Outside Scope of Citizen Group's Agreement With City: A citizen's group entered a franchise agreement with a professional baseball organization to bring a team to Missoula. After two potential sites were rejected, the city of Missoula accepted a gift of property upon which to construct a baseball facility and granted the citizen group the right to finance and construct the stadium on the property and to convey the completed facility to the city. The citizen group moved to enjoin the city from development of the proposed civic baseball stadium because of the city's failure to comply with statutory requirements for planning, funding, and managing the facility. All claims were dismissed on summary judgment, and the citizen group appealed, but the Supreme Court affirmed. The development and use agreements in this case did not preclude the city from executing an agreement with another entity for the construction of a similar facility on public property or from leasing a city-owned facility for baseball games or any other purpose. Any franchise agreement between the baseball organization and the citizen group was outside the scope of the group's agreement with the city, so the voter-approval provisions of 7-5-4321 did not apply. The citizen group's argument that the city was required to comply with urban renewal laws also failed. The decision whether to proceed with development under the urban renewal statutes was up to the city, and the fact that the city designated the capital improvements associated with the stadium

construction as an urban renewal project did not require that the citizen group's building project come under the same purview. Rather, under this section, the city is permitted to obtain an athletic field and civic stadium through purchase, donation, or condemnation and to regulate its use, but nothing in the statute prohibits the city from designating a stadium project as an urban renewal project or mandates that the project be designated as an urban renewal project. The District Court properly found that the city appropriately exercised its administrative authority in accepting the gift property and then leasing the site to the citizen group for purposes of constructing a stadium using private financial resources. The citizen group failed to raise a genuine issue of material fact that would preclude summary judgment. Fair Play Missoula, Inc. v. Missoula, 2002 MT 179, 311 M 22, 52 P3d 926 (2002).

Land Deeded for Park Purposes — Reversionary Clause: Lands were deeded to a city for park purposes by deeds providing for reversion to the grantors if used for any other purpose. The lands may be used for some other purpose if the city obtains a waiver, quitclaim deed, or unconditional deed from the owner of the reversionary interest removing the restriction. The city then will own the lands in fee and may use the property as it sees fit. Lloyd v. Great Falls, 107 M 442, 86 P2d 395 (1938).

Collateral References

Municipal Corporations *key* 221, 276, 717.

63 C.J.S. Municipal Corporations §1057.

56 Am. Jur. 2d Municipal Corporations §§532, 533.

Validity of governmental borrowing or expenditure for purposes of acquiring, maintaining, or improving stadium for use by professional athletic team. 67 ALR 3d 1186.

7-16-4107. Use of park funds for public recreation.

Attorney General's Opinions

Repair or Maintenance of Swimming Pool — City Not to Borrow Money: Section 7-16-4104, authorizing a city to incur indebtedness, does not include authority to do so for maintenance or repairs. The Legislature intended that maintenance or repair of swimming pools be funded by tax levy under 7-16-4105 or by park funds under 7-16-4107; therefore, a city may not borrow money to maintain or repair a municipal swimming pool. 41 A.G. Op. 73 (1986).

7-16-4108. Operation of public recreation programs.

Collateral References

56 Am. Jur. 2d Municipal Corporations §202.

Liability of swimming facility operator for injury to or death of trespassing child. 88 ALR 3d 1197.

7-16-4110. Establishment and maintenance of public baths.

Collateral References

56 Am. Jur. 2d Municipal Corporations §202.

7-16-4112. Presentation of public band concerts.

Collateral References

56 Am. Jur. 2d Municipal Corporations §202.

7-16-4113. Tax levy for band concerts.

Compiler's Comments

2001 Amendment: Chapter 574 near end substituted "a tax on the taxable value of all taxable property of the city or town" for "an amount not to exceed 1 mill on the dollar on the taxable value of the property of the city or town subject to taxation". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-16-4114. Authorization to levy tax and establish fund for establishment and maintenance of programs and employee training for day-care facilities.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) near end substituted "levy on the taxable property" for "levy of up to 1 mill on each dollar of taxable property". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1983 Amendment: In (1), before "city" inserted "county"; after "establish and maintain" inserted "programs for the operation of"; near end of (2), after "development of" inserted "programs for and training of operators and employees of".

Collateral References

Governmental liability for negligence in licensing, regulating, or supervising private day-care home in which child is injured. 68 ALR 4th 266.

Part 42
Municipal Board of Park Commissioners

7-16-4201. Authorization for municipal board of park commissioners.

Compiler's Comments

1995 Amendment: Chapter 543 near beginning of first sentence, after "created", inserted "by ordinance" and inserted second sentence regarding ordinance requirements; deleted (2) that read: "(2) Such board of park commissioners shall constitute a department of the city government with the powers provided in this part"; and made minor changes in style.

Collateral References

Municipal Corporations *key* 721.

62 C.J.S. Municipal Corporations §646; 63 C.J.S. Municipal Corporations §1057.

7-16-4222. Rules to implement part.

Compiler's Comments

1997 Amendment: Chapter 42 in (1) deleted reference to 7-16-4224. Amendment effective March 12, 1997.

1995 Amendment: Chapter 543 in (1), at beginning, inserted "In addition to the powers and duties established in the ordinance creating the board of park commissioners and the provisions of 7-16-4223 through 7-16-4228" (7-16-4224 now repealed); and made minor changes in style.

7-16-4223. Leasing of municipal land for nonpark purposes.

Case Notes

Land Deeded for Park Purposes — Reversionary Clause: Lands were deeded to a city for park purposes by deeds providing for reversion to the grantors if used for any other purpose. The lands may be used for some other purpose if the city obtains a waiver, quitclaim deed, or unconditional deed from the owner of the reversionary interest removing the restriction. The city then will own the lands in fee and may use the property as it sees fit. Lloyd v. Great Falls, 107 M 442, 86 P2d 395 (1938).

Collateral References

Municipal corporation's power to exchange its real property used for a park. 60 ALR 2d 239.

7-16-4227. Allowance of claims.

Compiler's Comments

1993 Amendment: Chapter 409 near beginning of (1), after "(2)", inserted "and except as provided in subsection (4)"; inserted (4) allowing a city to have all claims allowed or disallowed by the governing body; and made minor changes in style.

Case Notes

Park Department's Use of City Shop Complex: A city has the implied power to allocate the proportionate share of costs among various city departments, including the park department, for use of a city shop complex. Greener v. Great Falls, 157 M 376, 485 P2d 932 (1971).

7-16-4228. Disbursement of money.

Compiler's Comments

1993 Amendment: Chapter 409 at beginning of (1) inserted exception clause; inserted (2) allowing a city to have all warrants signed by the city clerk and countersigned by the mayor or city manager; and made minor changes in style.

CHAPTER 21
BUSINESS, AGRICULTURE, AND LIVESTOCK SERVICES AND REGULATION

Part 21
General County Licensing Authority

Part Collateral References

Pardon as restoring public office or license or eligibility therefor. 58 ALR 3d 1191.

7-21-2101. General licensing power of counties.

Case Notes

Licensing Classifications: The Legislature imposed a license tax on motion picture theaters. The statute was attacked as containing an arbitrary classification because vaudeville and other classes of entertainment were excluded from its operation. Such theaters were taxable under a different statute. The court held that while the Legislature may impose a license tax on certain occupations and not on others, arbitrary and unreasonable classifications are not permissible. A classification, however, cannot be said to be unreasonable and arbitrary unless it precludes the assumption that it was made in the exercise of legislative judgment and discretion. No unlawful discrimination was involved. State ex rel. Griffin v. Greene, 104 M 460, 67 P2d 995 (1937).

Occupation — Valid Licensing Classification: Occupation is a valid ground for license tax classification, whether as to the amount imposed or as between subjection to and immunity from imposition. Equitable Life Assurance Co. v. Hart, 55 M 76, 173 P 1062 (1918); St. v. Hammond Packing Co., 45 M 343, 123 P 407 (1912).

Constitutionality:

This section is not, because of the exemptions therein contained, an unconstitutional denial of the equal protection of the laws. Quong Wing v. Kirkendall, 223 US 59, 56 L Ed 350, 32 S Ct 192 (1912).

Assuming that this section classifies laundries for license purposes into steam laundries and laundries operated by hand, such classification is not arbitrary or unreasonable. Quong Wing v. Kirkendall, 39 M 64, 101 P 250 (1909), affirmed 223 US 59, 56 L Ed 350, 32 S Ct 192 (1912).

The Legislature is not required to tax all occupations equally or uniformly. It had power to single out proprietors of hand laundries and compel them to pay a license, and so long as the law was uniform as to all persons operating such laundries, there was no denial of the equal protection of the laws. Quong Wing v. Kirkendall, 39 M 64, 101 P 250 (1909), affirmed 223 US 59, 56 L Ed 350, 32 S Ct 192 (1912), affirmed on remittitur, 47 M 16, 130 P 2 (1913).

License tax upon laundries did not violate Art. XII, sec. 11, 1889 Mont. Const. (similar to Art. VIII, sec. 3, 1972 Mont. Const.), requiring uniformity in the assessment and levy of taxes. St. v. Camp Sing, 18 M 128, 44 P 516 (1896); State ex rel. Sam Toi v. French, 17 M 54, 41 P 1078 (1895).

Law Review Articles

When First Amendment Principles and Local Zoning Regulations Collide, Brody, 12 N. Ill. U.L. Rev. 671 (1992).

Collateral References

Counties *key* 47.

20 C.J.S. Counties §81; 53 C.J.S. Licenses §§9, 30.

4 Am. Jur. 2d Amusements and Exhibitions §24; 51 Am. Jur. 2d Licenses and Permits §§91, 130; 56 Am. Jur. 2d Municipal Corporations §210.

Zoning or licensing regulation prohibiting or restricting location of billiard rooms and bowling alleys. 100 ALR 3d 252.

"Grandfather clause" of statute or ordinance regulating or licensing business or occupation. 4 ALR 2d 667.

Refusal of amusement license or permit as subject to judicial review. 124 ALR 247.

Failure to procure occupational or business license or permit as affecting validity or enforceability of contract. 118 ALR 646, 661; 42 ALR 1226; 30 ALR 834.

Validity of license tax or fee on show or place of amusement. 111 ALR 778; 58 ALR 1340.

7-21-2102. Procedure to supply license blanks.

Collateral References

Licenses *key* 21, 23.

53 C.J.S. Licenses §§37, 40.

7-21-2103. Determination of persons required to obtain licenses — classes of licenses.

Collateral References

Licenses *key* 22.
53 C.J.S. Licenses §39.
51 Am. Jur. 2d Licenses and Permits §§109 through 111.

7-21-2104. Lien arising from license.

Compiler's Comments

1987 Amendment: In (2) substituted "15-17-911" for "15-17-901 through 15-17-903".

Case Notes

Priority of Lien: Property that is held or used in any trade, occupation, or profession for which a license is required is liable for the license fee. The lien for the amount of license has precedence over any mortgage upon the property. Burfiend v. Hamilton, 20 M 343, 51 P 161 (1897).

Invalidity of Similar Section: Section 816 of the Revised Statutes of 1879 (now repealed), a statute similar to this section, authorized the summary seizure and sale of property belonging to another but in use by a person from whom a license fee was due. The section created a lien thereon and was held unconstitutional under Due Process of Law Clause of the federal constitution. Chauvin v. Valiton, 8 M 451, 20 P 658 (1889).

Collateral References

Licenses *key* 31.
53 C.J.S. Licenses §50.
51 Am. Jur. 2d Licenses and Permits §75.

7-21-2105. Disbursement of license fees.

Compiler's Comments

1997 Amendment: Chapter 214 deleted introductory phrase that read: "Unless the disposition is otherwise provided for"; at end inserted "for the use of the county"; deleted (2) that read: "(2) Unless otherwise provided, the county treasurer shall retain 50% thereof for the use of the county, pay over 45% thereof to the state treasurer for the use of the general fund of the state, and pay over 5% thereof to the state treasurer for deposit in the state special revenue fund to be used by the board of livestock for predatory animal control"; and made minor changes in style.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Collateral References

Licenses *key* 33.
53 C.J.S. Licenses §56.
51 Am. Jur. 2d Licenses and Permits §118.

7-21-2111. General license requirements.

Case Notes

Condition Precedent: This section requires that a license shall be obtained as a condition precedent to the right to do business. St. v. N. Pac. Express Co., 27 M 419, 71 P 404 (1903).

Collateral References

Licenses *key* 36, 39.
53 C.J.S. Licenses §§13, 59.
51 Am. Jur. 2d Licenses and Permits §88.

7-21-2113. Effect of failure to comply with licensing requirements.

Case Notes

Action to Collect Tax Unauthorized: This section does not authorize an action to collect a license tax but merely imposes a penalty for doing business without the license required. State ex rel. Carter v. Kall, 53 M 162, 162 P 385 (1917).

Collateral References

Licenses *key* 40, 41.
53 C.J.S. Licenses §§62, 66.
51 Am. Jur. 2d Licenses and Permits §71.

Recovery of money paid to unlicensed person required by law to have occupation or business license or permit to make contract. 74 ALR 3d 637.

Validity of statute or rule which makes specified conduct or condition a ground for cancellation or suspension of license, irrespective of licensee's personal fault. 3 ALR 2d 107.

Liability to penalty imposed for failure to pay tax of one who in good faith contested its validity. 147 ALR 142.

7-21-2114. Investigation of possible licensing violations.

Compiler's Comments

1995 Amendment: Chapter 179 after "The board of county commissioners" deleted "or the department of commerce, when examining the treasurer's report"; and made minor changes in style. Amendment effective July 1, 1995.

1983 Amendment — Executive Order: Section 7, Ch. 79, L. 1983, changed "state examiner" to "department of administration". However, Ch. 287, L. 1983, transferred functions of generally assisting local governments from the Department of Administration to the Department of Commerce and provided that: "The governor may by executive order assign to the department of commerce in a manner consistent with this act functions allocated to the department of administration by the 48th legislature relating to local governments or political subdivisions." By Executive Order No. 4-83, the Governor transferred the function contained in this section from the Department of Administration to the Department of Commerce, and the Code Commissioner has corrected the reference accordingly.

Collateral References

Licenses *key* 41.

53 C.J.S. Licenses §55.

7-21-2116. Enforcement of licensing requirements.

Case Notes

Construction of Statute: The words "any person required to take out a license" mean any person engaged in a profession, trade, or occupation for which a license tax is required, and a person engaged in any such business, upon the payment of the required fee, can demand a license as a matter of right. In the enactment of the section, the Legislature intended nothing more than to provide means for the collection of a license fee from one entitled to a license as a matter of right upon payment of the fee. State ex rel. Carter v. Kall, 53 M 162, 162 P 385 (1917).

Collateral References

51 Am. Jur. 2d Licenses and Permits §§70 through 80.

Validity of statute or rule which makes specified conduct or condition a ground for cancellation or suspension of license, irrespective of licensee's personal fault. 3 ALR 2d 107.

7-21-2117. Defenses in actions related to licensing violations.

Collateral References

Licenses *key* 32(2).

53 C.J.S. Licenses §58.

51 Am. Jur. 2d Licenses and Permits §§63 through 69.

Actionability of malicious prosecution under 42 USCS §1983. 79 ALR Fed. 896.

Part 23
Licensing of Itinerant Vendors

Part Attorney General's Opinions

Constitutionality — Licensing Requirement Prior to Entry of Goods Into State: Sections 7-21-2301 through 7-21-2310 held unconstitutional as violating Art. I, sec. 8, U.S. Const., insofar as they attempt to impose a license for persons selling or seeking to sell the goods of a nonresident of Montana prior to the introduction of such goods in the state. 11 A.G. Op. 141 (1925).

Part Collateral References

Civil liability of mobile vendor for attracting into street child injured by another's motor vehicle. 84 ALR 3d 826.

Authorization, prohibition, or regulation by municipality of the sale of merchandise on streets or highways, or their use for such purpose. 14 ALR 3d 896.

Validity of municipal ordinance prohibiting house-to-house soliciting and peddling without invitation. 77 ALR 2d 1216; 35 ALR 2d 355.

Liability of municipality in damages for its refusal to grant permit, license, or franchise. 37 ALR 2d 694.

Validity of municipal regulation of solicitation of magazine subscriptions. 35 ALR 2d 355.

7-21-2301. Definitions.

Collateral References

Licenses *key* 15(2).

53 C.J.S. Licenses §30.

51 Am. Jur. 2d Licenses and Permits §130; 56 Am. Jur. 2d Municipal Corporations §482.

7-21-2303. License required to do business as itinerant vendor — fee.

Compiler's Comments

2001 Amendment: Chapter 7 near end after "period of" substituted "90 days" for "1 year"; and made minor changes in style. Amendment effective October 1, 2001.

Case Notes

Power to Prohibit Door-to-Door Solicitation: The city of Billings enacted an ordinance declaring uninvited door-to-door solicitation a nuisance punishable as a misdemeanor. It was argued that a state statute regulating itinerant vendors did not empower a city to prohibit their activities, therefore precluding the ordinance. The Supreme Court disagreed. Under the expanded powers of local self-government provided by Montana's Constitution, a city possessing those powers may exercise any power not prohibited by the constitution or state statute. A city possessing self-government powers may prohibit uninvited door-to-door solicitation by itinerant vendors, and a licensing statute does not legalize an activity otherwise prohibited. Any statements to the contrary contained in DeLong v. Downes, 175 M 152, 573 P2d 160 (1977), are expressly overruled. Tipco Corp. v. Billings, 197 M 339, 642 P2d 1074, 39 St. Rep. 600 (1982).

Collateral References

Licenses *key* 29.

53 C.J.S. Licenses §48.

51 Am. Jur. 2d Licenses and Permits §114.

Who may be classed as "itinerant vendor", "transient merchant", or the like within license regulations. 94 ALR 1076.

7-21-2304. Nontransferability of license.

Collateral References

Licenses *key* 22, 37.

53 C.J.S. Licenses §45.

51 Am. Jur. 2d Licenses and Permits §3.

7-21-2305. Application for itinerant vendor license.

Collateral References

Licenses *key* 22.

53 C.J.S. Licenses §39.

51 Am. Jur. 2d Licenses and Permits §§45, 138.

7-21-2306. Bond required if deposit taken on orders for future delivery.

Compiler's Comments

1985 Amendment: Near end of (1) before "sum", deleted "penal".

Collateral References

Licenses *key* 26.

53 C.J.S. Licenses §36.

51 Am. Jur. 2d Licenses and Permits §§48, 140.

7-21-2307. Right of aggrieved purchaser.

Collateral References

Licenses *key* 26.

53 C.J.S. Licenses §36.

51 Am. Jur. 2d Licenses and Permits §81.

7-21-2308. Processing of application — issuance of license.

Collateral References

Licenses *key* 22, 37.
53 C.J.S. Licenses §§38, 39.
51 Am. Jur. 2d Licenses and Permits §§47, 138.

7-21-2309. License to be displayed upon demand.

Collateral References

Licenses *key* 40.
53 C.J.S. Licenses §66, et seq.

7-21-2310. Effect of failure to comply with licensing requirements.

Collateral References

Licenses *key* 40.
53 C.J.S. Licenses §66.
51 Am. Jur. 2d Licenses and Permits §70.

Liability to penalty imposed for failure to pay tax of one who in good faith contested its validity. 147 ALR 142.

Part 24
Licensing of Transient Retail Merchants

Part Collateral References

Authorization, prohibition, or regulation by municipality of the sale of merchandise on streets or highways, or their use for such purpose. 14 ALR 3d 896.

Liability of municipality in damages for its refusal to grant permit, license, or franchise. 37 ALR 2d 694.

7-21-2401. Definitions.

Collateral References

Licenses *key* 15(2).
53 C.J.S. Licenses §30.

Who may be classed as "itinerant vendor", "transient merchant", or the like within license regulations. 94 ALR 1076.

7-21-2402. Applicability of term transient retail merchant.

Collateral References

Licenses *key* 15(2).
53 C.J.S. Licenses §30.

Who may be classed as "itinerant vendor", "transient merchant", or the like within license regulations. 94 ALR 1076.

7-21-2404. License required to do business as transient retail merchant — fee.

Collateral References

Licenses *key* 29.
53 C.J.S. Licenses §48.
51 Am. Jur. 2d Licenses and Permits §§114, 133.

7-21-2405. Nontransferability of license.

Collateral References

Licenses *key* 22, 37.
53 C.J.S. Licenses §45.
51 Am. Jur. 2d Licenses and Permits §3.

7-21-2406. Application for transient retail merchant license.

Collateral References

Licenses *key* 22.
53 C.J.S. Licenses §39.
51 Am. Jur. 2d Licenses and Permits §138.

7-21-2407. Bond in lieu of license fee.

Compiler's Comments

1985 Amendment: In (2) before "sum", deleted "penal".

Collateral References

Licenses *key* 26.
53 C.J.S. Licenses §36.
51 Am. Jur. 2d Licenses and Permits §140.

7-21-2408. Right of aggrieved purchaser.

Collateral References

Licenses *key* 26.
53 C.J.S. Licenses §36.
51 Am. Jur. 2d Licenses and Permits §81.

7-21-2409. Processing of application — issuance of license.

Collateral References

Licenses *key* 22, 37.
53 C.J.S. Licenses §§38, 39.
51 Am. Jur. 2d Licenses and Permits §138.

7-21-2410. License to be displayed in place of business.

Collateral References

Licenses *key* 40.
53 C.J.S. Licenses §66.

7-21-2411. Effect of failure to comply with licensing requirements.

Collateral References

53 C.J.S. Licenses §§59, 66.
51 Am. Jur. 2d Licenses and Permits §70.

Part 25
Licensing of Hucksters

Part Collateral References

Civil liability of mobile vendor for attracting into street child injured by another's motor vehicle. 84 ALR 3d 826.

Authorization, prohibition, or regulation by municipality of the sale of merchandise on streets or highways, or their use for such purpose. 14 ALR 3d 896.

Liability of municipality in damages for its refusal to grant permit, license, or franchise. 37 ALR 2d 694.

7-21-2501. Definition of term huckster.

Collateral References

Hawkers and Peddlers *key* 3(2).
39A C.J.S. Hawkers and Peddlers §1, et seq.

Who may be classed as "itinerant vendor", "transient merchant", or the like within license regulations. 94 ALR 1076.

7-21-2502. Scope of part.

Collateral References

Hawkers and Peddlers *key* 1.
39A C.J.S. Hawkers and Peddlers §6.

7-21-2503. License required to do business as huckster — fee.

Collateral References

Licenses *key* 29.
53 C.J.S. Licenses §48.
51 Am. Jur. 2d Licenses and Permits §§114, 130.

7-21-2504. Nontransferability of license.

Collateral References
53 C.J.S. Licenses §45.
51 Am. Jur. 2d Licenses and Permits §3.

7-21-2505. Application for huckster license.

Collateral References
Hawkers and Peddlers *key* 4.
39A C.J.S. Hawkers and Peddlers §7; 53 C.J.S. Licenses §39.
51 Am. Jur. 2d Licenses and Permits §138.

7-21-2506. Processing of application — issuance of license.

Collateral References
53 C.J.S. Licenses §§38, 39.
51 Am. Jur. 2d Licenses and Permits §138.

7-21-2507. License to be displayed upon demand.

Collateral References
Hawkers and Peddlers *key* 6, 7.
39A C.J.S. Hawkers and Peddlers §§10, 11.

7-21-2508. Effect of failure to comply with licensing requirements.

Collateral References
53 C.J.S. Licenses §66.
51 Am. Jur. 2d Licenses and Permits §§70, 148.

Part 31
Public Scales

7-21-3101. Establishment of public scales.

Collateral References
Weights and Measures *key* 8.
94 C.J.S. Weights and Measures §§2, 3, 6.
56 Am. Jur. 2d Municipal Corporations §481.

7-21-3108. Misconduct by public weigher.

Collateral References
Counties *key* 102.
20 C.J.S. Counties §146.

Part 32
County Agricultural and Livestock Services

7-21-3201. Authorization to appropriate money for promotion of county products.

Collateral References
Counties *key* 153 ½.
20 C.J.S. Counties §236.
56 Am. Jur. 2d Municipal Corporations §205.

7-21-3202. Limitation on appropriation to promote county products.

Collateral References
56 Am. Jur. 2d Municipal Corporations §205.

7-21-3203. Support of extension work in agriculture and home economics.

Compiler's Comments
2001 Amendment: Chapter 574 in (1) near middle after "provided by" substituted "a levy" for "special levy". Amendment effective July 1, 2001.
1999 Amendment: Chapter 584 in first sentence in (1) after "levy" deleted "which the county commissioners are hereby authorized to make at the same time as other levies for county

purposes" and inserted second sentence authorizing commissioners to impose levy subject to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "Montana state university" to "Montana state university-Bozeman".

Case Notes

Extension Agent: The extension agent is not a county officer who, under 7-4-2211, must keep his office at the county seat. Not only does the law bringing into existence the extension agent fail to designate him as a county agent, but section 16-2403, R.C.M. 1947 (now repealed), which enumerated who are county officers, made no mention of an extension agent. Turnbull v. Brown, 128 M 254, 273 P2d 387 (1954).

Collateral References

Counties *key* 153 ½.
20 C.J.S. Counties §§235, 236.

7-21-3211. Employment of stock inspector.

Collateral References

Counties *key* 63.
20 C.J.S. Counties §101.
56 Am. Jur. 2d Municipal Corporations §246.

7-21-3212. Compensation of stock inspector.

Collateral References

56 Am. Jur. 2d Municipal Corporations §258.

Part 33
Public Markets

7-21-3301. Establishment of markets and market houses.

Collateral References

Counties *key* 105(1).
20 C.J.S. Counties §167.
56 Am. Jur. 2d Municipal Corporations §212.

7-21-3302. Acquisition of property for establishment and maintenance of public markets.

Collateral References

Counties *key* 103, 105(1).
20 C.J.S. Counties §§165, 167.

7-21-3305. Notice of rules and days of operation.

Compiler's Comments

2001 Amendment: Chapter 354 substituted "must be published as provided in 7-1-2121 by the county commissioners once in each year prior to the opening of the market" for "shall be published by the county commissioners once in each year in every newspaper printed and published in their respective counties for a period of not less than 2 successive weeks, the first publication thereof to be made not less than 2 weeks prior to the opening of the markets established hereunder in each county and the future annual publications thereof to be made at such time as may be ordered by the boards of county commissioners". Amendment effective October 1, 2001.

7-21-3321. Market master.

Collateral References

Counties *key* 107.
20 C.J.S. Counties §169.

7-21-3322. Role of market master.

Compiler's Comments

2003 Amendment: Chapter 561 in (2)(f) at beginning deleted "to remove all vagrants" and after "from" substituted "remaining" for "loitering"; and made minor changes in style. Amendment effective May 5, 2003.

Collateral References

Counties *key* 107.

20 C.J.S. Counties §169.

Validity of vagrancy statutes and ordinances. 25 ALR 3d 792.

Part 34
County Fairs

Part Case Notes

County Fair — Tax on Admission Tickets: Cascade County was not subject to a penalty for the alleged willful failure to collect the proper admission tax on the sale of admission tickets to the county fair since the county in establishing the county agricultural fair was engaged in a governmental function authorized by Montana statutes. Cascade County v. Penwell, 67 F. Supp. 253 (D.C. Mont. 1946).

Part Collateral References

4 Am. Jur. 2d Amusements and Exhibitions §19; 56 Am. Jur. 2d Municipal Corporations §262.

Validity and construction of contract exempting agricultural fair or similar bailee from liability for articles delivered for exhibition. 69 ALR 3d 1025.

7-21-3401. Authorization to create county fair commission.

Compiler's Comments

1995 Amendment: Chapter 543 at end inserted "subject to the provisions of 7-1-201 through 7-1-203"; deleted (2) that read: "(2) The board of county commissioners shall, at a public meeting, pass a resolution establishing the number of members of the fair commission and the terms of the appointments. The fair commission must consist of at least three members and no more than nine members, and the members of the board must be residents of the county"; and made minor changes in style.

1991 Amendment: In (1), after "appoint", deleted "from the electors of the county five responsible persons to constitute" and after "commission" deleted "three of the members to be appointed for a term of 2 years and two for a term of 1 year and until their successors are appointed"; and substituted (2) concerning establishment of number of members and terms of county fair commission for former (2) that read: "(2) Each year thereafter, the board of county commissioners shall appoint members of the county fair commission to succeed the members whose terms then expire".

Collateral References

Agriculture *key* 5.

3 C.J.S. Agriculture §14.

56 Am. Jur. 2d Municipal Corporations §§235, 246, 258.

Liability of owner or operator for injury to patron of fair, carnival, or the like, from operation of sideshows, games, or similar concessions. 24 ALR 3d 945.

7-21-3406. Powers of county fair commission.

Compiler's Comments

2003 Amendment: Chapter 35 near middle of first sentence after "through" substituted "7-21-3413" for "7-21-3414"; and made minor changes in style. Amendment effective July 1, 2003.

1995 Amendment: Chapter 543 at beginning substituted "In addition to the powers and duties established in the" for "By" and after "commissioners" inserted "creating the county fair commission and by the provisions of 7-21-3407 through 7-21-3414"; and made minor changes in style.

1989 Amendment: At beginning inserted "By resolution of the board of county commissioners"; near middle inserted "on a continuous basis throughout the fiscal year"; and made minor change in phraseology. Amendment effective July 1, 1989.

Attorney General's Opinions

Authority to Lease County Fairgrounds: Responsibility for leasing the county fairgrounds and buildings is with the County Commissioners for nonfair-related matters and with the County Fair Commission for fair-related matters. Concurrent jurisdiction should not be construed when it can be avoided. 39 A.G. Op. 58 (1982).

7-21-3407. Duties of county fair commission.

Compiler's Comments

1989 Amendment: In (1), before "county agricultural fair", inserted "annual"; inserted (1)(a) through (1)(e) specifying duties; and made minor changes in phraseology. Amendment effective July 1, 1989.

Case Notes

No Authority to Borrow Money: County fair commissions have no authority to borrow money under this section. A bank brought an action to recover money lent in which defendant county disclaimed liability. The Treasurer paid warrants out of other county funds when there was no money in the fair fund and replaced it with a loan from the bank. The county, having obtained the use and benefit of the loan, was in equity and good conscience required to pay it back, recovery being warranted in an action as for money had and received. First Nat'l Bank of Nashua v. Valley County, 112 M 18, 113 P2d 783 (1941).

Attorney General's Opinions

Authority to Lease County Fairgrounds: Responsibility for leasing the county fairgrounds and buildings is with the County Commissioners for nonfair-related matters and with the County Fair Commission for fair-related matters. Concurrent jurisdiction should not be construed when it can be avoided. 39 A.G. Op. 58 (1982).

Collateral References

Validity and construction of contract exempting agricultural fair or similar bailee from liability for articles delivered for exhibition. 69 ALR 3d 998.

7-21-3408. Acquisition of property for fair purposes.

Compiler's Comments

1983 Amendment: In (1) deleted "a tract of" before "land" and deleted ", not exceeding 160 acres," before "as county fairgrounds"; deleted from end of (1) "and an additional tract of land in their respective county, not exceeding 80 acres, as junior fairgrounds. These lands may be used by the county fair commission for the purpose of promoting the interests of horticulture, agriculture, and stockraising"; at end of (2) deleted "and junior fairgrounds".

Collateral References

Exemption from taxation of property of agricultural fair society or association. 89 ALR 2d 1104.

7-21-3409. Lease of county fairgrounds and buildings.

Compiler's Comments

1989 Amendment: Near beginning of (1) inserted "or county fair commissions"; and made minor changes in phraseology. Amendment effective July 1, 1989.

1983 Amendment: In (1) after "lease" deleted "for limited periods of time"; deleted last sentence of (1), which read: "No lease shall be executed to permit the use of said premises during any time within 3 weeks prior to the holding of a county fair."; in (2) after "county commissioners" inserted "or county fair commission"; deleted from end of (2) ", but not in excess of 20% of the gross receipts taken in by the lessee. Said property shall not be leased unless the lessee shall give a bond such as the board may deem sufficient."; inserted (3) relating to bond or insurance; in (4) after "board" inserted "or commission"; in (5) substituted "fair fund" for "poor fund"; in (6) after "county commissioners" inserted "or the fair commission" and substituted "allowing" for "preventing".

Case Notes

Leasing of Fairground Property Controlled by Specific Versus General Statute: The Supreme Court held that an obvious conflict existed between general statutes concerning the leasing of county property and the specific statute dealing with the leasing of fairground property. The court stated that in interpreting conflicting statutes, the specific controls over the general to the extent of any inconsistency. Gallatin Saddle & Harness Club v. White, 246 M 273, 805 P2d 1299, 47 St. Rep. 2012 (1990).

Attorney General's Opinions

Authority to Lease County Fairgrounds: Responsibility for leasing the county fairgrounds and buildings is with the County Commissioners for nonfair-related matters and with the County Fair Commission for fair-related matters. Concurrent jurisdiction should not be construed when it can be avoided. 39 A.G. Op. 58 (1982).

Collateral References

Agriculture *key* 5.

3 C.J.S. Agriculture §160.

7-21-3410. Funding of county fair activities.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning of (2) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Case Notes

Delegation of Authority by Fair Commission: Where money has been appropriated to the county fair commission for advertising purposes, the fair commission must determine the method and nature of the advertising and cannot delegate that responsibility to a corporation or individual not responsible to the state or county, such as a chamber of commerce. Dickey v. Bd. of Comm'rs, 121 M 223, 191 P2d 315 (1948).

Collateral References

Agriculture *key* 5; Counties *key* 192.

3 C.J.S. Agriculture §§156 through 163; 20 C.J.S. Counties §281.

Power of county or municipality to exempt from taxation or otherwise aid or subsidize private enterprises conducted for recreational, exhibition, or entertainment purposes. 116 ALR 889.

7-21-3413. Fair commission capital improvement fund authorized.

Compiler's Comments

2003 Amendment: Chapter 35 near beginning after "establish" deleted "by a vote of the majority of the commission" and at end after "improvement fund" substituted "in accordance with the provisions of Title 7, chapter 6, part 6" for "for the replacement and acquisition of property, buildings, or equipment costing more than $5,000 and having a useful life of 5 years or more"; and made minor changes in style. Amendment effective July 1, 2003.

7-21-3422. Notice of intention to create fair district — hearing.

Compiler's Comments

1985 Amendment: Substituted "as provided in 7-1-2121, stating that" for "in two regular weekly issues of a newspaper in the county, setting forth the date on which" and substituted "that" for "at which time" before "objections".

7-21-3425. Board of directors of fair district.

Compiler's Comments

1983 Amendment: In (1) substituted "shall appoint one member of their commission to the" for "constitute"; in (2) substituted "shall appoint one member of their commission to" for "are likewise members of"; and made a grammar change.

7-21-3426. Organization of board and conduct of business.

Compiler's Comments

1995 Amendment: Chapter 216 in (4)(c) substituted "open to the public during the office hours determined by the governing body by resolution after a public hearing" for "at all reasonable hours open to the public"; and made minor changes in style.

7-21-3432. Effect of failure of county commissioners to meet or take action.

Compiler's Comments

1999 Amendment: Chapter 584 in middle inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-21-3433. Authorization for mill levy.

Compiler's Comments

2001 Amendment: Chapter 574 deleted former (2) that read: "(2) The levy provided for in subsection (1) may not exceed 1 mill on the dollar of the taxable value of all the taxable property in the county, except in the case of the county in which the fair is being conducted. In that county, the levy may not exceed 1 1/2 mills on the dollar of taxable property in the county"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 in (1) inserted "provided for in 7-21-3432" and after "shall" inserted reference to 15-10-420; in (2) inserted "provided for in subsection (1)"; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-21-3451. Authorization to create a joint fair and civic center commission.

Compiler's Comments

Preamble: The preamble to Ch. 553, L. 1989, provided: "WHEREAS, it is necessary to clarify and revise the general authority and powers of county fair commissions that supervise and manage fairgrounds and buildings during the course of the year and to coordinate the roles of county building commissions in areas which have civic center buildings on or contiguous to the fairgrounds."

Effective Date: Section 12, Ch. 553, L. 1989, provided that this section is effective July 1, 1989.

Case Notes

Park Board Not Legislative Body or Agent for Legislative Body: The trial court dismissed the plaintiffs' wrongful termination case on the basis that the park board was a legislative body immune from suit. The Supreme Court reversed the decision, stating that the board performed statutory executive functions and therefore was not a legislative body. The Supreme Court also ruled that the board was not an agent of the County Commissioners with respect to the employment of the plaintiffs and was not immune from suit on that basis. Koch v. Yellowstone County, 243 M 447, 795 P2d 454, 47 St. Rep. 1312 (1990).

7-21-3452. Organization of joint fair and civic center commission.

Compiler's Comments

1995 Amendment: Chapter 216 in (5)(c) substituted "open to the public during the office hours determined by the governing body by resolution after a public hearing" for "open to the public at all reasonable hours"; and made minor changes in style.

Preamble: The preamble to Ch. 553, L. 1989, provided: "WHEREAS, it is necessary to clarify and revise the general authority and powers of county fair commissions that supervise and manage fairgrounds and buildings during the course of the year and to coordinate the roles of county building commissions in areas which have civic center buildings on or contiguous to the fairgrounds."

Effective Date: Section 12, Ch. 553, L. 1989, provided that this section is effective July 1, 1989.

7-21-3453. Term of office.

Compiler's Comments

Effective Date: Section 12, Ch. 553, L. 1989, provided that this section is effective July 1, 1989.

7-21-3454. Duties of joint commission.

Compiler's Comments

Effective Date: Section 12, Ch. 553, L. 1989, provided that this section is effective July 1, 1989.

7-21-3455. Preparation of county fair or joint county fair and civic center budget.

Compiler's Comments

Effective Date: Section 12, Ch. 553, L. 1989, provided that this section is effective July 1, 1989.

7-21-3456. Meeting on county fair and civic center budgets.

Compiler's Comments

Effective Date: Section 12, Ch. 553, L. 1989, provided that this section is effective July 1, 1989.

7-21-3457. Effect of failure of county commissioners to meet or take action.

Compiler's Comments

2001 Amendment: Chapter 574 near end after "raised by" substituted "a levy" for "special levy". Amendment effective July 1, 2001.

Effective Date: Section 12, Ch. 553, L. 1989, provided that this section is effective July 1, 1989.

7-21-3458. General authority of county commissioners.

Compiler's Comments

Effective Date: Section 12, Ch. 553, L. 1989, provided that this section is effective July 1, 1989.

Part 37
Empowerment Zones

Part Compiler's Comments

Effective Date: This part is effective October 1, 2003.

Part 41
Municipal Licensing Authority

7-21-4101. General licensing power of municipalities.

Case Notes

Tax on Sale of Attorney's Services — Invalid: A city ordinance imposing an annual tax on every lawyer or law firm carrying on the practice of law, calculated on the basis of gross revenue generated from attorney-client relationships, was held to be an unconstitutional sales tax. The tax was beyond the scope of self-government powers and in violation of 7-1-112, since it was not related to any regulatory control measure for the health or welfare of the city but was a tax on the sale of attorneys' services. Brueggemann v. Billings, 221 M 375, 719 P2d 768, 43 St. Rep. 905 (1986).

Regulatory Municipal Business License Applicable to Attorneys — Unconstitutional: A business license ordinance enacted by a self-governing municipality requiring municipal licensure of attorneys and that provided for regulation was an unconstitutional encroachment on the Supreme Court's authority to regulate the bar as provided in Art. III, sec. 2, Mont. Const., because the ordinance conditions attorneys' access to the practice of law. The ordinance included police provisions that could conceivably cover standards of practice, prohibited attorneys from carrying on their occupation without procuring a municipal license, required municipal licensure of nonresident attorneys practicing in the municipality, and provided for fines and incarceration for failing to comply with the ordinance. Harlen v. Helena, 208 M 45, 676 P2d 191, 41 St. Rep. 162 (1984).

Mandamus: Action of Town Council in refusing to issue a mobile home court license until petitioner had removed a house which encroached onto a public alley was not an abuse of discretion, and mandamus will not lie to compel the issuance of the license. State ex rel. Barnes v. Belgrade, 164 M 467, 524 P2d 1112 (1974).

Abuse of Discretion: City Council could not, at its discretion, deny developers a license to operate a trailer park, where developers had complied with the city's health ordinances, Council disregarded the findings of the city's administrative officers, and developers had begun construction of the park before the area had been rezoned. State ex rel. Bennett v. Stow, 144 M 599, 399 P2d 221 (1965).

Ordinance Required: Where the city's licensing ordinance did not include the operation of a call office for drycleaning, the city was without jurisdiction to arrest the operator of such an

establishment for conducting business without a license. In the absence of a licensing ordinance, the city is powerless to attempt to exact license fees or to regulate the operation of any business. State ex rel. Willumsen v. Butte, 135 M 350, 340 P2d 535 (1959).

No Power to License Liquor Sales: The Prohibition Act of 1917, repealing all conflicting acts and all municipal ordinances relating to issuance of liquor licenses, divested municipalities of power to license sale of liquor under general statutes. Stephens v. Great Falls, 119 M 368, 175 P2d 408 (1946).

State Liquor Statutes to Control: Special statutes subsequently enacted relating to liquor traffic and licensing of sale of liquor control the more general statutes authorizing cities generally to license businesses and occupations and will be regarded as an exception to or qualification of the prior general statutes. State ex rel. Wiley v. District Court, 118 M 50, 164 P2d 358 (1945).

Interference on Gross Abuse: The power to license has been properly delegated to cities and towns by this section. It grants them the power to fix the amount, terms, and manner of issuing and revoking licenses or to refuse to issue them. Courts will not interfere in this exercise except when there has been a gross abuse of discretion. State ex rel. McIntire v. Libby, 107 M 216, 82 P2d 587 (1938).

Plumber's License Applicant — Court Review: Sections 5183 through 5193, R.C.M. 1921 (now repealed), relating to the municipal regulation of the plumbing business, were attacked by an unsuccessful applicant for a license as an unconstitutional delegation of legislative authority to a municipal board. The statutes were not so lacking in detail as to how examinations for applicants for licenses were to be conducted or as to the nature of the examination to amount to a conferring of arbitrary or capricious power on the Board of Examiners. Though the statutes did not provide for review by the courts of the Board of Examiners' actions, an aggrieved applicant for a license could by an appropriate proceeding have an allegation of arbitrary or capricious action reviewed by the courts. St. v. Stark, 100 M 365, 52 P2d 890 (1935).

Validity of Licensing Ordinance — Discretionary Granting: An ordinance vested in public officials the discretion to grant or refuse a license to carry on an ordinarily lawful business without referring to all of the classes to which the ordinance was intended to apply and without specifically enumerating the conditions to which similarly situated persons had to conform. Such an ordinance is normally invalid but is subject to the qualification that where it is impractical to lay down an all-comprehensive rule or where it relates to the administration of the police power and is necessary to protect the general welfare, morals, and safety of the public, it is not essential that the ordinance prescribe all the conditions upon which the license will be granted or refused. A person arbitrarily denied a license under such an ordinance may apply to the courts for relief. State ex rel. Altop v. Billings, 79 M 25, 255 P 11 (1927).

Amount of License Fee: What is a reasonable license fee must depend largely upon the sound discretion of the City Council, having reference to the circumstances and necessities of the case. Unless, however, the amount is manifestly unreasonable in view of its purpose as a regulation, the court will not adjudge it a revenue measure. Bozeman v. Nelson, 73 M 147, 237 P 528 (1925).

Taxi License:

Taxicabs and autobuses operated for hire are legitimate objects of license fees. Bozeman v. Nelson, 73 M 147, 237 P 528 (1925).

Subdivision 3 of section 5039, R.C.M. 1921 (now 7-21-4101), provided that the license fee which a city might impose upon industries and businesses must not exceed the sum required by statute when the state requires a license therefor. Chapter 154, L. 1923 (since repealed), while authorizing the State Railroad Commission (now Public Service Commission) to require the payment of a license not to exceed $10 per motor vehicle, does not declare that a license shall be exacted. A city imposed a license fee of $25 for the first taxi operated for hire and $12 for each additional one. The Supreme Court held that in the absence of a showing that the Railroad Commission (now Public Service Commission) had exercised the power given it by Ch. 154, the fee exacted by the City Council cannot be said to exceed the fee imposed by the state for the same purpose. State ex rel. Bozeman v. Police Court, 68 M 435, 219 P 810 (1923).

License Authority — Police Power: The Legislature may not constitutionally authorize a city to provide revenue for general municipal purposes by the imposition of license taxes. It may, however, properly authorize it to impose such a tax upon any industry or upon the right to transact any business which falls within the scope of police regulations. Bozeman v. Nelson, 73 M 147, 237 P 528 (1925).

Revenue Incidental: Although revenue may result incidentally from an undisputed exercise of the police power, that fact alone does not divest the regulation of its police character and make it an exercise of the taxing power. Bozeman v. Nelson, 73 M 147, 237 P 528 (1925).

Power to Impose License Tax: A city cannot raise revenue for general municipal purposes by the imposition of license taxes. State ex rel. Bozeman v. Police Court, 68 M 435, 219 P 810 (1923).

Coal Dealer: Section 84-1402, R.C.M. 1947 (15-58-102, now repealed), required every coal dealer in the state to pay annually to the state a license fee of $1 and in addition thereto 5 cents per ton for every ton of coal sold by him during any one year upon which the mines license fee exacted by section 84-1302, R.C.M. 1947 (now repealed), had not been paid by the mine operator. Under subdivision 3 of section 5039, R.C.M. 1921 (now 7-21-4101), the power of cities or towns to license an industry or business was limited to an amount not to exceed the sum required by the state to be paid to it by the same business. A city ordinance exacting a fee of $1 from coal dealers and in addition 5 cents for every ton of coal sold, without incorporating therein the clause limiting the payment of the 5 cents to coal upon which the mines license fee exacted by section 84-1302, R.C.M. 1947 (now repealed), had not been paid to the state, was invalid as in excess of the power of the city to impose. State ex rel. Butte v. Police Court, 65 M 94, 210 P 1059 (1922).

Attorney General's Opinions

City Licensing: A city can license local aspects of interstate commerce if not a direct burden or impediment, but enterprises preempted by state regulation are not subject to city licensing. 37 A.G. Op. 100 (1977).

Regulation of Gambling Hours: A city may restrict by ordinance the hours of licensed gambling since it is the type of subject matter traditionally the object of reasonable regulation for the protection of the public health, safety, and welfare. 37 A.G. Op. 67 (1977).

Implied Amendment: This section was held impliedly amended by section 66-411, R.C.M. 1947 (37-30-307, now repealed), as amended by sec. 4, Ch. 183, L. 1937, to the extent that section 11-903, R.C.M. 1947 (now 7-21-4101), may have authorized cities and towns to license barbers. 17 A.G. Op. 314 (1938).

Collateral References

Licenses *key* 5 ½.

53 C.J.S. Licenses §10.

51 Am. Jur. 2d Licenses and Permits §88.

Regulation of exposure of female, but not male, breasts. 67 ALR 5th 431.

Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices. 90 ALR 2d 7.

Validity of ordinance relating to undertakers or embalmers. 89 ALR 2d 1338.

Comment note: admissibility of evidence of reputation or declaration as to matter of public interest. 58 ALR 2d 615.

Regulation of beauty shops or specialists. 56 ALR 2d 879, 893.

Regulation of junk dealer. 45 ALR 2d 1391.

Municipality's liability in damages for its refusal to grant permit, license, or franchise. 37 ALR 2d 694.

Regulation of house-to-house canvassing by peddlers, etc. 35 ALR 2d 355.

Validity of regulations as to plumbers and plumbing. 22 ALR 2d 816.

Regulations of tourist or trailer camps. 22 ALR 2d 774.

Public regulation of drycleaning and dyeing establishments. 128 ALR 678; 49 ALR 110.

Regulation of the sale of flowers or florist business. 124 ALR 547.

Regulation of auctions and auctioneers. 111 ALR 473.

Regulation and sale of newspapers on the streets. 107 ALR 1275.

Regulation of barbers. 98 ALR 1108; 20 ALR 1111.

Municipal regulation of electricians and the installation of electrical work. 96 ALR 1506.

Public regulation or authorization of gas filling stations. 96 ALR 1337; 79 ALR 918; 55 ALR 256; 49 ALR 767; 42 ALR 978; 34 ALR 507; 29 ALR 450; 18 ALR 101.

Licensing and regulation of pool and billiard rooms and bowling alleys. 72 ALR 1339; 53 ALR 149; 29 ALR 41; 20 ALR 1482.

Validity of ordinance fixing closing hours for certain kinds of business. 55 ALR 242.

Municipal regulation of sale of poison, drugs, or medicines. 54 ALR 730, 735.

Regulations concerning location of laundries. 6 ALR 1597.

Validity of ordinance interfering with privacy in restaurants. 5 ALR 965.

7-21-4102. Collection of license fees.

Collateral References

53 C.J.S. Licenses §52.

51 Am. Jur. 2d Licenses and Permits §118.

7-21-4103. Issuance of licenses.

Collateral References

53 C.J.S. Licenses §38.

51 Am. Jur. 2d Licenses and Permits §138.

Part 42
Municipal Regulation of Business and Commodities

Part Case Notes

Regulatory Municipal Business License Applicable to Attorneys — Unconstitutional: A business license ordinance enacted by a self-governing municipality requiring municipal licensure of attorneys and that provided for regulation was an unconstitutional encroachment on the Supreme Court's authority to regulate the bar as provided in Art. III, sec. 2, Mont. Const., because the ordinance conditions attorneys' access to the practice of law. The ordinance included police provisions that could conceivably cover standards of practice, prohibited attorneys from carrying on their occupation without procuring a municipal license, required municipal licensure of nonresident attorneys practicing in the municipality, and provided for fines and incarceration for failing to comply with the ordinance. Harlen v. Helena, 208 M 45, 676 P2d 191, 41 St. Rep. 162 (1984).

7-21-4201. Regulation of certain activities.

Case Notes

Pawnshop: An ordinance making it unlawful to keep a pawnshop open after 6 p.m. is not a prohibition of the business but a regulation of it authorized by this section. Butte v. Paltrovich, 30 M 18, 75 P 521 (1904).

Police Regulations: The power conferred upon a city by this section is primarily to enact such police regulations, with reference to the occupations therein enumerated, as shall be necessary to the good order and general welfare of its citizens. Butte v. Paltrovich, 30 M 18, 75 P 521 (1904).

Attorney General's Opinions

County Power to Contract With Humane Society: Counties which have enacted dog licensing requirements may contract with local humane societies for the impoundment and disposition of unlicensed dogs. In addition, counties may contract with local humane societies for kenneling and disposition of animals incidental to the Sheriff's performance of his duties as humane officer. 37 A.G. Op. 105 (1978).

City Licensing of Real Estate Firms: A city may not require real estate firms to obtain business licenses. 37 A.G. Op. 71 (1977).

Collateral References

Food *key* 3; Licenses *key* 5 ½; Theaters and Shows *key* 3.

36A C.J.S. Food §12; 53 C.J.S. Licenses §10; 62 C.J.S. Municipal Corporations §§211, 229 through 313; 86 C.J.S. Theaters and Shows §18, et seq.

51 Am. Jur. 2d Licenses and Permits §119; 56 Am. Jur. 2d Municipal Corporations §471.

Liability of municipality in damages for its refusal to grant, permit, license, or franchise. 37 ALR 2d 694.

Regulation of watch making, watch repairing, and the like. 34 ALR 2d 1326.

Municipal regulation of practice of photography. 7 ALR 2d 422, 426.

7-21-4202. Regulation of foodstuffs.

Compiler's Comments

1987 Amendment: Near beginning, after "inspection of", deleted "beef, pork".

Collateral References

Food *key* 1.

36A C.J.S. Food §§5 through 9.

Validity and construction of statutes, ordinances, or regulations concerning the sale of horse meat for human consumption. 19 ALR 2d 1013.

Validity, construction, and application of statutes or ordinances relating to inspection of food sold at retail. 127 ALR 322.

7-21-4203. Authority to weigh, measure, and regulate certain commodities.

Collateral References

Weights and Measures *key* 1 through 3.

62 C.J.S. Municipal Corporations §§260 through 262; 94 C.J.S. Weights and Measures §3.

7-21-4204. Regulation of location of businesses, factories, and steam boilers.

Collateral References

Municipal Corporations *key* 601(27), 602, 605, 623, 625; Steam *key* 1.

62 C.J.S. Municipal Corporations §§221, 227(3), 279, 280, 311; 82 C.J.S. Steam §1.

56 Am. Jur. 2d Municipal Corporations §473.

7-21-4205. Licensing and regulating of vehicles engaged in transporting persons and property.

Case Notes

Taxicabs: An ordinance requiring taxicab drivers to occupy a position by the side of their vehicles along the curb line of the street fronting a railway station and prohibiting them from soliciting patronage on railway property was a valid exercise of the police power. It withstood the objections that it was in conflict with the Due Process of Law Clause of the federal and state constitutions, indirectly interfered with interstate commerce carried on partially within the state, and impaired the obligations of contracts between the operator of the taxicabs and railway companies. Butte v. Roberts, 94 M 482, 23 P2d 243 (1933).

Ordinance — License Fee — Tax — Determination: An ordinance required the operator of buses and taxis to pay a license fee to aid in the police power and regulation by the city. The operator contended that it was an unlawful tax. Where a fee is imposed for the purpose of regulation and the ordinance imposing it requires compliance with conditions in addition to the payment of the prescribed fee, it is a license imposed under the police power. When the fee is exacted solely for revenue purposes without further conditions, it is a tax. In this case, the fee was a license and the ordinance was not invalid as imposing an unreasonable tax. State ex rel. Bozeman v. Police Court, 68 M 435, 219 P 810 (1923).

Collateral References

Licenses *key* 5 ½.

53 C.J.S. Licenses §10; 62 C.J.S. Municipal Corporations §§266, 307.

56 Am. Jur. 2d Municipal Corporations §481.

Validity of statute abolishing or forbidding granting of exclusive rights or franchises to taxicab or hack stands. 8 ALR 2d 574.

Conflict between statutes and local regulations as to automobile. 147 ALR 522; 64 ALR 993; 21 ALR 1186.

Validity of statute or ordinance relating to granting or revocation of license or permit to operate automobile. 125 ALR 1459; 108 ALR 1162; 71 ALR 616.

7-21-4206. Control of erection of signs and awnings.

Collateral References

62 C.J.S. Municipal Corporations §221.

Governmental liability for compensation or damages to advertiser arising from obstruction of public view of sign or billboard on account of growth of vegetation in public way. 21 ALR 4th 1309.

Validity and construction of state or local regulation prohibiting the erection or maintenance of advertising structures within a specified distance of street or highway. 81 ALR 3d 564.

Validity and construction of state or local regulation prohibiting off-premises advertising structures. 81 ALR 3d 486.

Validity and construction of statute or ordinance restricting outdoor rate advertising by motels, motor courts, and the like. 80 ALR 3d 740.

Classification and maintenance of advertising structure as nonconforming use. 80 ALR 3d 630.

Validity and construction of ordinance prohibiting roof signs. 76 ALR 3d 1162.

Validity of regulations restricting size of freestanding advertising signs. 56 ALR 3d 1207.

Municipal power as to billboards and outdoor advertising. 58 ALR 2d 1314.

7-21-4207. Authority to require records for pawn, secondhand, and junk shops.

Collateral References

Pawnbrokers and Money Lenders *key* 1, 2, 4.
62 C.J.S. Municipal Corporations §271.
Regulation of junk dealers. 45 ALR 2d 1391.

7-21-4208. Regulation of purchases from minors by pawn, secondhand, and junk shops.

Collateral References

62 C.J.S. Municipal Corporations §271.

7-21-4209. Establishment and supervision of markets.

Collateral References

Municipal Corporations *key* 275.
63 C.J.S. Municipal Corporations §1056.
56 Am. Jur. 2d Municipal Corporations §212.

7-21-4210. Regulation of dance houses.

Collateral References

Theaters and Shows *key* 2.
62 C.J.S. Municipal Corporations §245; 86 C.J.S. Theaters and Shows §4.
4 Am. Jur. 2d Amusements and Exhibitions §23; 56 Am. Jur. 2d Municipal Corporations §476.
Validity of ordinances restricting location of "adult entertainment" or sex-oriented businesses. 10 ALR 5th 538.
Sale or use of narcotics or dangerous drugs on licensed premises as ground for revocation or suspension of liquor license. 51 ALR 3d 1130.
Topless or bottomless dancing or similar conduct as offense. 49 ALR 3d 1084.

CHAPTER 22
WEED AND PEST CONTROL

Part 21
County Weed Control

Part Compiler's Comments

Severability: Section 33, Ch. 607, L. 1985, was a severability clause.

Part Attorney General's Opinions

Establishment of Rural Improvement District for Weed Control — Preemption: A Board of County Commissioners may not use 7-12-2102 or 7-12-4102 to authorize a rural improvement district to provide weed control because those statutes are subordinate to and preempted by the specific statutory scheme of weed control in Title 7, ch. 22, part 21. 42 A.G. Op. 90 (1988).

County Recoupment of Costs of Weed Control — Landowner Agreements — Former Law: Under 7-22-2146 the County Commissioners and weed control supervisors (now District Weed Board) are not required to have an agreement to assist landowners with weed control. Landowners in counties without such agreements are obliged to carry the entire financial burden of the weed program. If 7-22-2147 (now repealed) were to be interpreted to allow recovery by the county of only two-thirds of the costs incurred in destroying weeds on the property of noncomplying landowners, it would be economically advantageous for the landowners to refuse to cooperate in the program and let the county control all weeds instead. Complying landowners would bear the total cost of weed control while recalcitrant landowners would be liable for only two-thirds of the expenses. Therefore, in counties in which the full financial responsibility for a weed control program lies with the landowners, the county may recover the full amount of the cost incurred in noxious weed control if the weed board must institute weed control measures pursuant to 7-22-2124 without the consent of the owner. 39 A.G. Op. 13 (1981).

Part Collateral References

3 C.J.S. Agriculture §§84 through 88.
3 Am. Jur. 2d Agriculture §38.

Tort liability of municipality or other governmental unit in connection with destruction of weeds and the like. 34 ALR 2d 1210.

7-22-2101. Definitions.

Compiler's Comments

2003 Amendment: Chapter 98 in definition of native plant after "plant" substituted "indigenous" for "endemic". Amendment effective October 1, 2003.

2001 Amendment: Chapter 407 inserted definition of coordinator; deleted definition of supervisor that read: ""Supervisor" means the person employed by the board to conduct the district noxious weed management program and supervisor the other district employees"; and made minor changes in style. Amendment effective July 1, 2001.

1991 Amendment: Inserted definitions of native plant and native plant community; in definition of noxious weeds, near end of (7)(a) after "uses", inserted "or that may harm native plant communities"; and made minor changes in style.

1985 Amendment: Inserted definitions of board, department, person, supervisor, and weed management; in definition of district substituted ""District" means a weed management district organized under 7-22-2102" for ""District" means the area included within the boundaries of an organized weed control and weed seed extermination district"; in (5) substituted definition of noxious weeds (see 1985 Session Law for text) for former definition of noxious weeds that read: ""Noxious weeds" or "weeds" means Canadian thistle (Cirsium arvense (L.) scop.), wild morning glory or bindweed (Convolvulus arvensis L.), whitetop (Lepidium draba L.), leafy spurge (Euphorbia virgata waldst. and kit.), Russian knapweed (Centaurea pieris pallas.), and such other weeds as may be defined and designated as noxious weeds by the board of county commissioners of each county, subject to the approval of the county extension agent or agricultural experiment station at Montana state university"; and deleted definitions that read: "(4) "Seed" or "seeds" means the seed of any noxious weed.

(5) "Supervisors" means the persons appointed by the board of county commissioners to supervise the weed control and weed seed extermination within the county."

Statement of Intent: The statement of intent attached to Ch. 607, L. 1985, provided: "It is the intent of the legislature that the rulemaking authority of the department of agriculture under section 1 [7-22-2101] be employed to designate noxious weeds in a manner consistent with the definition of noxious weeds provided in section 1 [7-22-2101] and consistent with the weed management criteria to be developed under section 6(2)(b) [7-22-2109]."

Administrative Rules

Title 4, chapter 5, subchapter 2, ARM Designation of noxious weeds.

7-22-2102. Weed management districts established.

Compiler's Comments

1985 Amendment: At beginning changed "weed control and weed seed extermination district" to "weed management district", and after "boundaries of the county", inserted "except that a weed management district may include more than one county through agreement of the commissioners of the affected counties".

Attorney General's Opinions

Jurisdictional Limitations: A county weed control district may not directly control weeds outside the boundary of the county in which it exists. 36 A.G. Op. 103 (1976).

Collateral References

3 C.J.S. Agriculture §§84 through 88.

3 Am. Jur. 2d Agriculture §§45, 48.

7-22-2103. District weed board.

Compiler's Comments

1995 Amendment: Chapter 543 in (1), at end, inserted "subject to the provisions of 7-1-201 through 7-1-203"; deleted (2) through (4) that read: "(2) The commissioners shall, at a public meeting, pass a resolution establishing the number of members of the district weed board and the terms of the appointments. The board must consist of at least three members and no more than nine members, and the members of the board must be residents of the district. A majority of the board members must be rural agricultural land owners.

(3) The county extension agent in each county and other interested individuals may be appointed to serve as nonvoting members of that district's weed board.

(4) The board members are public officers"; and made minor changes in style.

1991 Amendment: In (1), after "board", deleted "consisting of three or five members, and:

(a) if a three-member board, two members shall be rural agricultural landowners within the district and one shall be a member-at-large; or

(b) if a five-member board, three members shall be rural agricultural landowners within the district, one member shall be a resident of a city or town within the district, and one shall be a member-at-large"; and inserted (2) concerning establishment of number of members and terms of district weed board.

1989 Amendment: Inserted (4) allowing the district weed board to call upon the County Attorney for legal services if required.

1985 Amendment: In (1) changed "board of county commissioners of each county" to "commissioners"; in (1)(a) and (1)(b) near end changed "teacher of biology or a person with comparable expertise" to "member-at-large"; in (2) after "in each county", deleted "is an ex officio member" and inserted "and other interested individuals may be appointed to serve as nonvoting members"; in (3) substituted "board members" for "supervisors"; and changed "county('s)" to "district('s)" and "county weed board" to "district weed board" throughout section.

Collateral References

3 C.J.S. Agriculture §§84 through 88.

7-22-2109. Powers and duties of board — use of inmates in county jail work program.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 203 inserted (1)(e) concerning inmate labor for weed management; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 407 in (1)(a) near beginning substituted "coordinator" for "supervisor"; in (1)(b) after "implementing an effective" inserted "noxious"; inserted (1)(f) regarding cost-share agreements; inserted (1)(g) regarding agreements with commercial applicators; in (2)(a) and (2)(c) after "noxious weed" inserted "management"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 543 in (1), at beginning, inserted "In addition to any powers or duties established in the resolution creating a district weed board"; and made minor changes in style.

Attorney General's Opinions

Setting of Compensation for Weed Control Board Employees — Approval Required: A weed control board may not set the level of compensation of board employees without the approval of the Board of County Commissioners. 47 A.G. Op. 11 (1998). See also 38 A.G. Op. 35 (1979).

7-22-2110. Administrative hearing — appeals.

Compiler's Comments

2001 Amendment: Chapter 407 in (1) in three places substituted "commissioners" for "board"; deleted former (2) that read: "(2) An order of the board may be appealed to the commissioners within 30 days from the time the order is entered. The commissioners shall hear such appeal within 30 days after the notice of appeal and shall render their order and findings within 7 days after such hearing. Participants may be represented by legal counsel"; and made minor changes in style. Amendment effective July 1, 2001.

7-22-2111. Liability restrictions.

Compiler's Comments

2001 Amendment: Chapter 407 near end substituted "coordinators" for "supervisors"; and made minor changes in style. Amendment effective July 1, 2001.

Termination Provision Repealed: Section 1, Ch. 171, L. 1995, repealed sec. 7, Ch. 516, L. 1987, which terminated this section July 1, 1991, and repealed sec. 8, Ch. 530, L. 1991, which extended the termination date to July 1, 1995.

Effective Date — Applicability: Section 6, Ch. 516, L. 1987, provided: "This act is effective July 1, 1987, and applies to claims accruing after July 1, 1987."

Termination: Section 7, Ch. 516, L. 1987, provided: "This act terminates July 1, 1991."

Collateral References

Tort liability of municipality or other governmental unit in connection with destruction of weeds and the like. 34 ALR 2d 1210.

Tort liability of governmental unit for injury or damage resulting from insecticide and vermin eradication operations. 25 ALR 2d 1057.

7-22-2112. Information on herbicide use.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 171, L. 1995, repealed sec. 7, Ch. 516, L. 1987, which terminated this section July 1, 1991, and repealed sec. 8, Ch. 530, L. 1991, which extended the termination date to July 1, 1995.

Effective Date — Applicability: Section 6, Ch. 516, L. 1987, provided: "This act is effective July 1, 1987, and applies to claims accruing after July 1, 1987."

Termination: Section 7, Ch. 516, L. 1987, provided: "This act terminates July 1, 1991."

7-22-2115. Noxious weeds and seeds declared nuisance.

Collateral References

3 C.J.S. Agriculture §§81, 84 through 88.

3 Am. Jur. 2d Agriculture §§38, 40 through 48.

7-22-2116. Unlawful to permit noxious weeds to propagate — notice required in sale.

Compiler's Comments

2001 Amendment: Chapter 407 inserted (2) regarding notification of existence of noxious weeds; and made minor changes in style. Amendment effective July 1, 2001.

1985 Amendment: Substituted entire section (see 1985 Session Law for text) for former text that read: "(1) It shall be unlawful to willfully permit any noxious weed, as named in this part or designated by the board of county commissioners of the respective county, to go to seed on any lands within the area of any district.

(2) This section shall apply to all persons, partnerships, corporations, or companies owning, occupying, or controlling lands, easements, or rights-of-way, as well as all county, state, and federally owned and controlled highways and state lands and also all drainage and irrigation ditches, spoil banks, borrow pits, and rights-of-way for canals and laterals within the district".

Case Notes

Seller's Failure to Control Weeds Not Breach of Contract: Property buyers claimed breach of contract because of seller's failure to control noxious weeds on adjacent property. The Supreme Court noted the existing statutory remedy for allowing propagation of noxious weeds in holding that the failure to control weeds was not sufficient to forgive payment on a contract by buyers for the purchase of land. Burgess v. Shiplet, 230 M 387, 750 P2d 460, 45 St. Rep. 293 (1988).

Attorney General's Opinions

Assessment of Governments for Weed Control: A weed control district (now weed management district) may not assess a local, state, or federal agency for weed control work. 36 A.G. Op. 103 (1976).

Entering Government Lands: A weed control district (now weed management district) may enter state and local lands or highway lands to control noxious weeds but not federal lands without federal permission unless there is a private lessee on the federal land. 36 A.G. Op. 103 (1976).

Collateral References

Agriculture *key* 8.

3 C.J.S. Agriculture §§81, 84 through 88.

7-22-2117. Violations.

Compiler's Comments

2001 Amendment: Chapter 407 in (1) at end substituted language regarding civil penalty and penalty imposed under 7-22-2124 for "guilty of a misdemeanor, and upon conviction thereof, he shall be fined not to exceed $100 for the first offense and not less than $100 or more than $200 for each subsequent offense"; in (2) after "provisions of this part" deleted "except those collected by a justice's court"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Near beginning of (2), after "part", inserted "except those collected by a justice's court".

1985 Amendment: In (1), near beginning after "interferes with", substituted "the board or its authorized agent" for "the supervisors or their deputies and employees", near middle after "an order", substituted "or notice of the board" for "of a supervisor", and near end, after "exceed $100", inserted "for the first offense and not less than $100 or more than $200 for each subsequent offense".

Collateral References

3 C.J.S. Agriculture §§81, 84 through 88.

7-22-2120. Funding — reporting requirements — emergency exemption.

Compiler's Comments

Effective Date: Section 28, Ch. 407, L. 2001, provided that this section is effective July 1, 2001.

7-22-2121. Weed management program.

Compiler's Comments

1991 Amendment: Inserted (2)(c) concerning pesticide management goals and procedures; and made minor change in style. Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 530, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of agriculture concerning the adoption of rules to identify the type and level of training a weed district supervisor should obtain to properly administer a noxious weed management program. It is the policy of the state of Montana to properly control and manage noxious weeds in order to protect the agricultural economy and natural ecosystems of the state. It is also the policy of the state of Montana to properly manage pesticides in order to ensure public and worker safety and to protect the environment. Weed district supervisors need special training and education in order to design and administer weed management programs that appropriately implement these policies. The legislature recognizes that funding is an important consideration that may constrain the level and type of training a weed district supervisor may obtain at any one time or in any particular year. The legislature directs the department to adopt rules that specify the objectives of weed district supervisor training and that identify the topics and level of education necessary for weed district supervisors to implement effective noxious weed management programs and to ensure that pesticides are properly managed. The legislature further directs the department, in cooperation with the Montana state university [now Montana state university-Bozeman] extension service, to assist in the development of a curriculum and a course of training for district weed supervisors that will fulfill the objectives specified in the department's rules. Within the limitations of available funding, county weed boards should ensure, over a period of several years if necessary, that district weed supervisors obtain proper training as defined in the department's rules."

1985 Amendment: Inserted (1) and (2) relating to a plan and its contents; in (3), at beginning of first sentence changed "The supervisors shall control" to "The board shall provide for the management of", near middle of first sentence, after "on all", changed "lands" to "land or rights-of-way owned or controlled by a county or municipality", in second sentence, near middle after "precautions", changed "to control" to "while managing" and made minor wording changes, in third sentence, near middle after "shall include", changed "mowing" to "cultural"; and inserted (4) relating to special management zones.

Collateral References

3 C.J.S. Agriculture §§84 through 88.

3 Am. Jur. 2d Agriculture §§38, 45.

Products liability: fertilizers, insecticides, pesticides, fungicides, weedkillers, and the like, or articles used in application thereof. 12 ALR 4th 462.

7-22-2123. Procedure in case of noncompliance.

Compiler's Comments

2001 Amendment: Chapter 407 in (2) in first sentence near beginning substituted "coordinator" for "supervisor" and near end substituted "district noxious weed management program" for "district weed control program"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Inserted (3)(e) requiring that notice specify right of the person to request an administrative hearing.

1985 Amendment: Deleted former (1) that read: "The supervisors may employ suitable and competent persons as assistants and employees as may be necessary and provide for their compensation"; in (1), near beginning of first sentence, after "been made", changed "and the supervisors have" to "or the board has", near middle of first sentence, after "present upon", changed "the lands" to "a person's land", after "the law", substituted "that person must be notified by mail or telephone of the complaint and the board may request inspection of the land"

for "they shall forthwith inspect the premises", and inserted second and third sentences concerning inspection of the land and allowing the board or its agent to enter and inspect land if landowner does not cooperate; in (2), near beginning after "are found", changed "the supervisors" to "the board or supervisor", and after "shall", substituted notification for voluntary compliance or notice of noncompliance for "cause written notice to be served on the person permitting the same, directing him to comply with the provisions of this part within a period of time specified in said notice"; and inserted (3) through (5) specifying notice contents, control proposal and performance under proposal, and board consideration of the proposal, respectively.

Attorney General's Opinions

Written Notice to Enter Land: A county weed control district (now weed management district) must serve a written notice, pursuant to this section, prior to entering land for weed control purposes unless it has prior written permission to enter the land from the person owning, occupying, or controlling the land. 36 A.G. Op. 103 (1976).

Collateral References

3 C.J.S. Agriculture §§84 through 88.

7-22-2124. Destruction of weeds by board.

Compiler's Comments

2001 Amendment: Chapter 407 in (1) in second sentence near end increased penalty from 10% to 50% of costs incurred and inserted last two sentences authorizing board to enter into agreement with commercial applicator; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: In (1), in middle of first sentence after "accepted", inserted "or no request for an administrative hearing is made"; and inserted (3) preventing board from instituting control measures, except in an emergency, pending resolution after a request for an administrative hearing and providing for liability of costs.

1985 Amendment: Substituted entire section (see 1985 Session Law for text) for former text that read: "(1) If the notice be not obeyed within the time specified in the notice, the supervisors shall forthwith institute control measures and make report thereof to the county clerk, with a verified, itemized account of their services and expenses in so doing and a description of the lands involved, and shall include in said account the necessary cost and expense of chemicals, man-hours of labor, and equipment employed, at a rate paid, in the immediate vicinity, for labor per day and for equipment used for an 8-hour day.

(2) In effectively controlling such weeds, the supervisors are authorized to take possession and control of any infested tract of land within their district, together with any fences or ditches thereon, and to move any fence or ditch where necessary in order to better conduct the control work. If any fence or ditch be moved, the same shall be replaced upon completion of the control work if requested by the landowner".

Attorney General's Opinions

County Recoupment of Costs of Weed Control — Landowner Agreements — Former Law: Under 7-22-2146 the County Commissioners and weed control supervisors (now District Weed Board) are not required to have an agreement to assist landowners with weed control. Landowners in counties without such agreements are obliged to carry the entire financial burden of the weed program. If 7-22-2147 (now repealed) were to be interpreted to allow recovery by the county of only two-thirds of the costs incurred in destroying weeds on the property of noncomplying landowners, it would be economically advantageous for the landowners to refuse to cooperate in the program and let the county control all weeds instead. Complying landowners would bear the total cost of weed control while recalcitrant landowners would be liable for only two-thirds of the expenses. Therefore, in counties in which the full financial responsibility for a weed control program lies with the landowners, the county may recover the full amount of the cost incurred in noxious weed control if the weed board must institute weed control measures pursuant to 7-22-2124 without the consent of the owner. 39 A.G. Op. 13 (1981).

Collateral References

3 C.J.S. Agriculture §§84 through 88.

3 Am. Jur. 2d Agriculture §§45, 48.

Tort liability of governmental unit for injury or damage resulting from insecticide and vermin eradication operations. 25 ALR 2d 1057.

7-22-2126. Embargo.

Compiler's Comments

1995 Amendment: Chapter 521 inserted (2) requiring the board to establish an embargo program for the movement of forage and allowing embargoes; inserted (3) relating to moving forage that is not in compliance with Title 80, chapter 7, part 9, and to release of the embargo under certain stated conditions; inserted (4) requiring the board to report embargo information to the Department; and inserted (5) relating to compliance with board conditions, condemnation of forage, board implementation of conditions, and payment of board expenses. Amendment effective January 1, 1996.

1985 Amendment: Substituted "The board may establish voluntary embargo programs to reduce the spread of noxious weeds within the district or the introduction of noxious weeds into the district" for "Whenever the supervisors have reason to believe that farm products, including seed, which will cause the spread of noxious weeds are about to be introduced into the county, the supervisors shall declare an embargo against the importation of such farm products and seeds into such county".

Collateral References

3 C.J.S. Agriculture §§84 through 88.

3 Am. Jur. 2d Agriculture §§40, 41.

7-22-2130. Weed district coordinator training.

Compiler's Comments

2001 Amendment: Chapter 407 in first sentence near middle substituted "district coordinator" for "district supervisor". Amendment effective July 1, 2001.

1991 Statement of Intent: The statement of intent attached to Ch. 530, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of agriculture concerning the adoption of rules to identify the type and level of training a weed district supervisor should obtain to properly administer a noxious weed management program. It is the policy of the state of Montana to properly control and manage noxious weeds in order to protect the agricultural economy and natural ecosystems of the state. It is also the policy of the state of Montana to properly manage pesticides in order to ensure public and worker safety and to protect the environment. Weed district supervisors need special training and education in order to design and administer weed management programs that appropriately implement these policies. The legislature recognizes that funding is an important consideration that may constrain the level and type of training a weed district supervisor may obtain at any one time or in any particular year. The legislature directs the department to adopt rules that specify the objectives of weed district supervisor training and that identify the topics and level of education necessary for weed district supervisors to implement effective noxious weed management programs and to ensure that pesticides are properly managed. The legislature further directs the department, in cooperation with the Montana state university [now Montana state university-Bozeman] extension service, to assist in the development of a curriculum and a course of training for district weed supervisors that will fulfill the objectives specified in the department's rules. Within the limitations of available funding, county weed boards should ensure, over a period of several years if necessary, that district weed supervisors obtain proper training as defined in the department's rules."

Effective Date: Section 9, Ch. 530, L. 1991, provided: "[This act] is effective July 1, 1991."

7-22-2141. Noxious weed fund authorized.

Compiler's Comments

1985 Amendment: In (1), near beginning after "commissioners of", changed "any county" to "each county", after "this state", changed "may create" to "shall create", near end changed "noxious weed control and weed seed extermination fund" to "noxious weed management fund", and made minor wording changes.

7-22-2142. Sources of money for noxious weed fund.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 407 in (1) at end inserted "to enable the board to fulfill its duties as specified in 7-22-2109"; in (2)(b) in first sentence near beginning after "levying a tax" substituted "of not less than 1.6 mills" for "not exceeding 2 mills" and after "taxable valuation in the county" inserted language regarding contribution of equivalent amount from another source or, for first-class counties, the greater of an amount from all county sources

or $100,000; deleted former (1)(c) that read: "(c) levying a tax in excess of 2 mills if authorized by a majority of the qualified electors voting in an election held for this purpose pursuant to 7-6-2531 through 7-6-2536"; in (3) after "weed control tax" inserted "or other contribution"; inserted (6) regarding weed control tax within special management zone; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 495 in (1)(c) deleted reference to 7-6-2532 and inserted reference to 15-10-425. Amendment effective October 1, 2001. The amendments by Ch. 407 and Ch. 574 rendered the amendment by Ch. 495 void.

Chapter 574 in (1)(b) at end of first sentence substituted "tax on the value of all taxable property" for "a tax not exceeding 2 mills on the dollar of total taxable valuation"; and deleted former (1)(c) that read: "(c) levying a tax in excess of 2 mills if authorized by a majority of the qualified electors voting in an election held for this purpose pursuant to 7-6-2531 through 7-6-2536". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1)(b) inserted reference to 15-10-420. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1991 Amendment: Near beginning of (1), after "weed fund", inserted language concerning providing sufficient money in the fund to allow board to fulfill its duties; at end of (1)(b) inserted sentence concerning identification on assessment of tax levied as being for noxious weed control; near beginning of (2), before "tax", inserted "noxious weed control"; and made minor changes in style. Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 530, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of agriculture concerning the adoption of rules to identify the type and level of training a weed district supervisor should obtain to properly administer a noxious weed management program. It is the policy of the state of Montana to properly control and manage noxious weeds in order to protect the agricultural economy and natural ecosystems of the state. It is also the policy of the state of Montana to properly manage pesticides in order to ensure public and worker safety and to protect the environment. Weed district supervisors need special training and education in order to design and administer weed management programs that appropriately implement these policies. The legislature recognizes that funding is an important consideration that may constrain the level and type of training a weed district supervisor may obtain at any one time or in any particular year. The legislature directs the department to adopt rules that specify the objectives of weed district supervisor training and that identify the topics and level of education necessary for weed district supervisors to implement effective noxious weed management programs and to ensure that pesticides are properly managed. The legislature further directs the department, in cooperation with the Montana state university [now Montana state university-Bozeman] extension service, to assist in the development of a curriculum and a course of training for district weed supervisors that will fulfill the objectives specified in the department's rules. Within the limitations of available funding, county weed boards should ensure, over a period of several years if necessary, that district weed supervisors obtain proper training as defined in the department's rules."

1985 Amendment: Inserted (1)(c) relating to voted levy; in (2) near middle, after "purpose of", changed "promoting the control of noxious weeds or extermination of weed seed" to "managing noxious weeds"; in (3) near end, after "within", changed "the fiscal year" to "that fiscal year or any subsequent year"; inserted (4) relating to acceptance of other funds; and made minor wording changes throughout section.

Attorney General's Opinions

Setting of Compensation for Weed Control Board Employees — Approval Required: A weed control board may not set the level of compensation of board employees without the approval of the Board of County Commissioners. 47 A.G. Op. 11 (1998). See also 38 A.G. Op. 35 (1979).

Discretionary Power of County Commission to Levy Noxious Weed Tax: This section grants discretionary authority (see 1999 amendment) to the Board of County Commissioners to assess and levy up to 2 mills each fiscal year to fund the noxious weed program. (See 2001 amendment.) 44 A.G. Op. 35 (1992).

Approval of Weed Control District Expenditures — Former Law: Proceeds from work or chemical sales of weed control districts (now weed management districts) must be credited to the noxious weed fund for reuse within the fiscal year, and the county weed control board (now

District Weed Board) may expend money from the fund, provided the warrants issued do not exceed cash on hand in the fund. 29 A.G. Op. 10 (1961).

7-22-2143. Determination of cost of weed control program.

Compiler's Comments

1991 Amendment: At beginning inserted "Based on the board's recommendations". Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 530, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of agriculture concerning the adoption of rules to identify the type and level of training a weed district supervisor should obtain to properly administer a noxious weed management program. It is the policy of the state of Montana to properly control and manage noxious weeds in order to protect the agricultural economy and natural ecosystems of the state. It is also the policy of the state of Montana to properly manage pesticides in order to ensure public and worker safety and to protect the environment. Weed district supervisors need special training and education in order to design and administer weed management programs that appropriately implement these policies. The legislature recognizes that funding is an important consideration that may constrain the level and type of training a weed district supervisor may obtain at any one time or in any particular year. The legislature directs the department to adopt rules that specify the objectives of weed district supervisor training and that identify the topics and level of education necessary for weed district supervisors to implement effective noxious weed management programs and to ensure that pesticides are properly managed. The legislature further directs the department, in cooperation with the Montana state university [now Montana state university-Bozeman] extension service, to assist in the development of a curriculum and a course of training for district weed supervisors that will fulfill the objectives specified in the department's rules. Within the limitations of available funding, county weed boards should ensure, over a period of several years if necessary, that district weed supervisors obtain proper training as defined in the department's rules."

1985 Amendment: Near middle, after "noxious weeds", changed "and of extermination of noxious weed seed in weed districts" to "in the district", and at end changed "supervisors" to "board".

7-22-2144. Payment of cost of weed control program.

Compiler's Comments

1999 Amendment: Chapter 51 in first sentence after "control" inserted "within the district" and at end of third sentence substituted "7-322-2124" for "7-22-2116"; and made minor changes in style. Amendment effective March 15, 1999.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1985 Amendment: In second sentence, near middle after "presentation by the", changed "supervisors" to "board" and near end, after "highway fund", inserted "in compliance with 7-14-2132 and any agreement between the board and department of highways"; and in third sentence, after "collected from the", changed "appropriate holder or owner of interest" to "responsible person".

7-22-2145. Expenditures from noxious weed fund.

Compiler's Comments

1991 Amendment: Near end of (1), after "as is", substituted "recommended" for "deemed best"; and made minor changes in style. Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 530, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of agriculture concerning the adoption of rules to identify the type and level of training a weed district supervisor should obtain to properly administer a noxious weed management program. It is the policy of the state of Montana to properly control and manage noxious weeds in order to protect the agricultural economy and natural ecosystems of the state. It is also the policy of the state of Montana to properly manage pesticides in order to ensure public and worker safety and to protect the environment. Weed district supervisors need special training and education in order to design and administer weed management programs that appropriately implement these policies. The legislature recognizes that funding is an important consideration that may constrain the level and type of training a weed district supervisor may obtain at any one time or in any particular year. The legislature directs the department to adopt rules that specify the

objectives of weed district supervisor training and that identify the topics and level of education necessary for weed district supervisors to implement effective noxious weed management programs and to ensure that pesticides are properly managed. The legislature further directs the department, in cooperation with the Montana state university [now Montana state university-Bozeman] extension service, to assist in the development of a curriculum and a course of training for district weed supervisors that will fulfill the objectives specified in the department's rules. Within the limitations of available funding, county weed boards should ensure, over a period of several years if necessary, that district weed supervisors obtain proper training as defined in the department's rules."

1985 Amendment: In (1), near middle after "best by", changed "said supervisors" to "the board", and near end after "to secure", changed "the control and extermination of noxious weeds and weed seed" to "the control of noxious weeds"; in (2) changed "supervisors" to "board" twice and made minor wording changes.

Attorney General's Opinions

Use of Funds to Control Nonnoxious Weeds — Former Law: A county weed control district (now weed management district) may not use noxious weed funds to control weeds which are not classified as noxious. 36 A.G. Op. 103 (1976).

7-22-2146. Financial assistance to persons responsible for weed control.

Compiler's Comments

2001 Amendment: Chapter 407 in (1) in first sentence after "may establish a cost-share" substituted remainder of sentence and remainder of subsection regarding cost-share program for "programs with any person, specifying costs that may be paid from the noxious weed fund and costs that must be paid by the person. Cost-share programs may be established for special projects and for established management zones"; inserted (2) and (3) regarding cost-share agreement; in (4)(a) in first sentence after "or otherwise, or under any" substituted "cost-share agreement" for "cost-share program"; and made minor changes in style. Amendment effective July 1, 2001.

1985 Amendment: Substituted entire section (see 1985 Session Law for text) for former text that read: "If in the judgment of the commissioners and supervisors it seems advisable, they may agree to assist the landowners in said district with a part of the cost of weed control on their land. If this is to be done, then in cases where the landowner controls the weeds and exterminates the weed seed, he shall present to the supervisors a duly verified claim for one-third of such cost, and when the same has been approved by the supervisors and commissioners, it shall be paid to such landowner out of the noxious weed fund".

7-22-2148. Tax liability for payment of weed control expenses.

Compiler's Comments

1991 Amendment: Near end of (2), after "owner", deleted "which was contiguous to or joined the parcel upon which the work was done at the time the work was done"; and made minor change in style. Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 530, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of agriculture concerning the adoption of rules to identify the type and level of training a weed district supervisor should obtain to properly administer a noxious weed management program. It is the policy of the state of Montana to properly control and manage noxious weeds in order to protect the agricultural economy and natural ecosystems of the state. It is also the policy of the state of Montana to properly manage pesticides in order to ensure public and worker safety and to protect the environment. Weed district supervisors need special training and education in order to design and administer weed management programs that appropriately implement these policies. The legislature recognizes that funding is an important consideration that may constrain the level and type of training a weed district supervisor may obtain at any one time or in any particular year. The legislature directs the department to adopt rules that specify the objectives of weed district supervisor training and that identify the topics and level of education necessary for weed district supervisors to implement effective noxious weed management programs and to ensure that pesticides are properly managed. The legislature further directs the department, in cooperation with the Montana state university [now Montana state university-Bozeman] extension service, to assist in the development of a curriculum and a course of training for district weed supervisors that will fulfill the objectives specified in the department's rules. Within the limitations of available funding, county weed boards should

ensure, over a period of several years if necessary, that district weed supervisors obtain proper training as defined in the department's rules."

1985 Amendment: In (1), in first sentence, near middle after "repaid by the", changed "owner or occupant" to "person billed under 7-22-2124", and after "is repaid", changed "before the succeeding October 15" to "on or before the date due".

Attorney General's Opinions

County Recoupment of Costs of Weed Control — Landowner Agreements — Former Law: Under 7-22-2146 the County Commissioners and weed control supervisors (now District Weed Board) are not required to have an agreement to assist landowners with weed control. Landowners in counties without such agreements are obliged to carry the entire financial burden of the weed program. If 7-22-2147 (now repealed) were to be interpreted to allow recovery by the county of only two-thirds of the costs incurred in destroying weeds on the property of noncomplying landowners, it would be economically advantageous for the landowners to refuse to cooperate in the program and let the county control all weeds instead. Complying landowners would bear the total cost of weed control, while recalcitrant landowners would be liable for only two-thirds of the expenses. Therefore, in counties in which the full financial responsibility for a weed control program lies with the landowners, the county may recover the full amount of the cost incurred in noxious weed control if the weed board must institute weed control measures pursuant to 7-22-2124 without the consent of the owner. 39 A.G. Op. 13 (1981).

7-22-2150. Cooperation with state and federal-aid programs.

Compiler's Comments

2001 Amendment: Chapter 407 at end of first sentence after "that becomes available" inserted "if the district complies with 7-22-2120"; and made minor changes in style. Amendment effective July 1, 2001.

1985 Amendment: In first sentence, at beginning changed "The supervisors are" to "The board is", and in second sentence, near end, changed "supervisors of the county" to "board of the district".

7-22-2151. Cooperative agreements.

Compiler's Comments

2001 Amendment: Chapter 407 in (2) at end of first sentence inserted "by January 1, 2002"; and in (4) at end substituted "a state electronic access system" for "the state bulletin board". Amendment effective July 1, 2001.

1995 Amendments: Chapter 418 in (1) deleted reference to Department of State Lands; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 519 in (1), in last full sentence of introductory clause after "responsibilities for", inserted "integrated" and inserted last clause; inserted (1)(a) through (1)(d) providing what the agreement must include; and inserted (4) requiring submission of a statement of noxious weed actions subject to the agreement and posting of a copy of the statement. Amendment effective July 1, 1995.

Chapter 546 in (1), in first sentence, substituted "department of corrections" for "department of corrections and human services". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendments — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Chapter 512 substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

7-22-2152. Revegetation of rights-of-way and areas that have potential for noxious weed infestation.

Compiler's Comments

2001 Amendment: Chapter 407 in (1) substituted text regarding notification of activities with potential for noxious weed infestation for former text that read: "Any state agency or local government unit approving a mine, major facility, transmission line, solid waste facility,

highway, subdivision, or any other development resulting in significant disturbance of land within a district shall notify the board"; in (2) substituted text regarding construction on easement or right-of-way for former text that read: "Whenever any person or agency disturbs vegetation on an easement or right-of-way within a district by construction of a road, irrigation or drainage ditch, pipeline, transmission line, or other development, the board shall require that the disturbed areas be seeded, planted, or otherwise managed to reestablish a cover of beneficial plants"; in (3)(a) in first sentence near beginning after "The person or agency" substituted "committing the action" for "disturbing the land" and at end inserted "at least 15 days prior to the activity"; and in (3)(b) substituted second through fourth sentences regarding approval of revegetation plan for "Upon approval by the board, the revegetation plan must be signed by the chairman of the board and the person or agency responsible for the disturbance and constitutes a binding agreement between the board and such person or agency." Amendment effective July 1, 2001.

7-22-2153. Voluntary agreements for control of noxious weeds along roads — liability of landowner who objects to weed district control measures — penalties.

Compiler's Comments

2001 Amendment: Chapter 407 in (1) in second sentence at beginning substituted "The coordinator" for "The supervisor". Amendment effective July 1, 2001.

1999 Amendment: Chapter 433 inserted (3) concerning liability of person who does not enter voluntary agreement or provide alternative weed control measures; and made minor changes in style. Subsections (1), (2), and (3)(a) effective April 22, 1999. Subsection (3)(b) effective October 1, 1999.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Part 22
Rodent Control Districts

7-22-2207. Definitions.

Compiler's Comments

1983 Amendment: Throughout definition of rodent substituted "Spermophilus" for "Citellus".

7-22-2212. Notice of hearing.

Compiler's Comments

2001 Amendment: Chapter 354 deleted former (2) that read: "(2) notice is to be posted in at least three public places within the proposed district"; and made minor changes in style. Amendment effective October 1, 2001.

1985 Amendment: In (3) substituted "as provided in 7-1-2121" for "in at least two issues of a newspaper of general circulation in the proposed district, with at least 7 days between publication, and the first publication must be at least 10 days before the hearing date."

7-22-2215. Rodent control board.

Compiler's Comments

1995 Amendment: Chapter 543 at end inserted "subject to the provisions of 7-1-201 through 7-1-203"; and deleted former language that read: "The county extension agent is an ex officio member of the board. Each member of the board must be an elector and reside within the district.

(2) The governing body shall, at a public meeting, pass a resolution establishing the number of members on the board and the terms of the appointments. The board must consist of at least three members and no more than nine members, and the members of the board must be residents of the district.

(3) Each member of the board is entitled to:

(a) a mileage allowance as provided in 2-18-503 for the distance actually and necessarily traveled to perform official duties; and

(b) per diem expenses established by the governing body.

(4) The district weed board appointed under 7-22-2103 may be appointed by the governing body to also serve as the rodent control board, in which case the qualifications, terms, compensation, mileage, and expenses of the rodent control board are the same as those of the district weed board and subsections (1) through (3) do not apply."

1991 Amendment: In (1), after "board", deleted "composed of not less than three or more than five members"; and substituted (2) concerning establishment of number of members and terms of

district rodent control board for former (2) that read: "(2) Board members serve 3-year staggered terms. Of the members first appointed to a board, at least one shall serve a 1-year term and at least one shall serve a 2-year term".

1985 Amendment: In (4) changed "county weed board" to "district weed board" twice.

1983 Amendment: Inserted (1) concerning appointment of the board; inserted (2) regarding staggered terms; and inserted (3) relating to mileage and per diem; in (4), substituted "may be appointed by the governing body to also" for "shall"; and at end of (4), inserted ", in which case the qualifications, terms, compensation, mileage, and expenses of the rodent control board are the same as those of the county weed board and subsections (1) through (3) do not apply".

7-22-2216. Board powers.

Compiler's Comments

1995 Amendment: Chapter 543 in (1), at beginning, inserted "In addition to the powers and duties established in the resolution creating a rodent control board"; and made minor changes in style.

1983 Amendment: Inserted (2) relating to cooperation with Department.

Collateral References

Tort liability of governmental unit for injury or damage resulting from insecticide and vermin eradication operations. 25 ALR 2d 1057.

7-22-2222. Mill levy authorized.

Compiler's Comments

2001 Amendment: Chapter 574 in first sentence after "tax" deleted "not to exceed 2 mills". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 inserted reference to 15-10-420. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-22-2232. Dissolution of district.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) in second sentence substituted "publishing notice as provided in 7-1-2121" for "posting notice in at least three public places in the district and by publishing notice at least once in a newspaper of general circulation in the district"; and made minor changes in style. Amendment effective October 1, 2001.

Part 23
County Control of Insect Pests

Part Collateral References

3 C.J.S. Agriculture §§98 through 103.

7-22-2301. Destruction of insect pests authorized.

Collateral References

3 C.J.S. Agriculture §§98 through 103.

3 Am. Jur. 2d Agriculture §42.

7-22-2306. Financing of insect pest control program.

Compiler's Comments

2001 Amendment: Chapter 574 at end of (2) substituted "levied on all taxable property in the county" for "levied upon all the property in the county and may not exceed 3 mills on each dollar of taxable value". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (2) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Collateral References

Counties *key* 192.

20 C.J.S. Counties §281.

Part 24
Mosquito Control Districts

7-22-2401. Definitions.

Collateral References

Agriculture *key* 1.

3 C.J.S. Agriculture §§98 through 103.

7-22-2402. Mosquito control districts authorized.

Collateral References

3 C.J.S. Agriculture §§98 through 103.

3 Am. Jur. 2d Agriculture §§42, 43.

7-22-2403. Petition to create mosquito control district — hearing required.

Compiler's Comments

1997 Amendment: Chapter 73 in (2), near end of second sentence, substituted "department of public health and human services" for "department of environmental quality"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 418 at end of (2) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

7-22-2406. Notice of hearing on petition to create district.

Compiler's Comments

2001 Amendment: Chapter 354 deleted former (2) that read: "(2) The commissioners shall cause notice to be posted in three public places within the district. Whenever the district is partly in one county and partly in another county, notice must be posted in each county but posting need not be in three places in each county"; in (2) substituted "publish the notice of the hearing" for "also cause notice to be given of the time and place of the hearing and the methods of objection by publication"; and made minor changes in style. Amendment effective October 1, 2001.

1985 Amendment: In (1) at beginning, deleted "If addresses are known", and inserted "as provided in 7-1-2122"; in (3) substituted "as provided in 7-1-2121, in each county" for "in a newspaper within or nearest to the district and", and at end deleted "in a newspaper in each county, if such newspaper exists. The publication must be for two weekly issues"; and deleted former (4) that read: "Posting and first publication shall be at least 10 days before the hearing."

1983 Amendment: In (1), after "owner" inserted "and purchaser under contract for deed".

7-22-2408. Hearing on petition to create district.

Compiler's Comments

2001 Amendment: Chapter 354 in (1) substituted "set forth in this part" for "hereinbefore set forth" and substituted "published or posted" for "published and posted"; and made minor changes in style. Amendment effective October 1, 2001.

7-22-2409. Adjournment of hearing.

Compiler's Comments

1997 Amendment: Chapter 73 in (2)(a) substituted "department of public health and human services" for "department of environmental quality"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 418 near end of (2)(a) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

7-22-2411. District to be governed by appointed mosquito control board.

Compiler's Comments

1995 Amendment: Chapter 543 at end inserted "subject to the provisions of 7-1-201 through 7-1-203"; deleted (2) through (5) that read: "(2) Each member of the mosquito control board shall be an elector within the boundaries of the district.

(3) The commissioners shall, at a public meeting, pass a resolution establishing the number of members of the board and the terms of the appointments. The board must consist of at least three members and no more than nine members, and the members of the board must be residents of the district.

(4) The board is a body corporate and shall act as such, and the members are public officers.

(5) The health officer having jurisdiction in the proposed district, the sanitarian or a member of his staff, and the county extension agent, if the county has any or all such officers, are ex officio members of the board without vote"; and made minor changes in style.

1991 Amendment: At end of (1) deleted "composed of not less than three or more than five members"; and inserted (3) concerning establishment of number of members and terms of district mosquito control board.

Attorney General's Opinions

Setting of Compensation for Mosquito Control Board Employees — Approval Required: A mosquito control board may not set the level of compensation of board employees without the approval of the Board of County Commissioners. 47 A.G. Op. 11 (1998). See also 38 A.G. Op. 35 (1979).

7-22-2415. Powers of mosquito control board.

Compiler's Comments

1995 Amendment: Chapter 543 in introductory clause, at beginning, substituted "In addition to the powers and duties established in the resolution creating a" for "The"; and made minor changes in style.

Attorney General's Opinions

Setting of Compensation for Mosquito Control Board Employees — Approval Required: A mosquito control board may not set the level of compensation of board employees without the approval of the Board of County Commissioners. 47 A.G. Op. 11 (1998). See also 38 A.G. Op. 35 (1979).

Collateral References

Tort liability for injury or damages resulting from insecticide and vermin eradication operations. 25 ALR 2d 1057.

7-22-2418. Relationship of mosquito control districts and boards with department of public health and human services and department of agriculture.

Compiler's Comments

1997 Amendment: Chapter 73 in (1) and (2) substituted "department of public health and human services" for "department of environmental quality". Amendment effective July 1, 1997.

1995 Amendment: Chapter 418 in (1) and (2) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

7-22-2432. Financing of mosquito control district — levy of district taxes — fee on structures.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) near end substituted "tax on the taxable value of all taxable property" for "tax not exceeding 5 mills on the dollar of the total taxable valuation in the district on all property"; and at end of (2) deleted "The schedule of fees is as follows:

(a) up to $20 per single-unit dwelling;
(b) up to $20 per unit in a duplex dwelling;
(c) up to $5 per unit in a multiple-unit dwelling;
(d) up to $75 per commercial establishment;
(e) up to $50 on each irrigated parcel of property that does not contain a dwelling; and

(f) up to $15 on each nonirrigated parcel of property that does not contain a dwelling." Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1991 Amendment: In (1), near beginning after "created", substituted "shall finance the operation of the district by levying" for "shall levy"; inserted (2) concerning County Commissioners, upon approval by majority of voters in district, collecting annual fee from owners of structures benefited by mosquito control services and concerning establishing fee schedule for single-unit, duplex, and multiple-unit dwellings, commercial establishments, and irrigated and nonirrigated parcels of property; inserted (3) prohibiting financing of district by both fee and property tax; inserted (4) concerning collection of fee with general county tax and assessment as lien on property assessed; in (5), after "tax", inserted "and the fees"; and made minor changes in style. Amendment effective July 1, 1991.

7-22-2434. Disposition of fines, bonds, and penalties.

Compiler's Comments

1987 Amendment: In middle, after "part", inserted "except those collected by a justice's court".

7-22-2446. Hearing on petition for dissolution — notice.

Compiler's Comments

2001 Amendment: Chapter 354 at end substituted "and publish a notice as provided in 7-1-2121" for "to be posted in at least three public places within the district, and to be published as provided in 7-1-2121" and deleted former second sentence that read: "Whenever the district is partly in one county and partly in another county, notice must be posted in each county, but posting need not be in three places in each county, and notice must be published in each county"; and made minor changes in style. Amendment effective October 1, 2001.

1985 Amendment: Inserted "as provided in 7-1-2122", substituted "as provided in 7-1-2121" for "at least once in the official newspaper of the county published in the district, the posting and publication to be at least 10 days before the date of hearing", and at end, deleted "the official newspaper of" before "each county".

1983 Amendment: Near middle of first sentence, after "owners" inserted "and purchasers under contracts for deed".

Part 25
County Vertebrate Pest Management

7-22-2501. Definitions.

Compiler's Comments

Coordination Instruction — Department Name Change: Section 10, Ch. 67, L. 1983, provided: "If House Bill No. 85, transferring vertebrate pest management responsibility from the department of livestock to the department of agriculture, is passed and approved, references to the "department of livestock" in this act are amended to read "department of agriculture"." House Bill No. 85 (Ch. 65, L. 1983) was passed and approved March 14, 1983, and the code commissioner has changed a reference in this section accordingly.

7-22-2503. Agreements with department.

Compiler's Comments

Coordination Instruction — Department Name Change: Section 10, Ch. 67, L. 1983, provided: "If House Bill No. 85, transferring vertebrate pest management responsibility from the department of livestock to the department of agriculture, is passed and approved, references to the "department of livestock" in this act are amended to read "department of agriculture"." House Bill No. 85 (Ch. 65, L. 1983) was passed and approved March 14, 1983, and the code commissioner has changed a reference in this section accordingly.

7-22-2512. Financing of vertebrate pest management program — tax.

Compiler's Comments

2001 Amendment: Chapter 574 in (1)(a) near middle substituted "amount to fund vertebrate pest management" for "amount not in excess of $10,000 annually"; and near beginning of (1)(b) after "tax" deleted "not to exceed 2 mills". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1)(b) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Part 41
Municipal Weed Control

Part Collateral References

Tort liability of municipality or other governmental unit in connection with destruction of weeds and the like. 34 ALR 2d 1210.

7-22-4101. Control of nuisance weeds within municipality.

Compiler's Comments

1985 Amendment: In (1)(a), (1)(c), and (1)(d) changed "noxious weeds" to "nuisance weeds"; and inserted (2) providing that a noxious weed may not be declared a nuisance weed under this section.

Law Review Articles

Public Nuisance—A Critical Examination, Spencer, 48 Cambridge L.J. 55 (1989).

Collateral References

Municipal Corporations *key* 605.

62 C.J.S. Municipal Corporations §§279, 281.

56 Am. Jur. 2d Municipal Corporations §466.

Tort liability of municipality or other governmental unit in connection with destruction of weeds and the like. 34 ALR 2d 1210.

CHAPTER 23
DOMESTIC ANIMAL CONTROL AND PROTECTION

Chapter Collateral References

Construction of provisions of statute or ordinance governing occasion, time, or manner of summary destruction of domestic animals by public authorities. 42 ALR 4th 839.

Construction and application of ordinance relating to unrestrained dogs, cats, or other domesticated animals. 1 ALR 4th 994.

Part 1
Local Government Control of Dogs

Part Collateral References

4 Am. Jur. 2d Animals §23.

7-23-101. Dog collar and license tag required.

Case Notes

Authority to License Dogs: Under 7-23-101 and 7-23-4102, the city of Choteau has the authority to license dogs. Choteau v. Joslyn, 208 M 499, 678 P2d 665, 41 St. Rep. 492 (1984).

Collateral References

3B C.J.S. Animals §§12 through 16.

4 Am. Jur. 2d Animals §24.

7-23-102. Seizure and impounding of dogs running at large without tag.

Collateral References

3B C.J.S. Animals §§12 through 16.

4 Am. Jur. 2d Animals §§40 through 45.

Validity of statute or ordinance providing for destruction of dogs. 56 ALR 2d 1024.

7-23-103. Local government cooperation in the operation of pounds.

Collateral References

62 C.J.S. Municipal Corporations §214.

4 Am. Jur. 2d Animals §48.

7-23-104. Violations.

Compiler's Comments

1983 Amendment: Deleted "or part 21" after "this part".

Severability: Section 4, Ch. 508, L. 1983, was a severability clause.

7-23-105. Disposition of fines.

Compiler's Comments

1987 Amendment: Near beginning, after "part 21", inserted "except those collected by a justice's court".

Part 21
County Control of Dogs

Part Collateral References

4 Am. Jur. 2d Animals §20.

7-23-2108. County control of dogs.

Compiler's Comments

1983 Amendment: In (1), near beginning of subsection changed "has power to" to "may"; and inserted (2) relating to violation of ordinance as a misdemeanor.

Severability: Section 4, Ch. 508, L. 1983, was a severability clause.

Law Review Articles

If Spot Bites the Neighbor, Should Dick and Jane Go to Jail?, 39 Syracuse L. Rev. 1445 (1988).

Collateral References

3B C.J.S. Animals §§12 through 16.

4 Am. Jur. 2d Animals §23.

Validity and construction of statute, ordinance, or regulation applying to specific dog breeds, such as "pit bulls" or "bull terriers". 80 ALR 4th 70.

Construction and application of ordinances relating to unrestrained dogs, cats, or other domesticated animals. 1 ALR 4th 994.

7-23-2109. Vicious dog control.

Collateral References

3B C.J.S. Animals §§12 through 20.

4 Am. Jur. 2d Animals §25.

Construction of provisions of statute or ordinance governing occasion, time, or manner of summary destruction of domestic animals by public authorities. 42 ALR 4th 839.

Personal liability of public officer for killing or injuring animal while carrying out statutory duties with respect to it. 2 ALR 3d 822.

Police power as authorizing statute providing for destruction of dogs. 56 ALR 2d 1033.

7-23-2110. Barking dog control.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

Part 41
Municipal Control and Protection of Domestic Animals

Part Collateral References

62 C.J.S. Municipal Corporations §212.

7-23-4101. Control of animals running at large.

Case Notes

Destruction of Dogs — Emergency Measure: At the time of the adoption of an emergency measure authorizing the shooting of dogs roaming at large, several people had been bitten by

rabid dogs in the city. The measure was adopted because months might elapse before rabies contracted by a dog might appear. The dog owner was aware of the emergency measure and was letting his dog roam at large. The dog had chased a small child shortly before it was destroyed. Police officers sought to catch and control the dog before they shot it. The police chief and officers were not liable to the dog owner on the theory that he was deprived of his property without due process. Ruona v. Billings, 136 M 554, 323 P2d 29 (1958).

Law Review Articles

If Spot Bites the Neighbor, Should Dick and Jane Go to Jail?, 39 Syracuse L. Rev. 1445 (1988).

Collateral References

Municipal Corporations *key* 604, 625, 629.
62 C.J.S. Municipal Corporations §214.
4 Am. Jur. 2d Animals §§40 through 45.

Construction of provisions of statute or ordinance governing occasion, time, or manner of summary destruction of domestic animals by public authorities. 42 ALR 4th 839.

Construction and application of ordinances relating to unrestrained dogs, cats, or other domesticated animals. 1 ALR 4th 994.

7-23-4102. Licensing of dogs.

Case Notes

Authority to License Dogs: Under 7-23-101 and 7-23-4102, the city of Choteau has the authority to license dogs. Choteau v. Joslyn, 208 M 499, 678 P2d 665, 41 St. Rep. 492 (1984).

Destruction of Dogs — Emergency Measure: At the time of the adoption of an emergency measure authorizing the shooting of dogs roaming at large, several people had been bitten by rabid dogs in the city. The measure was adopted because months might elapse before rabies contracted by a dog might appear. The dog owner was aware of the emergency measure and was letting his dog roam at large. The dog had chased a small child shortly before it was destroyed. Police officers sought to catch and control the dog before they shot it. The police chief and officers were not liable to the dog owner on the theory that he was deprived of his property without due process. Ruona v. Billings, 136 M 554, 323 P2d 29 (1958).

Collateral References

Animals *key* 4.
3B C.J.S. Animals §12; 62 C.J.S. Municipal Corporations §218.
4 Am. Jur. 2d Animals §24.

7-23-4103. Relation of municipal dog license tags to other laws.

Collateral References

62 C.J.S. Municipal Corporations §218.
4 Am. Jur. 2d Animals §24.

7-23-4104. Cruelty to animals.

Collateral References

Municipal Corporations *key* 604.
3B C.J.S. Animals §§194 through 221; 62 C.J.S. Municipal Corporations §217.
4 Am. Jur. 2d Animals §§27 through 30.
What constitutes statutory offense of cruelty to animals. 82 ALR 2d 794.

Part 42
Required Spaying or Neutering of Cat or Dog

Part Compiler's Comments

Applicability: Section 5, Ch. 426, L. 1997, provided: "[This act] [17-23-4201 through 7-23-4203] applies only if a local government has not enacted an ordinance that conflicts with the provisions of [this act]."

CHAPTER 31
GENERAL EMERGENCY AND PROTECTIVE SERVICES

Part 1
Smoke Abatement

Part Law Review Articles

Three Air Pollution Controls for Montana, Dudis, Jr., 32 Mont. L. Rev. 110 (1971).

Act Locally: Municipal Enforcement of Environmental Law, Lehner, 12 Stan. Envtl. L.J. 50 (1993).

Control of Air Pollution From Mobile Sources Through Inspection and Maintenance Programs, Reitze & Needleman, 30 Harv. J. on Legis. 409 (1993).

The Tools of Prevention: Opportunities for Promoting Pollution Prevention Under Federal Environmental Legislation, Bobertz, 12 Va. Envtl. L.J. 1 (1992).

Part Collateral References

56 Am. Jur. 2d Municipal Corporations §447.

Necessity of showing scienter, knowledge, or intent, in prosecution for violation of air pollution or smoke control statute or ordinance. 46 ALR 3d 758.

Operation of incinerator as nuisance. 41 ALR 3d 1009.

Validity of regulation of smoke and other air pollution. 78 ALR 2d 1305.

7-31-101. Authorization for smoke abatement program.

Collateral References

Counties *key* 21 ½; Municipal Corporations *key* 606.

20 C.J.S. Counties §49; 62 C.J.S. Municipal Corporations §298.

56 Am. Jur. 2d Municipal Corporations §451.

7-31-102. Petition for smoke abatement program.

Collateral References

Counties *key* 113(1); Municipal Corporations *key* 623(4).

20 C.J.S. Counties §§175 through 177; 62 C.J.S. Municipal Corporations §281.

7-31-103. Contract for smoke abatement.

Collateral References

Counties *key* 121, 123; Municipal Corporations *key* 338, 345, 623(1).

20 C.J.S. Counties §§190, 201; 62 C.J.S. Municipal Corporations §281; 63 C.J.S. Municipal Corporations §§1159, 1171, et seq.

Operation of cement plant as nuisance. 82 ALR 3d 1004.

7-31-105. Modification of contract.

Collateral References

Counties *key* 127; Municipal Corporations *key* 354.

20 C.J.S. Counties §198; 63 C.J.S. Municipal Corporations §1183.

7-31-106. Authorization for county to issue bonds — election required.

Compiler's Comments

2001 Amendment: Chapter 29 in (2) after "exceed" substituted "the debt limitation established in 7-7-2203 prior" for "22.5% of the taxable value of the taxable property in the county, inclusive of the existing indebtedness of the county, to be ascertained by the last assessment for state and county taxes previous" and at end after "bonds" deleted "and incurring of the indebtedness". Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1995 Amendment: Chapter 387 in (1)(b), near beginning after "submit", deleted "within 60 days" and inserted second sentence requiring the election to be held in conjunction with a regular or primary election; and made minor changes in style.

1981 Amendment: Substituted "may not exceed 22.5% of the taxable value" for "shall not exceed 5% of the value" near the beginning of (2).

Validation: Section 64, Ch. 614, L. 1981, provided: "Notwithstanding any provisions of this act, any outstanding indebtedness or bond issue on January 1, 1982, of any governmental subdivision is not invalidated because of any changes in the taxable valuation of the subdivision due to removal of automobiles and trucks having a rated capacity of three-quarters of a ton or less from the tax base."

Collateral References

Counties *key* 178; Municipal Corporations *key* 918(1).

20 C.J.S. Counties §§265, 266; 64 C.J.S. Municipal Corporations §1920.

7-31-107. Authorization for municipality to issue bonds — election required.

Compiler's Comments

2001 Amendment: Chapter 29 in (2) after "exceed" substituted "0.9% of the total assessed value of taxable property, determined as provided in 15-8-111" for "16.5% of the taxable value of the taxable property"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1995 Amendment: Chapter 387 in (1)(b), near beginning after "submit", deleted "within 60 days" and inserted second sentence requiring the election to be held in conjunction with a regular or primary election; and made minor changes in style.

1981 Amendment: Substituted "may not exceed 16.5% of the taxable value" for "shall not exceed 3% of the value" near the beginning of (2).

Validation: Section 64, Ch. 614, L. 1981, provided: "Notwithstanding any provisions of this act, any outstanding indebtedness or bond issue on January 1, 1982, of any governmental subdivision is not invalidated because of any changes in the taxable valuation of the subdivision due to removal of automobiles and trucks having a rated capacity of three-quarters of a ton or less from the tax base."

7-31-109. Conduct of election.

Compiler's Comments

1995 Amendment: Chapter 387 in (1), at end, inserted "The election must be held in conjunction with a regular or primary election"; and made minor changes in style.

Collateral References

Counties *key* 178; Elections *key* 97; Municipal Corporations *key* 918(4).

20 C.J.S. Counties §§265, 266; 29 C.J.S. Elections §38; 64 C.J.S. Municipal Corporations §1927.

7-31-112. Details relating to bonds.

Compiler's Comments

1987 Amendment: At beginning of (1)(e) substituted "as provided in 17-5-102" for "at a rate not exceeding the limitations of 17-5-102".

1983 Amendment: Made 1981 amendment permanent. (Amendment was to terminate July 1, 1983—sec. 21, Ch. 500, L. 1981.)

1981 Amendment: Substituted "a rate not exceeding the limitations of 17-5-102" for "the rate of 6% per annum" near the beginning of (1)(e).

Collateral References

Counties *key* 183(2); Municipal Corporations *key* 923 through 926.

20 C.J.S. Counties §268; 64 C.J.S. Municipal Corporations §§1935 through 1941.

7-31-113. Disposition of bonds.

Collateral References

Counties *key* 182; Municipal Corporations *key* 921(1).

20 C.J.S. Counties §275; 64 C.J.S. Municipal Corporations §1930.

7-31-116. Payment of bonds and other obligations.

Collateral References

Counties *key* 192; Municipal Corporations *key* 954.

20 C.J.S. Counties §281; 64 C.J.S. Municipal Corporations §1955.

Part 2
Public Safety Communications Officer

Part Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 58, L. 1991, provided: "A statement of intent is required for this bill because it grants authority to the board of crime control to adopt rules establishing minimum qualifications and minimum certification standards for public safety communications officers. These rules should address the following:

(1) standards of physical, educational, mental, and moral fitness governing the recruitment, selection, appointment, and certification of public safety communications officers;

(2) types of programs acceptable for meeting certification standards;

(3) standards for determining programs to be approved for fulfillment of the certification requirements, such as adequacy of facilities and qualifications of instructors;

(4) number of hours of instruction, if any, required;

(5) contents of examination, if any, required; and

(6) attendance requirements, if any.

It is not the intent of this legislation that the board of crime control be required to establish state-operated training schools for public safety communications officers, although the board may establish courses of study for public safety communications officers at training schools already administered by the state."

Effective Date: Section 6, Ch. 58, L. 1991, provided: "[This act] is effective July 1, 1991."

7-31-202. Qualifications for public safety communications officers.

Administrative Rules

ARM 23.14.510 through 23.14.516 Qualifications for public safety communications officers.

7-31-203. Certification of public safety communications officers — suspension or revocation — penalty — notification requirements.

Compiler's Comments

2001 Amendment: Chapter 88 in (1) near beginning substituted "shall" for "may" and after "person" inserted "unless exempt under subsection (3)"; inserted (2)(b) requiring certification standards to contain requirement for applicant to pass a basic course; inserted (3) creating exemptions for certain persons from requirement to complete basic course; in (4) near beginning after "board" inserted "or who is exempt from certain certification standards pursuant to subsection (3)" and after "probationary term" inserted "and 1 year"; inserted (5) setting out certain grounds creating cause to terminate a person's employment as a public safety communications officer; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 437 inserted (4) providing a penalty for acting as a public safety communications officer if certification has been suspended or revoked.

Administrative Rules

ARM 23.14.510 Minimum qualifications for public safety communications officers.

ARM 23.14.511 Requirements for public safety communications officer basic certificate.

ARM 23.14.512 Requirements for public safety communications officer intermediate certificate.

ARM 23.14.513 Requirements for public safety communications officer advanced certificate.

ARM 23.14.514 Requirements for public safety communications officer supervisory certificate.

ARM 23.14.515 Requirements for public safety communications officer command certificate.

ARM 23.14.516 Requirements for public safety communications officer administrative certificate.

Part 21
General Provisions Affecting Counties

7-31-2101. Authorization to transfer funds for emergency relief.

Collateral References

Counties *key* 162.
20 C.J.S. Counties §235.

Part 41
General Provisions Affecting Municipalities

7-31-4101. Board of health.

Case Notes

Proper Function: Any rule made by a Board of Health having a reasonable and direct relation to securing protection from rabid animals is a proper exercise of the Board's functions. The determination as to the means used to meet a threatening situation is vested in the Board and not the courts. Ruona v. Billings, 136 M 554, 323 P2d 29 (1958).

Attorney General's Opinions

Interlocal Cooperation Agreements: Since 7-31-4101 allows any city to provide for a Board of Health and 50-2-104 creates a County Board of Health in each county and even though 50-2-107 holds that cities other than first- and second-class cities cannot participate in a District Board of Health, 7-11-104 allows a public agency to contract with another public agency to perform an administrative service when both agencies are authorized by law to perform such services. Therefore, it appears as though all cities and counties can enter a contract for the provision of such common services. 35 A.G. Op. 48 (1973).

Collateral References

Health and Environment *key* 3.
39A C.J.S. Health and Environment §§4, 7; 62 C.J.S. Municipal Corporations §133.
56 Am. Jur. 2d Municipal Corporations §439.

7-31-4102. Sales of poisons and opium.

Collateral References

Poisons *key* 2, 3.
62 C.J.S. Municipal Corporations §284; 72 C.J.S. Poisons §2.
56 Am. Jur. 2d Municipal Corporations §487.

7-31-4103. Ditches, drains, and flumes in municipalities.

Case Notes

Statutes Not Applicable: The state statutes empowering cities to adopt ordinances designed to prevent the drowning of children do not apply to commercial irrigation ditches. Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491, 42 St. Rep. 1460 (1985).

Collateral References

Waters and Water Courses *key* 217.
94 C.J.S. Waters §315.
Municipality's liability for damage resulting from obstruction or clogging of drains or sewers. 59 ALR 2d 281.

7-31-4104. Suppression of fraud and immoral publications.

Law Review Articles

Miller, Jenkins, and the Definition of Obscenity, Howard, 36 Mont. L. Rev. 285 (1975).
The Censorship of Moving Pictures: An Open Question, Tidball, 17 Mont. L. Rev. 193 (1956).
When First Amendment Principles and Local Zoning Regulations Collide, Brody, 12 N. Ill. U.L. Rev. 671 (1992).
Constitutional law—zoning and first amendment—ordinance prohibiting operation of an adult theater in a residential community does not violate the first amendment—City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925, 17 Seton Hall L. Rev. 925 (1987).

Collateral References

Municipal Corporations *key* 598, 599; Obscenity *key* 5, 7 through 9.
62 C.J.S. Municipal Corporations §§132, 135; 67 C.J.S. Obscenity §§1 through 6.

56 Am. Jur. 2d Municipal Corporations §441.
Attorneys' fees as recoverable in fraud action. 44 ALR 4th 776.

7-31-4110. Restriction of wildlife.

Compiler's Comments
Saving Clause: Section 7, Ch. 466, L. 2003, was a saving clause.
Effective Date: Section 8, Ch. 466, L. 2003, provided that this section is effective on passage and approval. Approved April 23, 2003.

Part 42
Open Ditches

Part Case Notes
Statutes Not Applicable: The state statutes empowering cities to adopt ordinances designed to prevent the drowning of children do not apply to commercial irrigation ditches. Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491, 42 St. Rep. 1460 (1985).

Part Law Review Articles
Protection From Open Water Ditches, 22 Mont. L. Rev. 126 (1961).

7-31-4201. Findings and purpose.

Collateral References
93 C.J.S. Waters §§129 through 140.

7-31-4202. Interpretation of part.

Collateral References
62 C.J.S. Municipal Corporations §§126, 131 through 133.

7-31-4203. Open ditch declared nuisance.

Case Notes
Statutes Not Applicable: The state statutes empowering cities to adopt ordinances designed to prevent the drowning of children do not apply to commercial irrigation ditches. Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491, 42 St. Rep. 1460 (1985).

Collateral References
62 C.J.S. Municipal Corporations §279.
56 Am. Jur. 2d Municipal Corporations §§440, 446.
Comment note: age and mentality of child as affecting application of attractive nuisance doctrine. 16 ALR 3d 25.

7-31-4204. Investigation and remedial measures related to open ditches.

Collateral References
62 C.J.S. Municipal Corporations §281.

7-31-4205. Procedure to close and fill ditch — notice.

Collateral References
62 C.J.S. Municipal Corporations §281.

7-31-4207. Exemption for commercial irrigation ditches — improvement districts for protection from open ditches.

Case Notes
Statutes Not Applicable: The state statutes empowering cities to adopt ordinances designed to prevent the drowning of children do not apply to commercial irrigation ditches. Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491, 42 St. Rep. 1460 (1985).

CHAPTER 32
LAW ENFORCEMENT

Part 1
Department of Public Safety

Part Compiler's Comments

Severability Clause: Section 6, Ch. 347, L. 1973, was a severability clause.

Part Attorney General's Opinions

Authority of Public Safety Commission to Set Salary of Deputy Sheriff: In a department of public safety created pursuant to this part, the public safety commission may set the salary of a department Deputy Sheriff under 7-32-104 at any level at or above the amount that would be paid to the deputy under 7-4-2508. To the extent that 7-4-2508 and 7-32-104 conflict, the provisions of 7-32-104, which allow the public safety commission to set the salaries of department employees, are the more specific and therefore are controlling. 48 A.G. Op. 20 (2000).

Part Law Review Articles

Municipal Liability Litigation in Police Misconduct Cases From Monroe to Praprotnik and Beyond, Taylor, 19 Cum. L. Rev. 447 (1988-89).

Municipal Liability for Failure to Supply Adequate Police Service and for Criminal Acts Occurring on Its Property, Quinn 36 De Paul L. Rev. 309 (1987).

Part Collateral References

Liability of municipality or other governmental unit for failure to provide police protection from crime. 90 ALR 5th 273.

Liability of municipal corporation or other governmental entity for injury or death caused by action or inaction of off-duty police officer. 36 ALR 5th 1.

Right to compensation for real property damaged by law enforcement personnel in course of apprehending suspect. 23 ALR 5th 834.

7-32-101. Department of public safety authorized.

Attorney General's Opinions

Consolidated Law Enforcement Funding: Third-class cities or towns that have consolidated their police departments with county law enforcement offices may not use the funds received from the State Auditor under 19-10-305 (renumbered 19-19-305) to pay the county for their share of the consolidated law enforcement expense unless those funds are used exclusively for pensions and/or training. 37 A.G. Op. 117 (1978).

Collateral References

62 C.J.S. Municipal Corporations §564.

7-32-102. Director of department of public safety.

Collateral References

62 C.J.S. Municipal Corporations §565.

7-32-103. Structure of department of public safety — duties.

Compiler's Comments

1989 Amendment: In two places in (2) changed "patrolmen" to "patrol officers".

7-32-104. Salaries.

Compiler's Comments

1985 Amendment: Substituted second sentence that read: "The salary of the director may not be less than that specified for the sheriff in 7-4-2503" for "Said salaries in any event shall not be less than those specified in 7-4-2503"; and inserted last sentence relating to employee salaries.

Attorney General's Opinions

Authority of Public Safety Commission to Set Salary of Deputy Sheriff: In a department of public safety created pursuant to Title 7, ch. 32, part 1, the public safety commission may set the salary of a department Deputy Sheriff under this section at any level at or above the amount that would be paid to the deputy under 7-4-2508. To the extent that 7-4-2508 and this section conflict, the provisions of this section, which allow the public safety commission to set the salaries of department employees, are the more specific and therefore are controlling. 48 A.G. Op. 20 (2000).

Collateral References
62 C.J.S. Municipal Corporations §586.

7-32-105. Officers' status for purpose of enforcing and executing court orders.

Compiler's Comments
1989 Amendment: Changed "patrolman" to "patrol officer".

Collateral References
62 C.J.S. Municipal Corporations §§568, 574.

7-32-106. Meaning of terms employee and subordinate employee.

Compiler's Comments
1989 Amendment: Changed "patrolman" to "patrol officer".

Collateral References
62 C.J.S. Municipal Corporations §570.

7-32-107. Hearing required for discharge of subordinate employee.

Attorney General's Opinions
Department of Public Safety Undersheriff Serves at Pleasure of Sheriff — No Due Process Right to Hearing in Cases of Termination From Employment: The statutes dealing with departments of public safety provide due process rights for terminated subordinate employees of the department director. However, an Undersheriff does not fit within any of the categories of employees mentioned in the law, but rather serves at the pleasure of the Sheriff. Therefore, the due process provisions of 7-32-107 through 7-32-110 do not apply upon the termination of an Undersheriff who is appointed to serve in a department of public safety. 48 A.G. Op. 20 (2000).

Law Review Articles
Police Officers Accused of Crime: Prosecutorial and Fifth Amendment Risks Posed by Police-Elicited "Use Immunized" Statements, Bloch, 1992 U. Ill. L. Rev. 625 (1992).

Collateral References
62 C.J.S. Municipal Corporations §§577, 579.

7-32-108. Hearing procedure for employee discharged by an appointed director.

Case Notes
Validity of Acts of De Facto Public Officer: Dismissed police officer contended the Law Enforcement Commission that decided to discharge him was not properly empaneled at the time of his hearing because of technical defects in the manner of appointment of two of its members. With regard to one member, there was no merit to this objection. As to the second, he, at the least, was acting as a de facto officer at the time of the hearing. A de facto officer's acts are valid to the extent they involve the interest of the public and a third person. Wood v. Butorovich, 220 M 484, 716 P2d 608, 43 St. Rep. 546 (1986). See also City/County of Butte-Silver Bow v. Bd. of Personnel Appeals, 225 M 286, 732 P2d 835, 44 St. Rep. 237 (1987).

Attorney General's Opinions
Department of Public Safety Undersheriff Serves at Pleasure of Sheriff — No Due Process Right to Hearing in Cases of Termination From Employment: The statutes dealing with departments of public safety provide due process rights for terminated subordinate employees of the department director. However, an Undersheriff does not fit within any of the categories of employees mentioned in the law, but rather serves at the pleasure of the Sheriff. Therefore, the due process provisions of 7-32-107 through 7-32-110 do not apply upon the termination of an Undersheriff who is appointed to serve in a department of public safety. 48 A.G. Op. 20 (2000).

Collateral References
62 C.J.S. Municipal Corporations §579.

7-32-109. Hearing procedure for employee discharged by elected director.

Case Notes
Validity of Acts of De Facto Public Officer: Dismissed police officer contended the Law Enforcement Commission that decided to discharge him was not properly empaneled at the time of his hearing because of technical defects in the manner of appointment of two of its members. With regard to one member, there was no merit to this objection. As to the second, he, at the least, was acting as a de facto officer at the time of the hearing. A de facto officer's acts are valid to the extent they involve the interest of the public and a third person. Wood v. Butorovich, 220 M 484,

716 P2d 608, 43 St. Rep. 546 (1986). See also City/County of Butte-Silver Bow v. Bd. of Personnel Appeals, 225 M 286, 732 P2d 835, 44 St. Rep. 237 (1987).

Attorney General's Opinions

Department of Public Safety Undersheriff Serves at Pleasure of Sheriff — No Due Process Right to Hearing in Cases of Termination From Employment: The statutes dealing with departments of public safety provide due process rights for terminated subordinate employees of the department director. However, an Undersheriff does not fit within any of the categories of employees mentioned in the law, but rather serves at the pleasure of the Sheriff. Therefore, the due process provisions of 7-32-107 through 7-32-110 do not apply upon the termination of an Undersheriff who is appointed to serve in a department of public safety. 48 A.G. Op. 20 (2000).

Collateral References

62 C.J.S. Municipal Corporations §579.

7-32-110. Reinstatement of discharged employee who prevails in district court.

Attorney General's Opinions

Department of Public Safety Undersheriff Serves at Pleasure of Sheriff — No Due Process Right to Hearing in Cases of Termination From Employment: The statutes dealing with departments of public safety provide due process rights for terminated subordinate employees of the department director. However, an Undersheriff does not fit within any of the categories of employees mentioned in the law, but rather serves at the pleasure of the Sheriff. Therefore, the due process provisions of 7-32-107 through 7-32-110 do not apply upon the termination of an Undersheriff who is appointed to serve in a department of public safety. 48 A.G. Op. 20 (2000).

Collateral References

62 C.J.S. Municipal Corporations §§580, 581.

7-32-121. Public safety commission.

Attorney General's Opinions

Consolidated Law Enforcement Funding: Third-class cities or towns that have consolidated their police departments with county law enforcement offices may not use the funds received from the State Auditor under 19-10-305 (renumbered 19-19-305) to pay the county for their share of the consolidated law enforcement expense unless those funds are used exclusively for pensions and/or training. 37 A.G. Op. 117 (1978).

Collateral References

62 C.J.S. Municipal Corporations §564.

7-32-129. Compensation and expenses.

Collateral References

62 C.J.S. Municipal Corporations §586.

Part 2
Reserve and Auxiliary Officers

7-32-201. Definitions.

Compiler's Comments

1999 Amendment: Chapter 82 inserted definition of special services officer. Amendment effective October 1, 1999.

1991 Amendment: In definitions of law enforcement officer and reserve officer substituted "46-1-202" for "46-1-201(8)".

Case Notes

Authority of Auxiliary Officer: The District Court did not err when it convicted of assault and unlawful restraint a person who contended his conduct was authorized by statute since he was a member of the county Sheriff's posse and was making an arrest. The court held membership in the posse merely made him an auxiliary officer. He had only the arrest authority of a private person. No offense was committed in his presence, no felony was committed, and he was not a merchant. He had neither authority to arrest the person nor reason to believe he did. St. v. Lemmon, 214 M 121, 692 P2d 455, 41 St. Rep. 2359 (1984).

Attorney General's Opinions

Nepotism Statute Applicable to Reserve Officers: A reserve officer holds a position of public trust within the meaning of 2-2-302; therefore, the appointment of a reserve Deputy Sheriff is

subject to the nepotism law prohibiting appointment of a relative within the fourth degree of consanguinity or second degree of affinity. 42 A.G. Op. 91 (1988).

Compensation of Reserve Deputies From Public Funds: In accordance with federal rules outlined in 29 C.F.R. 553.100 through 553.106 regarding compensation of volunteers, county public funds may be used to reimburse a reserve deputy sheriff's expenses, provide reasonable benefits, and pay nominal compensation; however, the total amount of these provisions may not be given as a form of compensation tied to productivity. 42 A.G. Op. 68 (1988).

Private Patrol Operator License Requirements Inapplicable to Reserve Officers: The provision of 37-60-105 that exempts officers engaged in the performance of their official duties from the licensing requirements of the private investigators' and private patrol operators' licensing law applies to reserve officers as defined in 7-32-201, regardless of the source of any income they may receive when they are serving on the orders and at the direction of the chief law enforcement administrator of the local government. 38 A.G. Op. 58 (1979).

7-32-202. Prohibition on participation in certain pension and retirement systems.

Collateral References

62 C.J.S. Municipal Corporations §588.

7-32-203. Provision of workers' compensation coverage.

Compiler's Comments

1999 Amendment: Chapter 82 in first sentence of (1) after "reserve officers" inserted "or special services officers". Amendment effective October 1, 1999.

1987 Amendment: In (1), at beginning of second sentence, deleted "Coverage shall be provided through the state compensation insurance fund, and" and in two places, in second sentence, substituted "insurer" for "state fund".

Attorney General's Opinions

Search and Rescue Members Auxiliary Officers — Workers' Compensation Required: Members of a recognized search and rescue unit are auxiliary officers and must be provided full workers' compensation coverage when engaged in a search, training, or testing operation called and supervised by the Sheriff. 42 A.G. Op. 97 (1988).

7-32-214. Basic training program required.

Attorney General's Opinions

Private Patrol Operator License Requirements Inapplicable to Reserve Officers: The provision of 37-60-105 that exempts officers engaged in the performance of their official duties from the licensing requirements of the private investigators' and private patrol operators' licensing law applies to reserve officers as defined in 7-32-201, regardless of the source of any income they may receive when they are serving on the orders and at the direction of the chief law enforcement administrator of the local government. 38 A.G. Op. 58 (1979).

Collateral References

Liability of supervisory officials and governmental entities for having failed to adequately train, supervise, or control individual peace officers who violate plaintiff's civil rights under 42 USCS §1983. 70 ALR Fed. 17.

7-32-216. Limitations on activities of reserve officers.

Attorney General's Opinions

Mayor, Not Chief of Police, as Chief Law Enforcement Administrator in Commission-Executive Form of Government: In a commission-executive form of local government, the Mayor, not the Chief of Police, is the chief law enforcement administrator. To bestow the title of chief law enforcement administrator upon the Chief of Police would require the Chief of Police to perform administrative functions that the officer is not otherwise authorized to do. 48 A.G. Op. 4 (1999).

Private Patrol Operator License Requirements Inapplicable to Reserve Officers: The provision of 37-60-105 that exempts officers engaged in the performance of their official duties from the licensing requirements of the private investigators' and private patrol operators' licensing law applies to reserve officers as defined in 7-32-201, regardless of the source of any income they may receive when they are serving on the orders and at the direction of the chief law enforcement administrator of the local government. 38 A.G. Op. 58 (1979).

7-32-217. Restrictions on carrying weapons.

Attorney General's Opinions

Mayor, Not Chief of Police, as Chief Law Enforcement Administrator in Commission-Executive Form of Government: In a commission-executive form of local government, the Mayor, not the Chief of Police, is the chief law enforcement administrator. To bestow the title of chief law enforcement administrator upon the Chief of Police would require the Chief of Police to perform administrative functions that the officer is not otherwise authorized to do. 48 A.G. Op. 4 (1999).

7-32-218. Status of reserve officer upon activation.

Attorney General's Opinions

Mayor, Not Chief of Police, as Chief Law Enforcement Administrator in Commission-Executive Form of Government: In a commission-executive form of local government, the Mayor, not the Chief of Police, is the chief law enforcement administrator. To bestow the title of chief law enforcement administrator upon the Chief of Police would require the Chief of Police to perform administrative functions that the officer is not otherwise authorized to do. 48 A.G. Op. 4 (1999).

Private Patrol Operator License Requirements Inapplicable to Reserve Officers: The provision of 37-60-105 that exempts officers engaged in the performance of their official duties from the licensing requirements of the private investigators' and private patrol operators' licensing law applies to reserve officers as defined in 7-32-201, regardless of the source of any income they may receive when they are serving on the orders and at the direction of the chief law enforcement administrator of the local government. 38 A.G. Op. 58 (1979).

7-32-219. Reserve force coordinator.

Attorney General's Opinions

Mayor, Not Chief of Police, as Chief Law Enforcement Administrator in Commission-Executive Form of Government: In a commission-executive form of local government, the Mayor, not the Chief of Police, is the chief law enforcement administrator. To bestow the title of chief law enforcement administrator upon the Chief of Police would require the Chief of Police to perform administrative functions that the officer is not otherwise authorized to do. 48 A.G. Op. 4 (1999).

7-32-221. Termination of reserve officers.

Attorney General's Opinions

Mayor, Not Chief of Police, as Chief Law Enforcement Administrator in Commission-Executive Form of Government: In a commission-executive form of local government, the Mayor, not the Chief of Police, is the chief law enforcement administrator. To bestow the title of chief law enforcement administrator upon the Chief of Police would require the Chief of Police to perform administrative functions that the officer is not otherwise authorized to do. 48 A.G. Op. 4 (1999).

7-32-222. Reserve officer change in residency.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

7-32-231. Auxiliary officers authorized.

Attorney General's Opinions

Mayor, Not Chief of Police, as Chief Law Enforcement Administrator in Commission-Executive Form of Government: In a commission-executive form of local government, the Mayor, not the Chief of Police, is the chief law enforcement administrator. To bestow the title of chief law enforcement administrator upon the Chief of Police would require the Chief of Police to perform administrative functions that the officer is not otherwise authorized to do. 48 A.G. Op. 4 (1999).

7-32-232. Role of auxiliary officers.

Case Notes

Authority of Auxiliary Officer: The District Court did not err when it convicted of assault and unlawful restraint a person who contended his conduct was authorized by statute since he was a member of the county Sheriff's posse and was making an arrest. The court held membership in the posse merely made him an auxiliary officer. He had only the arrest authority of a private

person. No offense was committed in his presence, no felony was committed, and he was not a merchant. He had neither authority to arrest the person nor reason to believe he did. St. v. Lemmon, 214 M 121, 692 P2d 455, 41 St. Rep. 2359 (1984).

7-32-233. Limitation on arrest authority of auxiliary officer.

Compiler's Comments

1991 Amendment: At end deleted "and 46-6-503".

Case Notes

Authority of Auxiliary Officer: The District Court did not err when it convicted of assault and unlawful restraint a person who contended his conduct was authorized by statute since he was a member of the county Sheriff's posse and was making an arrest. The court held membership in the posse merely made him an auxiliary officer. He had only the arrest authority of a private person. No offense was committed in his presence, no felony was committed, and he was not a merchant. He had neither authority to arrest the person nor reason to believe he did. St. v. Lemmon, 214 M 121, 692 P2d 455, 41 St. Rep. 2359 (1984).

7-32-234. Exceptions.

Compiler's Comments

1999 Amendment: Chapter 82 near beginning inserted reference to special services officers. Amendment effective October 1, 1999.

7-32-235. Search and rescue units authorized — under control of county sheriff — optional funding.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 495 in (3) in middle of first sentence after "1 mill on" substituted "the" for "each dollar of" and at end of second sentence substituted "as provided in 15-10-425" for "in conjunction with a regular or primary election". Amendment effective October 1, 2001.

Chapter 574 in (3) at beginning of first sentence inserted "Subject to 15-10-420" and near middle substituted "tax on the taxable value" for "tax of not more than 1 mill on each dollar of taxable value" and at end of second sentence substituted "held as provided in 15-10-425" for "held in conjunction with a regular or primary election"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 387 in (3), at end, inserted "The election must be held in conjunction with a regular or primary election"; and made minor changes in style.

1991 Amendment: In (2), after "sheriff", inserted "or his designee" and at end inserted "and whose span of control would be considered within reasonable limits".

1985 Amendment: Inserted (1) authorizing search and rescue units; and inserted (3) authorizing a voted property tax levy.

Attorney General's Opinions

Control of County Search and Rescue Units by Unit Officers — Control of Finances: While search and rescue units recognized and operated by a county function under the County Sheriff's operational control whenever called into service, all other aspects of the units remain private, volunteer organizations under the control of unit officers. Therefore, a unit that receives tax money for its support may maintain private bank accounts to distribute funds accumulated from nontax sources. A County Sheriff does not control the finances of the unit. 44 A.G. Op. 10 (1991).

Search and Rescue Members Auxiliary Officers — Workers' Compensation Required: Members of a recognized search and rescue unit are auxiliary officers and must be provided full workers' compensation coverage when engaged in a search, training, or testing operation called and supervised by the Sheriff. 42 A.G. Op. 97 (1988).

7-32-239. Special services officers — authorization — role.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

Part 3
Qualifications of Law Enforcement Officers

7-32-301. Residency requirements.

Case Notes

Undercover Investigators — No Need to Meet Requirement to Be Deputy: Carrier worked as an undercover drug investigator in Billings for Yellowstone County. Carrier was a Deputy Sheriff even though he may not have met all the technical statutory qualifications. To require all law enforcement officials to be fully clothed with all statutory requirements in all instances would seriously jeopardize the success of law enforcement in circumstances such as those presented in this case. St. v. Bassett, 189 M 28, 614 P2d 1054, 37 St. Rep. 1300 (1980).

City Policemen: A city of the third class was not bound by any of the provisions of this section (which refers only to special police) in the appointment of a regular policeman and was not prohibited from appointing a policeman who had not been a resident of the city for 6 months. McBroom v. Polson, 137 M 33, 349 P2d 1023 (1960).

Law Review Articles

Toward New Images of Policing: Herman Goldstein's Problem-Oriented Policing, Kelling, 17 Law & Soc. Inquiry 539 (1992).

Collateral References

Municipal Corporations *key* 183(1 ¼), 184(2); Sheriffs and Constables *key* 22.

62 C.J.S. Municipal Corporations §§566, 571; 80 C.J.S. Sheriffs and Constables §29.

70 Am. Jur. 2d Sheriffs, Police, and Constables §10.

Validity, construction, and application of enactments relating to requirement of residency within or near specified governmental unit as condition of continued employment for policemen or firemen. 4 ALR 4th 380.

7-32-303. Peace officer employment, education, and certification standards — suspension or revocation — penalty.

Compiler's Comments

1993 Amendment: Chapter 437 inserted (8) providing a penalty for acting as a peace officer, detention officer, or detention center administrator if certification has been suspended or revoked; and made minor changes in style.

1991 Amendment: In (1) inserted reference to park ranger. Amendment effective April 26, 1991.

1989 Amendment: In (1) changed "patrolman" to "patrol officer".

1985 Amendment: In (5)(b) inserted last sentence relating to last date of employment and training; and in (5)(c), near beginning inserted "under the provisions of subsection (5)(b) or a peace officer", substituted "60 months" for "36 months", and near middle before "initial employment", inserted "present employment or".

1983 Amendment: Substituted entire section (see 1983 Session Law for text) for "No sheriff of a county, mayor of a city, or other person authorized by law to appoint special deputies, marshals, or policemen in this state to preserve the public peace and prevent or quell public disturbance shall hereafter appoint as such special deputy, marshal, or policeman any person who does not meet the minimum qualifying standards for employment promulgated by the board of crime control."

Administrative Rules

Title 23, chapter 14, subchapter 4, ARM Peace officers standards and training.

ARM 23.14.525 through 23.14.531 Standards and certification pertaining to detention officers.

ARM 23.14.572 Minimum qualifications for commercial vehicle inspectors.

ARM 23.14.573 Requirements for commercial vehicle inspector basic certificate.

Attorney General's Opinions

Only One Basic Training Extension Allowed: This section authorizes only one 180-day extension of the requirement that an appropriate peace officer basic training course, certified by the Board of Crime Control, be attended and successfully completed by every peace officer within 1 year of the officer's initial appointment. 48 A.G. Op. 22 (2000).

7-32-304. Exception for organizing posse.

Collateral References

80 C.J.S. Sheriffs and Constables §34.

70 Am. Jur. 2d Sheriffs, Police, and Constables §60.

Part 21
Sheriff's Department

Part Administrative Rules

Title 23, chapter 14, subchapter 4, ARM Peace officers standards and training.

Title 23, chapter 14, subchapter 5, ARM Nonsworn officer training.

Title 23, chapter 14, subchapter 8, ARM Revocation/suspension of peace officer certification.

Part Collateral References

Liability of municipality or other governmental unit for failure to provide police protection from crime. 90 ALR 5th 273.

Construction and effect of constitutional or statutory provision disqualifying one for public office because of previous tenure of office. 59 ALR 2d 716.

7-32-2101. Vacancy in office of sheriff.

Collateral References

Sheriffs and Constables *key* 5.

80 C.J.S. Sheriffs and Constables §8, et seq.

70 Am. Jur. 2d Sheriffs, Police, and Constables §24.

7-32-2102. Undersheriff to be appointed — return to other duties.

Compiler's Comments

1985 Amendments: Chapter 220 in (1) near middle of first sentence substituted "counties of the seventh class" for "counties of the seventh and eighth classes".

Chapter 375 in (1) at beginning of first sentence, substituted "as soon as possible" for "as soon as may be"; and inserted (2) relating to undersheriff resuming position as deputy.

Case Notes

Distinction Between Undersheriff and Deputy Sheriff: An undersheriff is not equivalent to a Deputy Sheriff for the purposes of establishing tenure or termination only upon written notice and for cause. The clear unambiguous statement in 7-32-2102 that the Sheriff must appoint someone "undersheriff to hold during the pleasure of the sheriff" is not repealed by the grant of tenure to Deputy Sheriffs in 7-32-2107. Holly v. Preuss, 172 M 422, 564 P2d 1303 (1977).

Attorney General's Opinions

Undersheriff Required: Each County Sheriff, except those in counties of the seventh class, must appoint an Undersheriff. No other Deputy Sheriffs are required by law. 45 A.G. Op. 9 (1993).

Collateral References

Sheriffs and Constables *key* 15.

80 C.J.S. Sheriffs and Constables §§2, 22.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§7, 9, 50.

Liability of public officer or his bond for the defaults and misfeasances of his clerks, assistants, or deputies. 71 ALR 2d 1140; 116 ALR 1064; 102 ALR 174.

Compensation of additional deputies. 26 ALR 1309.

7-32-2104. Qualifications of deputy sheriff.

Case Notes

Salary of Deputy Sheriff: Plaintiff was not entitled to the salary of a Deputy Sheriff when she did not perform duties required of a Deputy Sheriff. Bynum v. Howard, 34 St. Rep. 1285 (D.C. Mont. 1977) (apparently not reported in Federal Supplement).

Collateral References

80 C.J.S. Sheriffs and Constables §25.

70 Am. Jur. 2d Sheriffs, Police, and Constables §10.

Validity, construction, and application of regulations regarding outside employment of governmental employees or officers. 62 ALR 5th 671.

7-32-2105. Probationary period for deputy sheriff.

Case Notes

Deputy Sheriff — Agent of Sheriff: A Deputy Sheriff is not the Sheriff but merely his substitute. He can only act in the name of the Sheriff and can perform no independent action of office. He is the agent of the Sheriff and acts in his name and by his authority. He holds no term of office, his authority to act as substitute being at the pleasure of the Sheriff. State ex rel. Rusch v. Bd. of Comm'rs, 121 M 162, 191 P2d 670 (1948).

7-32-2106. Attendance at Montana law enforcement academy required for deputy sheriffs.

Law Review Articles

Law Enforcement Academy, 20 Mont. L. Rev. 145 (1959).

Liability of supervisory officials and governmental entities for having failed to adequately train, supervise, or control individual peace officers who violate plaintiff's civil rights under 42 USCS §1983. 70 ALR Fed. 17.

7-32-2107. Tenure for deputy sheriffs — grounds for termination of employment.

Case Notes

Acquitted Deputy Subject to Dismissal for Gross Inefficiency: A deputy was dismissed and indicted for beating a prisoner. He was acquitted of the felony charge and sought reinstatement. At the reinstatement trial, the deputy moved for a summary judgment, arguing that the only reason he had been fired was the criminal charge. The Supreme Court affirmed the lower court's denial of the motion, ruling that the deputy's actions could also be construed by the jury to constitute gross inefficiency, which is also grounds for dismissal. Smith v. Roosevelt County, 242 M 27, 788 P2d 895, 47 St. Rep. 506 (1990), distinguished in McKay v. Bd. of Labor Appeals, 1999 MT 329, 297 M 357, 990 P2d 1251, 56 St. Rep. 1313 (1999).

Distinction Between Undersheriff and Deputy Sheriff: An undersheriff is not equivalent to a Deputy Sheriff for the purposes of establishing tenure or termination only upon written notice and for cause. The clear unambiguous statement in 7-32-2102 that the Sheriff must appoint someone "undersheriff to hold during the pleasure of the sheriff" is not repealed by the grant of tenure to Deputy Sheriffs in 7-32-2107. Holly v. Preuss, 172 M 422, 564 P2d 1303 (1977).

What Constitutes "Willful Disobedience": The refusal of a Deputy Sheriff to obey a written order to turn over criminal files to another officer is "willful" where the Deputy had a willingness to retain those files, even though no malicious motive may have been behind such action. Erickson v. Fisher, 170 M 491, 554 P2d 1336, 33 St. Rep. 947 (1976).

Collateral References

80 C.J.S. Sheriffs and Constables §26.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§20 through 22, 28, 37.

Refusal to submit to polygraph examination as ground for discharge or suspension of public employees or officers. 15 ALR 4th 1207.

Sexual misconduct or irregularity as amounting to "conduct unbecoming an officer," justifying officer's demotion or removal or suspension from duty. 9 ALR 4th 614.

7-32-2108. Written notice of termination of employment required.

Collateral References

80 C.J.S. Sheriffs and Constables §26.

70 Am. Jur. 2d Sheriffs, Police, and Constables §38.

7-32-2109. Right to hearing on termination of deputy sheriff's employment.

Compiler's Comments

1993 Amendment: Chapter 468 in (1) substituted "has a right of appeal" for "may, within 30 days from the date of the termination of his employment, make application"; at end of (1)(a) deleted "for a hearing before the court, with or without jury, on the charges resulting in the deputy's termination of employment or discharge"; inserted (1)(b) concerning grievance procedure and (2) concerning appeal to District Court; and made minor changes in style.

Collateral References

80 C.J.S. Sheriffs and Constables §26.

70 Am. Jur. 2d Sheriffs, Police, and Constables §38.

7-32-2110. Reinstatement of deputy sheriff.

Compiler's Comments

1993 Amendment: Chapter 468 in first sentence substituted "a termination is reversed or modified, the deputy must" for "a deputy prevails at the hearing provided for in 7-32-2109, he shall be entitled to"; and made minor changes in style.

Collateral References

70 Am. Jur. 2d Sheriffs, Police, and Constables §25.

7-32-2111. Hours of work for deputy sheriff of county of first or second class.

Attorney General's Opinions

Applicability of State Law Other Than Montana Minimum Wage and Maximum Hours Law to Workers Covered by Fair Labor Standards Act: The federal Fair Labor Standards Act of 1938 requires provisions of state law other than the Montana minimum wage and maximum hours law (Title 39, ch. 3, part 4), which set shorter workweeks for specified groups of employees, to be given effect. 41 A.G. Op. 58 (1986).

Four-Day Workweek: Local law enforcement agencies may, with the consent of affected employees, schedule a 40-hour workweek consisting of 4 consecutive 10-hour days. 38 A.G. Op. 83 (1980).

7-32-2112. Exception for organizing posse.

Collateral References

80 C.J.S. Sheriffs and Constables §34.

70 Am. Jur. 2d Sheriffs, Police, and Constables §60.

7-32-2121. Duties of sheriff.

Compiler's Comments

1989 Amendment: In (7), in three places, substituted "detention center" for "county jail" or "jail", substituted "inmates" for "prisoners", and at end inserted "or by another local government".

1985 Amendment: In (7) after "therein", inserted "unless the jail is operated by a private party under an agreement entered into under 7-32-2201 or by a jail administrator".

1981 Amendment: Inserted (11) relating to search and rescue units.

Case Notes

Service of Process as Exercise of Discretion in Charge of Threat in Official Matters: Deputies attempted to serve civil process on Keating at his home. Keating threatened the officers and was convicted of threats in official matters under 45-7-102. On appeal, Keating contended that service of process was not a discretionary function that could serve as the basis of a charge of threats in official matters. The Supreme Court noted that the statutory definition of threats in official matters speaks to a threat made for the purpose of influencing an exercise of discretion by a public servant but does not speak to a discretionary function. The fact that service of process is a statutory duty under this section, rather than a discretionary function, does not relate to the issue of whether service of process involves an exercise of discretion under 45-7-102. Under Rule 4D, M.R.Civ.P. (Title 25, ch. 20), personal service of process can be accomplished wherever and whenever the person to be served can be found. The Sheriff's Department uses a variety of discretionary methods of serving process. Thus, service of process clearly involves the power of choice among several courses of action, constituting a sufficient exercise of discretion to form a basis for charges of threats in official matters. St. v. Keating, 285 M 463, 949 P2d 251, 54 St. Rep. 1250 (1997).

Liability of Sheriff: This section is merely declaratory of the common law, and the Sheriff is not liable in damages for damage caused by mob violence. Annala v. McLeod, 122 M 498, 206 P2d 811 (1949).

Authority Limited to State: A Sheriff is without authority, as such, beyond the confines of the state. The ordinary discharge of his duties does not authorize him to leave the state except where he is designated the agent of the state in cases of extradition. Brannin v. Sweet Grass County, 88 M 412, 293 P 970 (1930).

Nonfeasance — Warrants Removal: The failure of a Sheriff to arrest a person who commits a crime in his presence constitutes nonfeasance in office and warrants his removal as Sheriff. State ex rel. Beazley v. District Court, 75 M 116, 241 P 1075 (1925).

Breaches of the Peace: The necessity of the Sheriff in assembling his deputies, police, and employees of the defendant as a posse comitatus is not in question. Presumably the Sheriff was

acting within his authority, and he was the one to judge whether he needed help to preserve the peace. It was his duty to prevent and suppress breaches of the peace, riots, and insurrections and to command the aid of as many male inhabitants of his county as he thought necessary to execute that duty. Upon such an occasion the Sheriff is the commander of all he summons to his aid, and all under his command are in duty bound to obey his lawful orders. McCarthy v. Anaconda Copper Min. Co., 70 M 309, 225 P 391 (1924).

Failure to Suppress Riot: On June 13, 1914, large numbers of people, many bearing arms, unlawfully and riotously assembled on the streets of Butte. The Miners' Union Hall was wrecked, the safe was dynamited, one man was killed, and two were wounded. The Sheriff was charged with failure to act and removed from office. The court held that when a riot exists to the knowledge of the Sheriff, it becomes his duty to suppress it. He must command the rioters to disperse and arrest them if they do not disperse. For this purpose he may command the aid of all persons present or within the county. The duty imposed is absolute, and evidence that the riot occurred with the knowledge of the Sheriff and that it continued for 8 hours without action on his part was sufficient to warrant his removal from office. St. v. Driscoll, 49 M 558, 144 P 153 (1914).

Guarding Railroad Strikers: A Sheriff employed a number of men, sworn in as Deputy Sheriffs, to guard railroad strikers, after having assured the company that he was able to enforce the peace without such aid. The company had agreed to pay for such services, and the company was liable for such payment, the statutory provision empowering the Sheriff to call to his aid such persons as may be necessary to suppress unlawful assemblies and the provision prohibiting a Sheriff from demanding for official services any greater fees than are allowed by law notwithstanding. Sullivan v. Utah & N. Ry., 11 M 236, 28 P 307 (1891).

Attorney General's Opinions

Sheriff Authorized to Accept Compensation From Federal Agency for Performance of Services Outside Official Duties: A Sheriff may receive compensation from a federal agency under the terms of a cooperative law enforcement agreement without violating any Montana statutory or constitutional provision, so long as the services rendered by the Sheriff fall outside the scope of the Sheriff's official duties. 49 A.G. Op. 12 (2001).

Duty of County Sheriff to Enforce Law Throughout County: Although it is often customary for a County Sheriff to leave local policing to local law enforcement officers, the Sheriff is a county officer whose authority extends over the entire county, including all municipalities and townships within the county. If local law enforcement is lacking, the Sheriff must undertake that enforcement. 45 A.G. Op. 9 (1993).

County Power to Contract With Humane Society: Counties which have enacted dog licensing requirements may contract with local humane societies for the impoundment and disposition of unlicensed dogs. In addition, counties may contract with local humane societies for kenneling and disposition of animals incidental to the Sheriff's performance of his duties as humane officer. 37 A.G. Op. 105 (1978).

Collateral References

Sheriffs and Constables *key* 77, 86.

80 C.J.S. Sheriffs and Constables §§35 through 49.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§46, 48, 49, 61.

17 Am. Jur. POF2d Sheriffs' Negligent Failure to Attach Property, pp. 715 through 754.

Liability of municipal corporation for shooting of bystander by law enforcement officer attempting to enforce law. 76 ALR 3d 1176.

Duty of Sheriff as to care of property levied upon by him. 138 ALR 710.

Mistreatment of prisoner as ground for removal of Sheriff. 100 ALR 1401.

Liability of Sheriff or other officer executing process of execution or attachment for failure to seize sufficient property. 93 ALR 316.

Liability for death of or injury to prisoners. 61 ALR 569; 50 ALR 268; 46 ALR 94.

Liability for damage to person or goods during execution of eviction process. 56 ALR 1038.

Personal liability of peace officer or his bond for negligence causing damage to property. 53 ALR 41.

7-32-2122. Duties of undersheriff.

Collateral References

Sheriffs and Constables *key* 79.

80 C.J.S. Sheriffs and Constables §37.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§7, 9, 50, 63.

Civil liability of Sheriff or other officer charged with keeping jail or prison for act of deputy causing death or injury of prisoner. 41 ALR 3d 1021.

Liability of Sheriff for arrest under warrant by deputy where action is based on mistake as to identity of person arrested. 10 ALR 2d 752.

7-32-2123. Appointment of detention center staff.

Compiler's Comments

1989 Amendment: In first sentence, before "7-32-2121", substituted "detention center under" for "county jail pursuant to" and in two places substituted reference to detention center staff for reference to jailers.

1986 Amendment: Substituted "A sheriff who operates a county jail pursuant to 7-32-2121 may appoint deputy sheriffs or nonsworn individuals as jailers. A nonsworn individual appointed as a jailer need not receive the same salary as a deputy sheriff" for "A sheriff who operates a county jail may appoint two deputies in counties of the first, second, or third class and one deputy in counties of the fourth, fifth, sixth, or seventh class who shall act as jailer and receive the same salary as other deputy sheriffs."

1985 Amendment: At beginning substituted "A sheriff who operates a county jail" for "The sheriff".

Collateral References

60 Am. Jur. 2d Penal and Correctional Institutions §§18 through 22; 70 Am. Jur. 2d Sheriffs, Police, and Constables §§9, 50.

7-32-2124. Service of papers on sheriff.

Collateral References

Notice *key* 10.

66 C.J.S. Notice §18.

7-32-2125. Operation of sheriff's vehicle.

Attorney General's Opinions

Insurance Expense — Privately Owned Vehicle: Unless a Sheriff, Undersheriff, or Deputy Sheriff has been assigned use of a vehicle purchased or leased by the county and furnished under the terms of 7-32-2125, the Board of County Commissioners must provide full coverage insurance for privately owned motor vehicles of a Sheriff, an Undersheriff, and Deputy Sheriffs when such vehicles are used on official business. The type of insurance to be furnished must be full comprehensive, collision, and public liability insurance in the limits specified, and the Board of County Commissioners is obligated to pay that portion of the premium for such insurance that approximates the time the vehicle will be used on official business during the policy period. 34 A.G. Op. 14 (1971).

Collateral References

Liability of governmental unit or its officers for injury to innocent occupant of moving vehicle, or for damage to such vehicle, as result of police chase. 4 ALR 4th 865.

7-32-2126. Liability insurance for privately owned vehicles when used on official business.

Attorney General's Opinions

Insurance Expense and Coverages for Privately Owned Vehicles Used by Sheriffs on Official Business: A county may require Deputy Sheriffs to individually purchase "no-deductible" comprehensive and collision insurance for their private vehicles and pay or reimburse each Deputy for that portion of the premium which approximates the time the vehicle is used on official business. If such coverage is unavailable, deductible coverages may be purchased if the county reimburses its Deputy Sheriffs the amount of the deductible for repairs necessitated by job-related, insured damages. 37 A.G. Op. 18 (1977).

Collateral References

What is "motor vehicle" or the like within statute waiving governmental immunity as to operation of such vehicles. 77 ALR 2d 945.

7-32-2127. Prosecution of action involving county law enforcement personnel brought against executor or administrator.

Compiler's Comments

1989 Amendment: Near middle substituted "detention center staff" for "jailer".

Collateral References

Abatement and Revival *key* 73.

1 C.J.S. Abatement and Revival §168.

7-32-2128. False claims by sheriff.

Compiler's Comments

2003 Amendment: Chapter 114 near middle substituted "governor" for "attorney general"; and made minor changes in style. Amendment effective October 1, 2003.

1989 Amendment: Made minor change in phraseology.

Case Notes

Information: Information which charges that defendants presented for allowance to the Board of County Commissioners a certain false and fraudulent monthly report concerning board furnished Missoula County prisoners is insufficient to state an offense unless accompanied by a statement of facts upon which the charges of falsehood or fraud rest. St. v. MacLean, 129 M 500, 291 P2d 250 (1955).

Collateral References

Sheriffs and Constables *key* 153.

80 C.J.S. Sheriffs and Constables §§209, 210.

70 Am. Jur. 2d Sheriffs, Police, and Constables §87.

7-32-2129. Misconduct of undersheriff.

Collateral References

80 C.J.S. Sheriffs and Constables §53.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§50, 99.

Personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker. 41 ALR 3d 700.

7-32-2130. Liability for refusing to pay over money.

Case Notes

Application of Section: This section, providing that if a Sheriff refuses to pay over money which came into his hands by virtue of his office, the person entitled thereto may recover it with 25% damages, has application only to cases of intentional delinquency. It merely prescribes punishment for willful or corrupt neglect of duty and is therefore inapplicable to a case where failure to pay was due to the closing of a bank in which the money was deposited. Wells-Dickey Co. v. Benjamin, 74 M 170, 239 P 771 (1925).

Loss Due to Bank Failure: An officer who comes into possession of funds by virtue of his office and deposits the same, exercising good faith and due care in the selection of the depository, is not liable on his official bond for their loss resulting from the failure of the bank. Wells-Dickey Co. v. Benjamin, 74 M 170, 239 P 771 (1925).

Mandamus — When Unnecessary: Under this section a means is provided for compelling a Sheriff to pay money which may have come into his hands by virtue of his office to the person entitled thereto. Mandamus does not lie to compel him to do so. State ex rel. Grantier v. Woods, 67 M 337, 215 P 671 (1923).

Collateral References

Sheriffs and Constables *key* 122.

80 C.J.S. Sheriffs and Constables §95.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§90, 121 through 124, 198.

7-32-2131. Liability in civil actions.

Case Notes

Irregularity Not to Invalidate Sale: The Sheriff of Stillwater County held property under a valid Writ of Attachment. The Writ of Execution was directed to the Sheriff of Yellowstone County. The Writ was sufficient to advise the Stillwater Sheriff that the claim had been reduced to judgment and could be treated as surplusage in other respects. Failure of the Sheriff to sell the property to satisfy judgment after receipt of the Writ of Execution would have rendered him personally liable to the creditor. Stokke v. Graham, 129 M 96, 281 P2d 1025 (1955).

Writ of Supreme Court — Process: The decision of the Supreme Court, on an application for a writ under its original jurisdiction, constitutes the judgment of the court, and the writ itself that is thereafter issued is merely the court process issued for the enforcement thereof. State ex rel. Clark v. District Court, 103 M 145, 61 P2d 836 (1936).

Attachment — Duty of Sheriff: The Sheriff in levying a Writ of Attachment has a special interest in the property, not only for the satisfaction of any judgment that the attaching creditor may recover but for the protection of the real owner of the property. If the defendant in the action in which the levy was made recovers judgment, it is the duty of the Sheriff to return the attached property or the proceeds to the defendant or his agent. This duty would also be imposed upon the Sheriff if judgment was recovered by the plaintiff but was satisfied otherwise than by the application of the property or the value thereof. It is the duty of the Sheriff, in any event, to safely keep and account for property he has seized by virtue of a Writ of Attachment. Fergus Motor Co. v. Schott, 95 M 249, 26 P2d 365 (1933).

Sufficiency of Complaint: The complaint in an action against a Sheriff and his official bondsman for damages flowing from the refusal of the officer to levy a Writ of Attachment alleged that the judgment in the attachment suit and all of the rights of the judgment creditor against the defendants had been assigned to plaintiff and that plaintiff was the assignee of all of the rights of the said judgment creditor against them. This pleading was sufficient to show an assignment of the cause of action in the absence of a special demurrer or motion to make more definite and certain. Gotzian & Co. v. Norris, 89 M 307, 297 P 489 (1931).

Mandamus — When Required: Where a judgment creditor is entitled to the possession of specific property and the Sheriff refuses to proceed under execution, the remedy of an action for damages on the officer's bond is not adequate and mandamus lies to compel action. State ex rel. Duggan v. District Court, 65 M 197, 210 P 1062 (1922).

Mandamus — When Unnecessary: Where a Sheriff wrongfully refuses to levy upon and sell property on execution issued on a money judgment, he is liable in damages to the judgment creditor on his official bond. The creditor has a plain, speedy, and adequate remedy and is not entitled to a Writ of Mandate to compel the officer to proceed under the execution. State ex rel. Duggan v. District Court, 65 M 197, 210 P 1062 (1922).

Form of Action: A Sheriff who wrongfully seizes personal property under a Writ of Attachment may be sued in any appropriate form of action the person whose rights have been invaded may choose to pursue. Bank of Commerce v. USF&G Co., 58 M 236, 194 P 158 (1920).

Mistaken Execution — Liability: A Sheriff acting under an execution sold property in the possession of the debtor but belonging to a third person. The Sheriff on learning of the true owner of the property returned the money to the purchaser and the property to its owner and made his return upon the execution in accordance with the facts. The Sheriff was not liable to the creditor for the amount realized at the sale. McCarthy v. O'Marr, 19 M 215, 47 P 953 (1897).

Collateral References

Sheriffs and Constables *key* 87, 101, 106, 120 ½, 123.

80 C.J.S. Sheriffs and Constables §§52 through 127.

70 Am. Jur. 2d Sheriffs, Police, and Constables §90, et seq.

Liability of municipal corporation or other governmental entity for injury or death caused by action or inaction of off-duty police officer. 36 ALR 5th 1.

Personal liability of officer or his bond as affected by his failure to file return of his proceedings after seizing property under writ or process. 98 ALR 692.

7-32-2141. Fees of sheriff.

Compiler's Comments

1995 Amendment: Chapter 390 in (2), near middle after "be", substituted "deposited" for "credited" and after "treasurer" substituted "in the general fund of the county unless the county has instituted a public safety levy, in which case the fees must be deposited in the account established pursuant to 7-6-2513" for "to the sheriff's budget"; and made minor changes in style. Amendment effective April 12, 1995.

1989 Amendment: In (1), in first sentence, inserted introductory clause, at end of first sentence substituted "the fees, if any, set by the county governing body" for "the following fees", and inserted introductory clause in second sentence. Amendment effective March 29, 1989.

1981 Amendment: Increased the fee in (1)(a), (1)(c), (1)(d), (1)(e), (1)(i), (1)(j), and (1)(l) from $2 to $5; increased the fee in (1)(f) from $1 to $2.50; increased the fee in (1)(g) from $4 to $5; increased the fee in (1)(h) from $5 to $7; inserted (1)(b), (1)(m), (1)(n), and (2) relating to return of summons for person not found, holding Sheriff's sale, cancellation or postponement of sale, and deposit and credit of fees collected, respectively; and made minor changes in phraseology.

Case Notes

Agreement for Extra Fees: There is no rule in Montana that bars an attaching creditor from entering into a private agreement with the Sheriff to pay such Sheriff out of the attaching

creditor's own pocket additional compensation over and above that contemplated by the statute. Bucher v. Fraser, 138 M 83, 354 P2d 1042 (1960).

"Fees" Defined: The term "fees", as used in this section, refers to the Sheriff's mileage as well as his other charges. St. v. Story, 53 M 573, 165 P 748 (1917).

Sheriff's Sale Commission: A Sheriff is entitled to his commission on the purchase price paid for real property sold by him under an order of sale in a foreclosure action even when the mortgagee buys the property. Jurgens v. Hauser, 19 M 184, 47 P 809 (1897).

Collateral References

Sheriffs and Constables *key* 28, et seq.

80 C.J.S. Sheriffs and Constables §§215, 217, 218.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§78 through 86.

Right, in absence of express statute, of one governmental unit, or officers thereof, to compensation for collecting or disbursing special taxes or assessments levied by or owed to another governmental unit. 114 ALR 1098.

7-32-2142. Fees of the sheriff for holding property.

Case Notes

Attachment by Sheriff — Reimbursement of Expenses: Under a Writ of Attachment, a Sheriff takes and retains possession of the property at his peril. When he appoints a custodian to keep and care for the attached property, he is liable to the custodian under his express contract or for reasonable compensation. The Sheriff is entitled to reimbursement of his actual, necessary, and reasonable expenses. Where the Sheriff has paid the expense of keeping and caring for the attached property and judgment in the action goes against the defendant, the Sheriff is entitled to deduct his expenses from the proceeds of the property before turning them over to the attaching creditor. Letz v. Letz, 123 M 494, 215 P2d 534 (1950).

Keeper of Attached Property: Under this section the necessity for the appointment of a keeper of attached property is a question to be determined by the trial court, taking into consideration all facts and circumstances. On appeal, defendant debtor may not complain for the first time that the appointment was unnecessary and improper and that the expense had been unnecessarily incurred. Chowning v. Madison Land & Irrigation Co., 84 M 494, 276 P 946 (1929).

When Fee Payable: A Sheriff is not entitled to be paid for his trouble and expense in taking and keeping property under attachment or execution until the allowance for so doing is fixed by the court. If the Sheriff takes possession and employs a keeper without an order from the court, he is personally liable for the keeper's compensation. Noel v. Cowan, 80 M 258, 260 P 116 (1927).

Keeper — No Obligation to Determine Appointment: The Sheriff took into his possession a large amount of personal property under a Writ of Attachment and appointed a caretaker. A receiver was later appointed by the court who refused to pay the caretaker for his services. A Sheriff who fails to secure an order authorizing the appointment of a keeper before appointing him may be held personally liable for his compensation. The keeper has no obligation to determine whether such an order was secured. Daly v. Kelley, 57 M 306, 187 P 1022 (1920).

Collateral References

80 C.J.S. Sheriffs and Constables §236.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§78, 87.

7-32-2143. Mileage and expenses of sheriff in general.

Compiler's Comments

1989 Amendment: Near middle and at end of first sentence of (1) substituted "a detention center" for "jail" and near end of third sentence substituted "inmates" for "prisoners".

1985 Amendment: Inserted (4) relating to a fee in lieu of mileage.

Attorney General's Opinions

Mileage Reimbursement for Constables: Parties involved in civil litigation in Justice's Court who desire to have legal process served by a constable should prepay the cost of service based upon the estimated round-trip mileage involved and the mileage reimbursement rate established in 2-18-503. A constable should be reimbursed for travel only upon the amount of miles actually traveled at the legally established rate. Any difference between the amount paid by the parties to litigation for service of process by a constable and the amount that the constable is reimbursed accrues to the benefit of the local governing body providing the service. 42 A.G. Op. 15 (1987).

Collateral References

Coroners *key* 7; Sheriffs and Constables *key* 61.

18 C.J.S. Coroners §28; 80 C.J.S. Sheriffs and Constables §251.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§87 through 89.

7-32-2144. Mileage and expenses of sheriff for delivery of prisoners and mentally ill persons.

Compiler's Comments

2001 Amendment: Chapter 371 in (1) near middle of fourth sentence after "by the" substituted "governor" for "attorney general" and deleted former fifth sentence that read: "In determining the actual expense if travel is by a privately owned vehicle, the mileage rate shall be allowed as provided in subsection (2)"; in (2) in third sentence near middle after "travel or for" substituted "expenses" for "subsistence" and at end after "section" deleted "the fees for mileage named in this section being in full for all such traveling expenses in both civil and criminal work"; and made minor changes in style. Amendment effective October 1, 2001.

1983 Amendment: In (1), substituted "Montana state hospital" for "Warm Springs state hospital".

Case Notes

Amendment of Claim to Include Mileage Up to Ten Cents — Where Limitation Statute Not Applicable: A Sheriff's claims for mileage during two terms in office had been approved by the Commissioners at the rate of 7 cents and 8 ½ cents per mile. After retiring from office he presented additional claims for the difference between those rates and 10 cents per mile under section 4885, R.C.M. 1921 (now this section). He was not required to present the latter claims within a year after the last claim accrued, under 7-6-2421, because they amounted to amendments of the original Board approved claims. Weir v. Silver Bow County, 113 M 237, 124 P2d 1003 (1942).

Construction:

The provision in section 4885, R.C.M. 1921 (now this section), that the Sheriff "while in the discharge of his duties, both civil and criminal", shall receive 10 cents per mile actually and necessarily traveled, did not mean that he might collect that amount per mile in the performance of every duty imposed upon him. It meant, in the performance of other duties for which he is authorized to charge mileage, it shall be fixed at 10 cents per mile. Brannin v. Sweet Grass County, 88 M 412, 293 P 970 (1930).

The term "fees", as used in section 3137, Rev. C. 1907 (now this section), connotes mileage payable to the Sheriff by the county in certain cases. St. v. Story, 53 M 573, 165 P 748 (1917).

Misconduct in Office: A Sheriff, Constable, or other peace officer traveling in the discharge of his duties is entitled to charge only for each mile "actually and necessarily" traveled. A Chief of Police is guilty of misconduct in office for claiming and collecting mileage fees for services performed by another officer, he paying to the latter his actual traveling expenses and retaining for himself the balance of the total amount received. State ex rel. Wynne v. Examining & Trial Bd., 43 M 389, 117 P 77 (1911).

Constitutionality: Chapter 86, sec. 1, L. 1905, allowing Sheriffs only actual traveling expenses for transporting prisoners and insane persons was constitutional when applied to officers elected prior to its passage. Scharrenbroich v. Lewis & Clark County, 33 M 250, 83 P 482 (1905).

Attorney General's Opinions

State Financial Responsibility for Sentenced Inmate Upon Oral Pronouncement of Sentence: A sentencing hearing represents the only common date by which the criminal justice system can definitely measure when legal and financial responsibility for an inmate shifts from a county to the state. Oral pronouncement of sentence from the bench in the presence of a defendant constitutes final judgment (see St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998)). Once sentenced, an inmate is considered to be in the legal custody of the Department of Corrections, even though a local or regional detention center may serve as a place of temporary detention until the inmate can be placed by the Department. Therefore, upon oral pronouncement of sentence that transfers legal custody of an inmate to the Department, the financial responsibility for the inmate transfers to the Department as well. 49 A.G. Op. 13 (2001).

Returning Patients to Montana State Hospital — Financial Responsibility: A Sheriff who returns a patient to Warm Springs State Hospital (now Montana State Hospital) pursuant to 7-32-2144 when the patient has been subjected to an involuntary civil or a criminal commitment is entitled to reimbursement for his costs from the applicable county for a person committed

pursuant to 46-14-221 and 46-14-222 or the institution to which the person is committed when committed pursuant to 46-14-301, 53-21-121, 53-21-124, and 53-21-127. 37 A.G. Op. 129 (1978).

Transport of Prisoners by Aircraft: A Sheriff may be reimbursed under this section for expenses incurred in transporting prisoners to or from the state prison by aircraft or airline if flying is the least expensive means of transport. 36 A.G. Op. 70 (1976).

Collateral References

Sheriffs and Constables *key* 40, 41.

80 C.J.S. Sheriffs and Constables §§230, 232.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§87 through 89.

Constitutional inhibition of change of officer's compensation as applicable to allowance for expenses or disbursements. 106 ALR 779.

7-32-2145. Mileage and expenses of sheriff for return of fugitives.

Collateral References

80 C.J.S. Sheriffs and Constables §251.

70 Am. Jur. 2d Sheriffs, Police, and Constables §87.

Part 22
Detention Centers

Part Administrative Rules

ARM 23.14.525 through 23.14.531 Detention officer qualifications and standards.

Title 23, chapter 14, subchapter 6, ARM Rules concerning regional youth detention services.

Part Case Notes

Evidence of Negligence in County Jail Sufficient to Uphold Verdict — Duty of Jailer to Inmate: Moralli was injured when she slipped on the wet floor of a bathroom in the Lake County jail. The Supreme Court held that there was sufficient evidence of negligence on the part of the county to prevent a directed verdict and for the court to be bound by the jury verdict. Following Pretty On Top v. Hardin, 182 M 311, 597 P2d 58 (1979), the Supreme Court found that the county owed a duty to the plaintiff, the duty had been breached, and the breach was the cause of the plaintiff's injury. Moralli v. Lake County, 255 M 23, 839 P2d 1287, 49 St. Rep. 872 (1992).

Part Attorney General's Opinions

Act Allowing Private Parties to Contract for Jails Not in Conflict With Local Government Regulatory Statutes: The act allowing counties to contract with private parties for the building, maintenance, and operation of jails, enacted as Chapter 447, L. 1985, does not directly conflict with other Montana statutes regulating the indebtedness, contracts, jail facilities, or interlocal agreements of local governments. However, Chapter 447 is subject to the various applicable limitations contained in those statutes. 42 A.G. Op. 81 (1988).

7-32-2201. Establishing detention center — detention center contract — regional detention center.

Compiler's Comments

1989 Amendment: Inserted introductory clause; throughout section changed references to jail to detention center, county commissioners to governing body, and county to local government; at beginning of (1) changed "shall" to "may" and in two places substituted "multijurisdictional detention center" for "common jail"; near beginning of (2) substituted "detention center allowed" for "jail required"; in (2)(a), after "administrator and", deleted "with the sheriff's concurrence" and at end, after "position", inserted "or appointing the sheriff as detention center administrator"; near beginning of (2)(b), after "agreement", deleted "with the concurrence of the sheriffs of all participating counties"; substituted (3) (see 1989 Session Law for text) for former subsection that read: "The common jails in the several counties of this state are kept by the sheriffs, jail administrators, or private parties agreeing to act as jailers of the counties in which they are respectively situated. In the case of more than one county utilizing a common jail as provided in subsection (1), such jail shall be kept by the sheriffs of the counties utilizing the common jail on a basis as the sheriffs shall agree, by a jail administrator hired by the county in which the jail is situated, or by a private party agreeing to act as the jailer"; at end of (4), after "maintained", inserted "and operated. The costs must be paid for out of the county treasury"; and made minor changes in phraseology and punctuation.

1985 Amendment: Inserted (2) relating to a multicounty jail; in (3) in first sentence, after "sheriffs", inserted "jail administrators, or private parties agreeing to act as jailers" and at end

after "agree", inserted "by a jail administrator hired by the county in which the jail is situated, or by a private party agreeing to act as the jailer".

Case Notes

County Responsibility for Medical Costs of Detained Person Unable to Pay — "Nature of the Crime" Approach: In determining whether a city or a county is responsible for medical costs incurred by a person ultimately charged with a violation of state law but who is unable to pay, the Supreme Court adopted the "nature of the crime" approach. This approach determines financial responsibility not on the basis of which agency first takes a person into custody, but rather on the basis of the crime charged. Because the county is vested with the primary responsibility for enforcing state law and maintaining facilities to accomplish that responsibility, performance of the task necessarily includes assumption of the associated financial burden. Mont. Deaconess Medical Center v. Great Falls, 232 M 474, 758 P2d 756, 45 St. Rep. 1207 (1988).

Attorney General's Opinions

County Primarily Responsible for Postarrest Medical Care: A county is primarily responsible to third-party providers for postarrest medical care given to a person who is ultimately charged with a violation of state law. Following conviction, an inmate who has the means to pay is responsible for the ultimate payment of medical costs pursuant to 7-32-2245, and a county at that point may seek recovery from another party pursuant to state law. 47 A.G. Op. 2 (1997).

Prisoners in County Jail for Municipal Violations — County Charge for Maintenance: A county may charge a city or town for maintaining prisoners committed to the county jail at the request of a city or town police department in the course of enforcing city or town ordinances. 42 A.G. Op. 70 (1988).

Collateral References

60 Am. Jur. 2d Penal and Correctional Institutions §§4 through 8.

7-32-2202. Use of detention center in contiguous county.

Compiler's Comments

1989 Amendment: Throughout section changed "jail" to "detention center", "prisoners" to "inmates", and "sheriff", "jail administrator", and "keeper of the jail" to "detention center administrator"; near beginning of (2), after "county", substituted "involved" for "or the keeper of the designated jail if the keeper is not the sheriff" and in two places, after "detention center administrator", deleted "or private party jailer"; at end of first sentence of (4), after "county", substituted "involved" for "or the keeper of the jail in each county if the keeper is not the sheriff"; and made minor changes in phraseology.

1985 Amendment: In (2) near beginning, after "served on", substituted "the sheriff of each county, or the keeper of the designated jail if the keeper is not the sheriff" for "the sheriff or keeper of the designated jail", in two places near end of (2), after "sheriff", inserted "jail administrator, or private party jailer"; substituted (4) relating to service of revocation for former text that read: "The clerk must immediately serve a copy of the revocation upon the sheriff of the county, who must thereupon remove the prisoners to the jail from which the removal was had"; and made minor changes in phraseology.

Collateral References

Criminal Law *key* 1218; Prisons *key* 13.

24 C.J.S. Criminal Law §§1976, 2000; 72 C.J.S. Prisons §18.

7-32-2203. Who may be confined in a detention center.

Compiler's Comments

1989 Amendment: At beginning substituted "Detention centers" for "The common jails"; and inserted (5) relating to confinement of persons sentenced to State Prison.

Collateral References

60 Am. Jur. 2d Penal and Correctional Institutions §§3, 123 through 131.

Construction and application of state statute providing compensation for wrongful conviction and incarceration. 34 ALR 4th 648.

Authority of court to order juvenile delinquent incarcerated in adult penal institution. 95 ALR 3d 568.

7-32-2204. Maintenance of detention center.

Compiler's Comments

1989 Amendment: Near middle, after "building", inserted "operating" and substituted "detention center" for "jail"; and deleted former (2) that read: "(2) The county commissioners must inquire into the security of the jail and the condition of the prisoners every 3 months."

1985 Amendment: In (1) (formerly introductory clause), after "commissioners", inserted "or the private party when provided in an agreement entered into under 7-32-2201(2)" and after "have the" substituted "duty" for "care"; deleted former (1) that read: "must, once every 3 months, inquire into its state, as respects the security thereof, and the treatment and condition of prisoners"; and inserted (2) relating to county commissioner inquiry.

Collateral References

Prisons *key* 1.

72 C.J.S. Prisons §2.

7-32-2205. Confinement of inmates.

Compiler's Comments

1989 Amendment: At beginning substituted "detention center administrator" for "sheriff, jail administrator, or private party jailer", after "committed to" substituted "the detention center" for "jail", and at end, after "bedding", deleted "for which sheriffs or jail administrators, but not jailers operating a jail under an agreement provided for in 7-32-2201(2), shall submit claims for the actual expenses incurred to the board of county commissioners for their determination and, except as provided in 7-32-2207, to be paid out of the county treasury".

1985 Amendment: Near beginning, after "sheriff", inserted "jail administrator, or private party jailer"; near middle of section, after "for which", deleted "he" and inserted "sheriffs or jail administrators, but not jailers operating a jail under an agreement provided for in 7-32-2201(2)".

Case Notes

Accounting to Commissioners: Prior to the 1971 amendment of this section, a Sheriff had no clear legal duty to provide the Board of County Commissioners with a detailed itemized accounting of county funds received for furnishing board to prisoners of county jail. State ex rel. Lucier v. Murphy, 156 M 186, 478 P2d 273 (1970).

Expense of Providing Food: The Sheriff is compelled by law to supply prisoners with food. The law does not prescribe where the food shall be prepared, whether inside the jail or out, at the option of the Sheriff. It is intended that the Sheriff not make any profit or gain out of providing food, but neither is it intended that the Sheriff suffer a loss in furnishing food. A part of the necessary expense in providing food is the cost of the fuel with which the food is cooked. Pac. Coal Co. v. Silver Bow County, 79 M 323, 256 P 386 (1927).

Contract With Federal Government: The provision of section 5547, United States Revised Statutes, making it the duty of the Attorney General of the United States to contract with "the managers or proper authorities having control" of federal prisoners in county jails for their subsistence, contemplates that the contract shall be made with the Sheriffs and not with the Boards of County Commissioners. The former, under this section, are the custodians of the jails and answerable for the safekeeping of the persons confined. Majors v. County of Lewis & Clark, 60 M 608, 201 P 268 (1921).

Attorney General's Opinions

County Primarily Responsible for Postarrest Medical Care: A county is primarily responsible to third-party providers for postarrest medical care given to a person who is ultimately charged with a violation of state law. Following conviction, an inmate who has the means to pay is responsible for the ultimate payment of medical costs pursuant to 7-32-2245, and a county at that point may seek recovery from another party pursuant to state law. 47 A.G. Op. 2 (1997).

Collateral References

72 C.J.S. Prisons §§18, 19.

60 Am. Jur. 2d Penal and Correctional Institutions §§23 through 28.

7-32-2207. Confinement of persons on civil process.

Compiler's Comments

1989 Amendment: Near middle of (1) substituted "detention center administrator" for "sheriff, jail administrator, or private party jailer".

1985 Amendment: In (1) after "sheriff", inserted "jail administrator, or private party jailer".

7-32-2208. Actual confinement of inmates required.

Compiler's Comments

1989 Amendments — Composite Section: Chapter 361 in first sentence substituted "A prisoner committed to the county jail for trial or examination or, except as provided in 7-32-2225 through 7-32-2227, a prisoner convicted of a public offense" for "A prisoner committed to the county jail for trial, for examination, or upon conviction for a public offense"; and near end of second sentence inserted "or pursuant to a program established by law". The deletion of the second sentence by Ch. 461 rendered part of the amendments made by Ch. 361 ineffectual.

Chapter 461 at beginning substituted "An inmate" for "A prisoner", after "committed to" substituted "a detention center" for "the county jail", near middle, after "conviction", deleted "for a public offense", after "confined in the" substituted "detention center" for "jail", and deleted former second sentence that read: "If he is permitted to go at large out of the jail, except by virtue of a legal order or process, it is an escape."

Collateral References

72 C.J.S. Prisons §§18, 19.

7-32-2211. Service of papers upon detention center administrator for prisoner.

Compiler's Comments

1989 Amendment: At beginning substituted "detention center administrator" for "sheriff or jailer", near middle substituted reference to inmate for reference to prisoner, and at end inserted "inmate" and deleted "prisoner, with a note thereon of the time of its service. For neglect to do so, he is liable to the prisoner for all damages occasioned thereby."

Collateral References

Prisons *key* 13.

72 C.J.S. Prisons §18.

60 Am. Jur. 2d Penal and Correctional Institutions §§4 through 8.

7-32-2222. Health and safety of prisoners.

Compiler's Comments

2003 Amendment: Chapter 579 deleted former (4) that read: "(4) (a) If in the opinion of the detention center administrator an inmate under the administrator's jurisdiction requires medication, medical services, or hospitalization, the expense must be borne by the arresting agency when the arresting agency is not the county in which the inmate is confined, except as provided in 7-32-2245 or subsection (4)(b) of this section.

(b) If a city or town commits a person to the detention center of the county in which the city or town is located for a reason other than detention pending trial for or detention for service of a sentence for violating an ordinance of that city or town, the expense must be paid by the county, except as provided in 7-32-2245. If the department of corrections is the arresting agency and the inmate is a probation violator, the expense must be paid by the county in which the district court that retains jurisdiction over the inmate is located, except as provided in 7-32-2245.

(c) The county attorney shall initiate proceedings to collect from the inmate any charges arising from the medical services or hospitalization for the inmate involved in accordance with 7-32-2245." Amendment effective May 5, 2003.

1999 Amendment Void: The amendment to this section made by Ch. 508, L. 1999, was rendered void by sec. 12, Ch. 508, L. 1999, a contingent voidness section.

1995 Amendments: Chapter 388 in (4)(a), near end before "subsection", inserted "7-32-2245"; at end of first and second sentences in (4)(b) inserted exception clause; at end of (4)(c) substituted "in accordance with 7-32-2245" for "if he determines the inmate is financially able to pay"; and made minor changes in style. Amendment effective April 12, 1995.

Chapter 546 in (4)(b), in second sentence, substituted "department of corrections" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendments — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Chapter 768 in (4)(a), near end before "agency", inserted "arresting", in two places, after "agency", deleted reference to authority at whose instance the inmate was arrested, and at end inserted "as provided in subsection (4)(b)"; in (4)(b) inserted second sentence concerning

payment of expense when Department of Institutions (now Department of Corrections and Human Services) is the arresting agency; and made minor changes in style.

1989 Amendment: Substituted entire section (see 1989 Session Law for text) for former section that read: "(1) When a county jail or building contiguous to it is on fire and there is reason to believe that the prisoners may be injured or endangered, the sheriff, jail administrator, or private party jailer must remove them to a safe and convenient place and there confine them as long as it may be necessary to avoid the danger.

(2) When a pestilence or contagious disease breaks out in or near a jail and the physician thereof certifies that it is likely to endanger the health of the prisoners, the district judge may by a written appointment designate a safe and convenient place in the county or the jail in a contiguous county as the place of their confinement. The appointment must be filed in the office of the clerk and authorize the sheriff, jail administrator, or private party jailer to remove the prisoners to the designated place or jail and there confine them until they can be safely returned to the jail from which they were taken.

(3) If in the opinion of the sheriff, jail administrator, or private party jailer any prisoner, while detained, requires medication, medical services, or hospitalization, the expense of the same shall be borne by the agency or authority at whose instance the prisoner is detained when the agency or authority is not the county wherein the prisoner is being detained. The county attorney shall initiate proceedings to collect any charges arising from such medical services or hospitalization for the prisoner involved if it is determined the prisoner is financially able to pay."

1985 Amendment: Throughout section after "sheriff" inserted "jail administrator, or private party jailer"; and made minor change in phraseology.

Case Notes

Conditions of Jail Held Not to Violate Statute — Defendant's Release Not Required: Collier was arrested and charged with solicitation of deliberate homicide, which was reduced to criminal endangerment by a plea bargain. At the District Court level and on appeal, Collier challenged her continued incarceration in a county jail allegedly failing to comply with this section. The Supreme Court noted that the District Court had taken testimony on the issue and that the testimony showed that although the jail was not in 100% compliance with this section, conditions were not so bad as to constitute a health hazard. The Supreme Court pointed out that testimony also showed that Collier brought some of the unsanitary conditions upon herself. St. v. Collier, 277 M 46, 919 P2d 376, 53 St. Rep. 534 (1996).

County Responsibility for Medical Costs of Detained Person Unable to Pay — "Nature of the Crime" Approach: In determining whether a city or a county is responsible for medical costs incurred by a person ultimately charged with a violation of state law but who is unable to pay, the Supreme Court adopted the "nature of the crime" approach. This approach determines financial responsibility not on the basis of which agency first takes a person into custody, but rather on the basis of the crime charged. Because the county is vested with the primary responsibility for enforcing state law and maintaining facilities to accomplish that responsibility, performance of the task necessarily includes assumption of the associated financial burden. Mont. Deaconess Medical Center v. Great Falls, 232 M 474, 758 P2d 756, 45 St. Rep. 1207 (1988).

Due Process Right of Official Detainees to Medical Care: The Supreme Court cited Revere v. Mass. Gen. Hosp., 463 US 239, 77 L Ed 2d 605, 103 S Ct 2979 (1983), in holding that due process demands that persons detained by government agencies receive adequate medical care regardless of their ability to pay; responsibility for costs is a matter of state law. Mont. Deaconess Medical Center v. Great Falls, 232 M 474, 758 P2d 756, 45 St. Rep. 1207 (1988).

Attorney General's Opinions

Prisoner Medical Care — Prior to and Subsequent to Judgment: The expenses for medication, medical services, and hospitalization for prisoners confined in the county jail prior and subsequent to judgment for violation of state fish and game laws or state highway laws must be borne by the appropriate state agency charged with the enforcement of such laws. 34 A.G. Op. 24 (1971).

Collateral References

72 C.J.S. Prisons §13.

60 Am. Jur. 2d Penal and Correctional Institutions §§128, 129, 131, 202, 203.

Comment note: prison conditions as amounting to cruel and unusual punishment. 51 ALR 3d 111.

Liability of prison authorities for injury to prisoner directly caused by assault by another prisoner. 41 ALR 3d 1021.

Relief under federal civil rights acts to state prisoners complaining of denial of medical care. 28 ALR Fed. 279.

7-32-2224. Payment of medical costs by entities other than inmate.

Compiler's Comments

Effective Date: Section 5, Ch. 579, L. 2003, provided: "[This act] is effective on passage and approval." Approved May 5, 2003.

7-32-2226. Operation of county jail work program.

Compiler's Comments

2001 Amendment: Chapter 203 inserted (7) concerning weed management and other maintenance projects authorized by county commissioners; and made minor changes in style. Amendment effective October 1, 2001.

7-32-2227. Inmate eligibility for participation.

Compiler's Comments

1995 Amendment: Chapter 350 in (2), near middle, substituted "partner or family member assault" for "domestic abuse"; and made minor changes in style.

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

7-32-2231. Purpose to allow private industry involvement.

Compiler's Comments

1989 Amendment: Near beginning, after "allow", substituted "multijurisdictional" for "regional", substituted "single-jurisdiction detention centers" for "single-county jails", after "leased" deleted "back", in three places substituted reference to local government for reference to county, and near end substituted "local governments" for "sheriff or sheriffs".

7-32-2232. Detention centers — contracts with private parties.

Compiler's Comments

1989 Amendment: Throughout section substituted "detention center" for "jail" and "local government" for "county"; at end of (2)(a) substituted "inmates" for "prisoners"; and in (2)(e) substituted "detention center staff" for "jailers".

Coordination — Text Not Codified: As amended by sec. 25, Ch. 461, L. 1989, 7-32-2232 contained a subsection (2)(g) referencing the Detention Center Standards Commission. Section 30, Ch. 461, L. 1989, provided: "If House Bill No. 282 (LC 20) is not passed and approved, the amendment in [section 25 of this act] [7-32-2232] that inserts 7-32-2232(2)(g) is void." House Bill No. 282 was not passed; therefore, the Code Commissioner has removed subsection (2)(g) from the text of 7-32-2232.

7-32-2233. Requests for contract proposals.

Compiler's Comments

1989 Amendment: Throughout section changed "county" to "local government" and "jail" to "detention center".

7-32-2234. Powers of detention center administrators.

Compiler's Comments

1989 Amendment: Throughout section changed "jail" to "detention center"; near beginning of introductory clause, after "administrator", deleted "or a private party acting as a jailer under an agreement, as provided for in 7-32-2201(2)" and near end substituted "detention center" for "corrections" and "inmates" for "prisoners"; and in (2) substituted "inmate" for "prisoner".

7-32-2241. Definitions.

Compiler's Comments

1999 Amendment Void: The amendment to this section made by Ch. 508, L. 1999, was rendered void by sec. 12, Ch. 508, L. 1999, a contingent voidness section.

7-32-2242. Use of detention center — payment of costs.

Compiler's Comments

1995 Amendment: Chapter 388 in (2)(a), near end before "subsection", inserted "7-32-2245"; and at end of first and second sentences in (2)(b) inserted exception clause. Amendment effective April 12, 1995.

Chapter 546 in (2)(b), in second sentence, substituted "department of corrections" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendments — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Chapter 768 in (2)(a), near beginning after "person is", substituted "confined in" for "committed to", after "by" substituted "an arresting agency" for "a government unit", before "costs" deleted "committing government unit shall pay the", after "confinement" substituted language requiring payment of holding costs by the arresting agency for "as agreed upon by the government unit and the detention center", and at end inserted "as provided in subsection (2)(b)"; in (2)(b) inserted second sentence concerning payment of costs when Department of Institutions (now Department of Corrections and Human services) is the arresting agency; at end of (2)(c) substituted "arresting agency" for "committing government unit"; inserted (3) regarding payment of costs of holding a person who is a fugitive from an out-of-state jurisdiction; and made minor changes in style.

Attorney General's Opinions

State Financial Responsibility for Sentenced Inmate Upon Oral Pronouncement of Sentence: A sentencing hearing represents the only common date by which the criminal justice system can definitely measure when legal and financial responsibility for an inmate shifts from a county to the state. Oral pronouncement of sentence from the bench in the presence of a defendant constitutes final judgment (see St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998)). Once sentenced, an inmate is considered to be in the legal custody of the Department of Corrections, even though a local or regional detention center may serve as a place of temporary detention until the inmate can be placed by the Department. Therefore, upon oral pronouncement of sentence that transfers legal custody of an inmate to the Department, the financial responsibility for the inmate transfers to the Department as well. 49 A.G. Op. 13 (2001).

7-32-2243. Contracts for detention center services.

Attorney General's Opinions

State Financial Responsibility for Sentenced Inmate Upon Oral Pronouncement of Sentence: A sentencing hearing represents the only common date by which the criminal justice system can definitely measure when legal and financial responsibility for an inmate shifts from a county to the state. Oral pronouncement of sentence from the bench in the presence of a defendant constitutes final judgment (see St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998)). Once sentenced, an inmate is considered to be in the legal custody of the Department of Corrections, even though a local or regional detention center may serve as a place of temporary detention until the inmate can be placed by the Department. Therefore, upon oral pronouncement of sentence that transfers legal custody of an inmate to the Department, the financial responsibility for the inmate transfers to the Department as well. 49 A.G. Op. 13 (2001).

7-32-2244. Detention of juveniles.

Compiler's Comments

1997 Amendments: Chapter 42 substituted "Title 41, chapter 5, part 3" for "41-5-301 through 41-5-307, 41-5-309, and 41-5-311". Amendment effective March 12, 1997.

Chapter 286 at end substituted "Title 41, chapter 5, part 3" for "41-5-301 through 41-5-307, 41-5-309, and 41-5-311".

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

1991 Amendment: Deleted reference to 41-5-308 and inserted reference to 41-5-311; deleted former (2) that read: "(2) Detention centers that hold juveniles must comply with the standards for the detention of juveniles promulgated by the department of family services"; and made minor changes in style. Amendment effective July 1, 1992.

7-32-2245. Payment of confinement and medical costs by inmate.

Compiler's Comments

2003 Amendment: Chapter 579 substituted (2) concerning inmate responsibility for medical costs for former text that read: "An inmate is responsible for the actual costs of medication, medical services, or hospitalization while the inmate is detained in a detention center. Inability to pay may not be a factor in providing necessary medical care for an inmate. This section does not restrict an inmate's right to use a third-party payor"; inserted (3) concerning collection of inmate's medical costs; inserted (4) concerning inability to pay; inserted (5) concerning right to use third-party payor; and inserted (6) concerning city or town as arresting agency. Amendment effective May 5, 2003.

1995 Amendment: Chapter 388 in (1), in first sentence after "costs", inserted "including actual medical costs", in second sentence substituted "The rate for confinement costs must be determined in accordance with 46-18-403" for "The rate at which the inmate must pay the costs must be established at the sentencing hearing", and inserted third sentence concerning payment of court-ordered confinement costs; inserted (2) concerning an inmate's responsibility for medical costs; and made minor changes in style. Amendment effective April 12, 1995.

Case Notes

Conditions Imposed in Written Judgment and Sentence Different From Those Imposed in Oral Sentence — Lane, Waters, and Simpson Reviewed — Test to Determine Which New Conditions Lawful or Unlawful — Payment of Restitution and Costs: Johnson was sentenced orally for writing bad checks and later contended that four of the conditions imposed in the written judgment and sentence by the District Court were unlawful under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), because they were not announced orally when she was sentenced in open court. The Supreme Court reviewed its decisions in St. v. Waters, 1999 MT 229, 296 M 101, 987 P2d 1142 (1999), and St. v. Simpson, 1999 MT 259, 296 M 335, 989 P2d 361 (1999), and reasoned that a written sentence would be held unlawful only if it substantively increased the defendant's loss of liberty or the defendant's sacrifice of property. Under this test, the Supreme Court held that two of the four penalties not mentioned by the District Court in its oral pronouncement of Johnson's sentence were unlawful, those being the restitution ordered to the Missoula County jail of money expended for Johnson's medical care and the requirement that Johnson pay for the costs of her prosecution in District Court. The Supreme Court held that the other two parts of the written sentence, the requirement that Johnson make restitution from money earned in prison and the imposition of certain "civil" restrictions as conditions of Johnson's suspended sentence, such as the requirement that Johnson stay out of gambling casinos, were lawfully imposed because they did not increase the amount of money that Johnson was ordered to pay or increase Johnson's deprivation of liberty in addition to those penalties imposed orally. The requirement for payment from prison earnings only specified where the money was to come from, and the "civil" restrictions were largely mentioned by the District Court at Johnson's sentencing hearing. St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000).

Attorney General's Opinions

County Primarily Responsible for Postarrest Medical Care: A county is primarily responsible to third-party providers for postarrest medical care given to a person who is ultimately charged with a violation of state law. Following conviction, an inmate who has the means to pay is responsible for the ultimate payment of medical costs pursuant to this section, and a county at that point may seek recovery from another party pursuant to state law. 47 A.G. Op. 2 (1997).

7-32-2246. Temporary release from detention center.

Collateral References

Liability of governmental officer or entity for failure to warn or notify of release of potentially dangerous individual from custody. 12 ALR 4th 722.

Governmental tort liability for injuries caused by negligently released individual. 6 ALR 4th 1155.

7-32-2249. False claims by detention center administrator.

Compiler's Comments

1989 Amendment: Substituted entire section (see 1989 Session Law for text) for former subsection that read: "Every sheriff who falsely represents to the board of county commissioners the actual expenses of boarding prisoners, for furnishing food and supplies therefor, or for any service rendered in connection therewith or presents to said board false items in a claim or false

vouchers or makes any profit whatever out of the board or keeping of prisoners in his custody and every person who gives a false item or false voucher to be used by such sheriff in any claim against the county before such board is guilty of a misdemeanor."

7-32-2250. Liability for escape in civil actions.

Compiler's Comments

1989 Amendment: In seven places substituted reference to detention center administrator for reference to Sheriff or jail administrator, in seven places deleted reference to private party jailer, and in (3) substituted "inmate" for "prisoner" and "detention center" for "jail".

1985 Amendment: Throughout section, after "sheriff", inserted "jail administrator, or private party jailer"; in (1) after "person", inserted "in his custody"; and in (2) after "rescue", inserted "of a person in his custody".

Collateral References

Sheriffs and Constables *key* 104.

80 C.J.S. Sheriffs and Constables §§118, 119.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§155, 204.

Duress, necessity, or conditions of confinement as justification for escape from prison. 54 ALR 5th 141.

Part 23
Powers of County Commissioners Related to Law Enforcement

7-32-2301. Rewards for apprehension of criminals.

Case Notes

Construction of Section: Under this section, authorizing the Board of County Commissioners to offer rewards for the apprehension and conviction of persons who have committed a felony, by the use of the words "who have committed a felony", it was the intention of the Legislature to authorize rewards only after a felony has been committed. Lewis v. Petroleum County, 92 M 563, 17 P2d 60, 86 ALR 575 (1932).

Collateral References

Rewards *key* 4.

70 Am. Jur. 2d Sheriffs, Police, and Constables §71.

Knowledge of reward as condition of right thereto. 86 ALR 3d 1142.

7-32-2302. Establishment of curfew — penalty.

Compiler's Comments

2001 Amendment: Chapter 131 at beginning of (1)(a) substituted "The governing body of a county" for "A board of county commissioners" and at end substituted "roadways, or lands of the county" for "within the confines of unincorporated cities and towns of the county"; inserted (1)(b) concerning area covered by ordinance, excluding incorporated cities and towns; inserted second sentence in (3) imposing absolute liability for violation of curfew; and made minor changes in style. Amendment effective October 1, 2001.

1995 Amendment: Chapter 258 in (1), at beginning, substituted "may adopt an ordinance that establishes" for "power to establish, by general order and from time to time"; deleted (1)(b) that read: "(b) authority to make all proper and necessary administrative rules for the purpose of carrying into effect the provisions of this section"; in (3) substituted "convicted of violating a curfew ordinance adopted under subsection (1)" for "violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof", increased fine from $10 to $75, and inserted reference to community service sentence; and made minor changes in style.

Collateral References

Validity, construction, and effect of juvenile curfew regulations. 83 ALR 4th 1056.

Part 41
Municipal Police Force

Part Administrative Rules

Title 23, chapter 14, subchapter 4, ARM Peace officers standards and training.

Title 23, chapter 14, subchapter 8, ARM Revocation/suspension of peace officer certification.

Part Case Notes

Metropolitan Police Law Exclusive Remedy — Collective Bargaining Agreement Grievance Procedure Inapplicable: A police officer terminated pursuant to the metropolitan police law, Title 7, ch. 32, part 41, pursued remedies under the grievance procedure of his union's collective bargaining agreement. The Supreme Court noted that under the agreement a grievance arose only on a misapplication of a provision of the agreement. Neither party claimed a misapplication of the method of discharge. By the agreement's own terms, the metropolitan police law was applicable and provided adequate administrative and judicial determination and review. Butte-Silver Bow did not commit an unfair labor practice by refusing to grieve the matter as being outside the grievance procedure provided by 7-32-4164. City/County of Butte-Silver Bow v. Bd. of Personnel Appeals, 225 M 286, 732 P2d 835, 44 St. Rep. 237 (1987).

City Liable for Negligent Acts of Police Officers: The power in the city to control its policemen in both broad and detailed affairs related to their work brings the policemen squarely within the definition of "employee" and subjects the city to liability for torts committed within the scope of their employment or duties. St. v. District Court, 170 M 15, 550 P2d 382, 33 St. Rep. 464 (1976).

Reduction of Police Force — Good Faith Required: The police force of Helena was appointed pursuant to the provisions of Ch. 136, L. 1907. The force was reduced by ordinance for alleged economic reasons. Subsequently, others were appointed as special policemen to fill the places of those discharged at substantially the same expense as the discharged officers' salaries. The ordinance was void for lack of good faith in attempting to defeat the purposes of the statutes. State ex rel. Quintin v. Edwards, 40 M 287, 106 P 695 (1909).

Part Law Review Articles

Municipal Liability Litigation in Police Misconduct Cases From Monroe to Praprotnik and Beyond, Taylor, Cum. L. Rev. 447 (1988-89).

Municipal Liability for Failure to Supply Adequate Police Service and for Criminal Acts Occurring on Its Property, Quinn, 36 De Paul L. Rev. 309 (1987).

Part Collateral References

56 Am. Jur. 2d Municipal Corporations §§114, 132.

Liability of municipality or other governmental unit for failure to provide police protection from crime. 90 ALR 5th 273.

Liability of municipal corporation or other governmental entity for injury or death caused by action or inaction of off-duty police officer. 36 ALR 5th 1.

7-32-4101. Police department authorized and required.

Case Notes

Mandatory as to First- and Second-Class Cities:

Since provisions of the Metropolitan Police Law prior to amendment were mandatory on cities of the first and second class, where newly passed city ordinance required police officers to serve continuously on the active list for not less than 30 years before being eligible for retirement, the ordinance was in direct conflict with sections 11-1818 and 11-1821, R.C.M. 1947 (now repealed), and invalid. Bartels v. Miles City, 145 M 116, 399 P2d 768 (1965).

The Metropolitan Police Law, placing the police department under civil service rules, was mandatory as to cities of the first class, prior to 1939 amendment, but was left optional with the authorities of the smaller cities and towns whether they would bring themselves within its provisions. Grush v. Bishop, 46 M 97, 126 P 619 (1912), explained in McBroom v. Polson, 137 M 33, 349 P2d 1023 (1960); State ex rel. Buchner v. Mayor, 41 M 377, 109 P 710 (1910).

Appointment of Policemen in Third-Class City: Where a city had not elected to come under the provisions of the Metropolitan Police Law, it was not bound by any of the provisions thereof and was not prohibited from appointing a policeman who had not been a resident for 6 months. McBroom v. Polson, 137 M 33, 349 P2d 1023 (1960).

Duty to Maintain Adequate Force: A municipality has the duty to maintain an adequate police force and, it follows, the duty to preserve order. In performing that duty the municipality is performing a governmental function. Kingfisher v. Forsyth, 132 M 39, 314 P2d 876 (1957).

Liability of City for Tortious Act of City Policeman: A city is not liable for tortious acts of a city policeman committed while acting within the course and scope of his employment in enforcing the laws and ordinances of a city. Kingfisher v. Forsyth, 132 M 39, 314 P2d 876 (1957).

Broad Power: The purpose of the laws relative to police departments and Police Commissioners was to remove the police from the influence of politics and to make the tenure of the force secure irrespective of the political effect of their actions. In considering the broad powers given Police Commissions, it is apparent that they are not bodies for only advisory

purposes but that the intention of the Legislature was to make them bodies of considerable importance whose findings should have weight. State ex rel. Goings v. Great Falls, 112 M 51, 112 P2d 1071 (1941).

Other Offices: The Metropolitan Police Law contemplates that in addition to the office of Chief of Police, which the law itself creates, there shall be different grades and other offices established by the City Council, as indicated in 7-32-4104, or by the Mayor in the event the Council fails to act, as shown by 7-32-4103. State ex rel. Dwyer v. Duncan, 49 M 54, 140 P 95 (1914).

Purpose of Statute: The purpose of the Legislature in enacting the Metropolitan Police Law was to remove the police force as far as possible from the control of partisan political influences by putting it under civil service rules and thus raise the standard of efficiency. State ex rel. Bennetts v. Duncan, 47 M 447, 133 P 109 (1913); State ex rel. Quintin v. Edwards, 40 M 287, 106 P 695 (1910).

Construction of Statute: The Legislature, in enacting the "police commission bill", employing, as it did, many expressions which are exclusive in their meaning, intended to supplant all existing legislation as to the mode of constituting the police departments of cities and to put all members thereof under civil service rules. State ex rel. Wynne v. Quinn, 40 M 472, 107 P 506 (1910).

Department Not to Be Abolished: The police force cannot be abolished as a whole, for under this section the city is required to maintain it, nor can it be abolished in part. The power of the city extends only to a reduction in its numbers for economical reasons, and it must be exercised in good faith. State ex rel. Quintin v. Edwards, 40 M 287, 106 P 695 (1910).

Attorney General's Opinions

Chief of Police Required in City or Town: Each city or town must have a Chief of Police. No other police officers are required. 45 A.G. Op. 9 (1993).

Police Dispatch Services: A county may contract with a city or town to provide the municipal police department with police dispatch services operated through the County Sheriff's office. 37 A.G. Op. 10 (1977).

Collateral References

Municipal Corporations *key* 175, 180(1).

62 C.J.S. Municipal Corporations §§563, 567, et seq.

56 Am. Jur. 2d Municipal Corporations §114.

Liability of governmental unit or its officers for injury to innocent occupant of moving vehicle or for damages to such vehicle, as result of police chase. 4 ALR 4th 865.

Liability of municipal corporation for shooting of bystander by law enforcement officer attempting to enforce law. 76 ALR 3d 1176.

7-32-4103. Supervision of police department.

Case Notes

Commission Form of Government: The Metropolitan Police Law is quite similar in its provisions relating to the appointment, suspension, and discharge of the Chief of Police and of members of the police force to the provisions of the law relating to municipal fire departments, as respects the chief and members of the city fire department. As to policemen, this court has held that the mode of their suspension or removal prescribed by the Metropolitan Police Law obtains under the commission form of government as forcibly as under the aldermanic form. State ex rel. Daly v. Dryburgh, 62 M 36, 203 P 508 (1921); State ex rel. Lease v. Wilkinson, 59 M 327, 196 P 878 (1921); State ex rel. Lease v. Wilkinson, 55 M 340, 177 P 401 (1918); State ex rel. McDonald v. Getchell, 51 M 323, 152 P 480 (1915).

Examination of Officers — Authority of Council: The city of Butte, by resolution of the City Council, created a commission to examine all members of the police force and to report to the Mayor any officers unable to discharge the duties of office. The supervision of the force is confided to the Mayor. It is his duty to know that the members of the force are physically able to perform the services required of them and to discharge members who cannot. Before making such a charge, he must have reasonable grounds to do so. If in the judgment of the City Council the Mayor needs assistance in that determination, section 3314, R.C.M. 1921 (now repealed), furnished authority for the provision of such help. Larkin v. Butte, 52 M 410, 158 P 316 (1916).

Organization by Ordinance: A city ordinance providing for the organization of the police department of the city in conformity with the statute governing that matter has, when duly passed, the force and effect of a statute. State ex rel. Dwyer v. Duncan, 49 M 54, 140 P 95 (1914).

Power of Council: The power to reduce the police force, as constituted under the Metropolitan Police Law, if unnecessarily large or for economic reasons, resides in the City Council and not in the Mayor. State ex rel. Rowling v. Mayor, 43 M 331, 117 P 604 (1911).

Review of Action by Mayor: If the Mayor of a city puts members of the police department out of active service but afterwards complies with an order of court to reinstate them and, after they have served a short time, again retires them, he is not in contempt. State ex rel. Rowling v. District Court, 41 M 532, 110 P 86 (1910).

How Construed as to Appointment and Removal: A Chief of Police whose duties are the same as those of the ordinary policeman, except that the additional one of supervision and control of the entire force is imposed upon him, is a "policeman", and as such, after appointment under the act placing the police departments of cities under civil service rules, he is secure from removal from office in any other manner than that provided in the act. State ex rel. Wynne v. Quinn, 40 M 472, 107 P 506 (1910).

Law to Be Followed: This section is wholly inconsistent with the notion that the Mayor or the Council, or both together, may appoint or remove any member of the department in any other manner than that prescribed in the later law of which the section forms a part. State ex rel. Wynne v. Quinn, 40 M 472, 107 P 506 (1910).

Attorney General's Opinions

Mayor, Not Chief of Police, as Chief Law Enforcement Administrator in Commission-Executive Form of Government: In a commission-executive form of local government, the Mayor, not the Chief of Police, is the chief law enforcement administrator. To bestow the title of chief law enforcement administrator upon the Chief of Police would require the Chief of Police to perform administrative functions that the officer is not otherwise authorized to do. 48 A.G. Op. 4 (1999).

Mayor Allowed to Designate Assistant Police Chief Without Approval of Municipal Council: In a council-mayor form of government, in the absence of a statutory requirement that a particular mayoral decision is subject to approval of the Municipal Council, the mayor may, in the exercise of the statutory authority to manage and supervise the municipal police force, designate an officer to serve as Assistant Police Chief without the prior approval of the Municipal Council. 46 A.G. Op. 21 (1996).

Collateral References

Municipal Corporations *key* 168.

62 C.J.S. Municipal Corporations §§543, 564, 565.

56 Am. Jur. 2d Municipal Corporations §§114, 132.

7-32-4104. Additional regulations by city council.

Case Notes

Members of Force — Determination of Competency: The City Council may furnish assistance to the Mayor, in the form of a commission, to determine the physical competency of the members of the police force. Larkin v. Butte, 52 M 410, 158 P 316 (1916).

Attorney General's Opinions

Mayor Allowed to Designate Assistant Police Chief Without Approval of Municipal Council: In a council-mayor form of government, in the absence of a statutory requirement that a particular mayoral decision is subject to approval of the Municipal Council, the mayor may, in the exercise of the statutory authority to manage and supervise the municipal police force, designate an officer to serve as Assistant Police Chief without the prior approval of the Municipal Council. 46 A.G. Op. 21 (1996).

Collateral References

Municipal Corporations *key* 180(1).

62 C.J.S. Municipal Corporations §568.

Validity, construction, and application of statutory provisions relating to public access to police records. 82 ALR 3d 19.

7-32-4105. Duties of chief of police.

Case Notes

Duties as Police Officer: The Chief of Police is a policeman or police officer in the same sense as is an ordinary policeman. When the circumstances demand it, he is required to perform all the duties of the ordinary policeman, for though he has the additional duty of supervision and control of the entire force, this does not lessen or abridge the duties which are enjoined upon all

police officers under the general laws of the state. State ex rel. Wynne v. Quinn, 40 M 472, 107 P 506 (1910).

Attorney General's Opinions

Mayor, Not Chief of Police, as Chief Law Enforcement Administrator in Commission-Executive Form of Government: In a commission-executive form of local government, the Mayor, not the Chief of Police, is the chief law enforcement administrator. To bestow the title of chief law enforcement administrator upon the Chief of Police would require the Chief of Police to perform administrative functions that the officer is not otherwise authorized to do. 48 A.G. Op. 4 (1999).

Collateral References

Municipal Corporations *key* 182.
62 C.J.S. Municipal Corporations §565.

7-32-4106. List of active and eligible policemen.

Case Notes

Civil Service: The act of the Mayor and City Council in retiring a lieutenant of police to the eligible list, on the ground of economy, and immediately thereafter appointing another to fill the same office was a violation of the civil service principle upon which the Metropolitan Police Law is founded and did not deprive the plaintiff of his office. State ex rel. Breen v. Stodden, 58 M 116, 190 P 991 (1920); State ex rel. Dwyer v. Duncan, 49 M 54, 140 P 95 (1914).

Attorney General's Opinions

Chief of Police Required in City or Town: Each city or town must have a Chief of Police. No other police officers are required. 45 A.G. Op. 9 (1993).

Retirement Credit for Temporary Police Duty: Time served for temporary duty as a special officer counts toward a police officer's time requirements for the retired list under 19-10-401 (renumbered 19-19-401). 41 A.G. Op. 29 (1985).

Collateral References

Municipal Corporations *key* 180(2).
62 C.J.S. Municipal Corporations §570.

7-32-4108. Appointment to police force.

Case Notes

Applications for Appointment: Under this section, action by the Mayor must precede that of the Police Commission, and the City Clerk's action in transmitting an application to the Police Commission could not bind the Mayor. The Mayor need not submit applications when no vacancy exists, nor need he submit every application where a vacancy does exist, the matter resting in his sound discretion. The purpose of the Commission's certificate is to assure minimum qualifications. Horvath v. Mayor, 112 M 266, 116 P2d 874 (1941).

Applications for Appointment — War Veterans: A proceeding in mandamus was brought to compel the Mayor of a city to appoint an honorably discharged war veteran to the position of patrolman under Ch. 66, L. 1937 (10-2-201 through 10-2-206). A war veteran's application must be transmitted to the Police Commission by the Mayor when a vacancy exists, unless on reasonable investigation the Mayor is convinced he is not qualified. He may not be coerced by Writ of Mandate to take favorable action if after investigation he learns that the veteran is not qualified physically due to a back injury. The duty to appoint carries with it the duty to determine the requisite qualifications. State ex rel. Montgomery v. Mayor, 112 M 275, 114 P2d 1046 (1941); Horvath v. Mayor, 112 M 266, 116 P2d 874 (1941).

Appointment on Completion of Probationary Term: It is obligatory upon the Mayor of a city to appoint to permanent service on the police force a policeman who, after service for the probationary term of 6 months, has demonstrated his fitness for the position. State ex rel. Bennetts v. Duncan, 47 M 447, 133 P 109 (1913).

Collateral References

Municipal Corporations *key* 184(1), (2).
62 C.J.S. Municipal Corporations §572.

7-32-4109. Temporary employment for persons doing police work.

Collateral References

Municipal Corporations *key* 185(1) through (15).
62 C.J.S. Municipal Corporations §576.

7-32-4110. Procedure for reinstatement on police force.

Case Notes

Mandamus for Reinstatement: A policeman, discharged contrary to the provisions of the Metropolitan Police Law, is not guilty of laches in delaying, for 13 months, to take any action by mandamus for his reinstatement where he is awaiting the final decision of law questions in a similar pending proceeding. State ex rel. Bennetts v. Duncan, 47 M 447, 133 P 109 (1913).

Collateral References

Municipal Corporations *key* 185(14).

62 C.J.S. Municipal Corporations §581.

7-32-4111. Examination of applicants for position on police force.

Case Notes

Statute of Limitations Not Applicable: Police Commission was not equitably estopped from preferring charges in reference to false statements on employment application 3 years after such application was submitted and 2 years 3 months after probationary period was completed as no mention is made in this section of any Statute of Limitations as to actions stemming from false information in employment application. Steer v. Missoula, 169 M 389, 547 P2d 843, 33 St. Rep. 332 (1976).

Finality of Decision of Board: The effect of this provision is that a decision of the Examining and Trial Board (now Police Commission) on questions of fact is final and conclusive on all courts if there is any substantial evidence to support it. Bailey v. Examining & Trial Bd., 45 M 197, 122 P 572 (1912); Bailey v. Examining & Trial Bd., 42 M 216, 122 P 69 (1910).

Collateral References

62 C.J.S. Municipal Corporations §571.

7-32-4112. Qualifications of police officers.

Compiler's Comments

1995 Amendment: Chapter 150 after "18 years of age" deleted "or more than 35 years of age, but this restriction does not apply to any member of any police department as of July 2, 1973, to honorably discharged persons who served in the armed forces of the United States in time of war, providing such time of service is not less than 3 months, or to applicants for reinstatement under 7-32-4110"; and made minor changes in style. Amendment effective March 16, 1995.

Administrative Rules

ARM 23.14.402, 23.14.412, and 23.14.413 Employment and training standards for qualification and certification of law enforcement officers.

Case Notes

Mandatory Police Officer Age Restriction Not Impliedly Repealed: The city police officer age restriction contained in this section is not irreconcilably in conflict with or repugnant to the provisions of Title 49, ch. 2, commonly known as the Montana Human Rights Act, or the governmental code of fair practices, Title 49, ch. 3, nor did the Montana Legislature intend to repeal this section by passage of the antidiscrimination in employment laws. The District Court did not err in holding that this section was not impliedly repealed by the enactment of the Montana Human Rights Act or the governmental code of fair practices. Ross v. Great Falls, 1998 MT 276, 291 M 377, 967 P2d 1103, 55 St. Rep. 1127 (1998).

Appointment of Policemen in Third-Class City: Where a city had not elected to come under the provisions of the Metropolitan Police Law, prior to amendments making the law mandatory, it was not bound by any of the provisions thereof and was not prohibited from appointing a policeman who had not been a resident for 6 months. McBroom v. Polson, 137 M 33, 349 P2d 1023 (1960).

Collateral References

Municipal Corporations *key* 184(2), (3).

62 C.J.S. Municipal Corporations §§571, 572.

Validity, construction, and application of enactments relating to requirement of residency within or near specified governmental unit as condition of continued employment for policemen or firemen. 4 ALR 4th 380.

7-32-4113. Probationary period and confirmation of appointment.

Case Notes

Confirmation of Police Officer After Completion of Probationary Period — No Denial Without Good Cause: Hobbs argued that the lower court erred in dismissing his suit against the city of Thompson Falls for terminating him without cause because the parties agreed that he had completed his probationary period and 39-2-904 states that an employee completing a probationary period may be terminated only for good cause. The city argued that this section extends the probationary period for 30 days because it states that upon completion of a probationary period, an officer's appointment must be confirmed by the city's governing body within 30 days. The Supreme Court held that Hobbs could be discharged only for good cause because the only way to reconcile the two statutes was to interpret them to mean that an officer's employment upon completion of the probationary period was subject to confirmation by the city's governing body. However, because the officer was beyond the probationary period during that 30-day time, the officer's confirmation could be denied only upon a showing of good cause. Hobbs v. Thompson Falls, 2000 MT 336, 303 M 140, 15 P3d 418, 57 St. Rep. 1432 (2000), distinguishing Schend v. Thorson, 170 M 5, 549 P2d 809 (1976).

Mayor's Discharge of Police Officer — Not a Denial of Due Process: Police officer's claim that his discharge by Mayor during his period of probation without opportunity to dispute reasons for discharge violated due process of law is without merit because constitutional right of due process only comes into play when one's vested "property" or "liberty" interests are at stake. Schend v. Thorson, 170 M 5, 549 P2d 809, 33 St. Rep. 449 (1976).

Probationary Officer — Reinstatement — Mandamus: A probationary police officer was discharged from the force prior to completion of 6 months' service. No one was appointed to the force to fill his position. He sought to compel the Mayor to submit his name to the City Council for confirmation of his appointment as a member of the police department. Because of his probationary status, he had no clear legal right to the position and mandamus did not lie to require the Mayor to submit his name for membership with the department. State ex rel. O'Neill v. Mayor, 96 M 403, 30 P2d 819 (1934).

Probationary Term:

A probationer, being a member of the police force, can be removed only upon charges made and trial had in conformity with this section and 7-32-4155. State ex rel. Bennetts v. Duncan, 47 M 447, 133 P 109 (1913).

A police captain is a "policeman" and upon appointment, after having served the probationary term of 6 months, is secure from removal from office except as provided by law. State ex rel. Bailey v. Edwards, 40 M 313, 106 P 703 (1910).

Collateral References

62 C.J.S. Municipal Corporations §§572, 576.

7-32-4114. Restrictions on activities of policemen.

Compiler's Comments

1993 Amendment: Chapter 124 at beginning of (1) inserted exception clause; inserted (2) regarding employment of a town or third-class city police force member in another department of town or city government; and made minor changes in style. Amendment effective March 18, 1993.

1981 Amendment: Changed "shall" to "may" in (1); deleted former subsections (2) and (3) relating to restrictions on political activities of policemen; inserted (2) relating to political activity and officeholding by policeman's family; and inserted (3) relating to policeman's political activity while not on duty or in uniform.

Collateral References

Arrest *key* 9; Jury *key* 55; Municipal Corporations *key* 184(2), 189(1).

6A C.J.S. Arrest §29; 50 C.J.S. Juries §153; 62 C.J.S. Municipal Corporations §§571, 575.

38 Am. Jur. 2d Grand Jury §8.

Validity, construction, and application of regulations regarding outside employment of governmental employees or officers. 62 ALR 5th 671.

Police officers or other law enforcement officers as jurors. 72 ALR 3d 895, 958.

Validity and effect of plan or practice of consulting preferences of persons eligible for jury service as regards periods or times of service or character of actions. 112 ALR 995.

7-32-4115. Exemptions of members of police force.

Collateral References

62 C.J.S. Municipal Corporations §575.

7-32-4116. Minimum wage of police in first- and second-class cities.

Compiler's Comments

1981 Amendment: Substituted "section" for "[act]" in (3).

Case Notes

Applicability: The provisions of subsection (3) of this section apply to the computation of longevity pay for police chiefs under 7-4-4202(1). Johnson v. Bozeman, 179 M 412, 587 P2d 359, 35 St. Rep. 1695 (1978).

Actual Current Salary: Where a policeman's salary for 1 fiscal year was a stated amount that was calculated to include the longevity to which he was entitled, his "actual current salary" was the amount received other than for longevity, and the amount to which he is entitled for the next year is computed by adding his total longevity to the "actual current salary" rather than to the stated amount. State ex rel. Raw v. Helena, 139 M 343, 363 P2d 720 (1961).

Added Wages — Computation: Under this section as amended by Ch. 28, L. 1957, added wages must be added to the actual current salary and not to the minimum of $350 a month. Hill v. Billings, 134 M 282, 328 P2d 1112 (1958).

Annual Increase: Although the wages provided for by the 1957 amendment were payable only after July 1, 1957, this did not mean that the Legislature did not intend to consider service prior to that date in computing what the wages should be. Hill v. Billings, 134 M 282, 328 P2d 1112 (1958).

Length of Service: In enacting Ch. 28, L. 1957, amending this section, the Legislature intended to recognize the status of police officers according to the length of service in the past and to reward the more experienced by paying them a higher wage scale. The Legislature drew no distinction between years of service performed before July 1, 1957, and those performed after that date. Hill v. Billings, 134 M 282, 328 P2d 1112 (1958).

Constitutionality: This section did not offend against Art. XII, sec. 4, 1889 Mont. Const., prohibiting the Legislature from levying taxes upon the inhabitants of or property in cities. In maintaining a police force, city is performing a governmental function and not acting in its proprietary capacity and is subject to state control. It may not refuse to enforce the provisions of this section. State ex rel. Gebhardt v. Helena, 102 M 27, 55 P2d 671 (1936).

Construction of Statute: If this section contains any provisions in direct conflict with Title 7, ch. 6, part 42, known as the Municipal Budget Law, this section controls as to such conflicts. State ex rel. Gebhardt v. Helena, 102 M 27, 55 P2d 671 (1936).

Attorney General's Opinions

All-Purpose Levy Encompassing Multiple Levies: This levy for minimum wages of police departments may be encompassed as part of but not in addition to the all-purpose levy authorized by law. 36 A.G. Op. 94 (1976).

Collateral References

Municipal Corporations *key* 186(5).

62 C.J.S. Municipal Corporations §586.

7-32-4117. Group insurance for police officers — funding.

Compiler's Comments

2001 Amendment: Chapter 574 at beginning of (2) deleted "In compliance with 1-2-112 and" and near end substituted "levy on the taxable value of all taxable property" for "levy not to exceed 2 mills on the taxable value of property"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 in (2) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1981 Amendment: Substituted the requirement that cities are to pay no less than the premium rate in effect as of July 1, 1980, for insurance coverage for policemen and their dependents for the requirement that cities pay 100% of the premium for insurance coverage for

each policeman and his dependents in (1)(b); and inserted (1)(c) relating to provisions in collective bargaining agreements.

Interim Study Committee Bill: Chapter 88, L. 1981 (HB 3), was introduced at the request of the interim Study Committee on State Mandates and the Effects of State-Owned Property on Local Governments. See committee report, Legislative Council, 1980.

Attorney General's Opinions

All-Purpose Mill Levy — Forfeiture of Powers: Municipalities that adopt the all-purpose mill levy authorized in 7-6-4452 (now repealed) forfeit the power to impose levies for any particular purpose not clearly excepted by statute. Thus, the all-purpose mill levy supplants the taxing authority granted in 7-33-4111, 19-10-301 (renumbered 19-19-301), and 19-11-503 (renumbered 19-18-503) but does not supplant the taxing authority granted in 7-32-4117, 7-33-4130, 19-3-204, 19-9-704 (renumbered 19-9-209), sec. 2, Ch. 324, L. 1975 (not codified), sec. 2, Ch. 359, L. 1975 (not codified), and sec. 3, Ch. 438, L. 1975 (not codified). 38 A.G. Op. 112 (1980).

All-Purpose Levy Encompassing Multiple Levies: This levy for insurance for police departments may be encompassed as part of but not in addition to the all-purpose levy authorized by law. 36 A.G. Op. 94 (1976).

7-32-4118. Work period — days off duty without loss of compensation.

Compiler's Comments

1983 Amendment: Substituted language relating to work periods and days off duty (see 1983 Session Law for text) for "Each member of the police force in every city of the first and second class shall be given 2 days off duty in each 7-day period without loss of compensation."

Attorney General's Opinions

Applicability of State Law Other Than Montana Minimum Wage and Maximum Hours Law to Workers Covered by Fair Labor Standards Act: The federal Fair Labor Standards Act of 1938 requires provisions of state law other than the Montana minimum wage and maximum hours law (Title 39, ch. 3, part 4), which set shorter workweeks for specified groups of employees, to be given effect. 41 A.G. Op. 58 (1986).

Collateral References

Municipal Corporations *key* 186(4).

62 C.J.S. Municipal Corporations §587.

What constitutes unfair labor practice under state public employee relations acts. 9 ALR 4th 20.

7-32-4119. Overtime compensation.

Compiler's Comments

1983 Amendment: Before "compensation for" inserted "overtime"; after "compensation for" deleted "overtime as provided under 39-3-405"; and added last clause relating to excess hours worked beyond period established by chief of police.

Case Notes

Policemen — Overtime Compensation — Application of Newly Enacted Statute: A declaratory judgment denied overtime compensation to policemen. A statute was then enacted granting overtime compensation to certain policemen. Applying traditional rules of statutory construction, overtime pay for policemen not mentioned in the statute was denied while overtime pay for those classes of policemen mentioned was upheld. The statute did not repeal the declaratory judgment. Dodd v. E. Helena, 180 M 518, 591 P2d 241, 36 St. Rep. 414 (1979).

Collateral References

62 C.J.S. Municipal Corporations §586.

7-32-4120. Expenditure of state payments by municipality not having police retirement system — annual report.

Compiler's Comments

1991 Amendment: Inserted (1) defining employee; near middle of (2), after "police", inserted "department employee", after "training" inserted "for equipment and personnel relating to substance abuse enforcement", and near end substituted "employees" for "members"; and made minor changes in style.

1981 Amendment: Substituted "chapter 9 or 10 [chapter 10 renumbered chapter 19] of Title 19" for "the police retirement system law" in (1).

Attorney General's Opinions

Pension Trust for PERS Members Prohibits Use of State Funds: Subsection (8) of 19-3-403 prohibits use of annual state payments received by a city pursuant to 19-10-305 (renumbered 19-19-305) for a pension trust plan for police officers who are also members of the Public Employees' Retirement System. 42 A.G. Op. 92 (1988).

Consolidated Law Enforcement Funding: Third-class cities or towns that have consolidated their police departments with county law enforcement offices may not use the funds received from the State Auditor under 19-10-305 (renumbered 19-19-305) to pay the county for their share of the consolidated law enforcement expense unless those funds are used exclusively for pensions and/or training. 37 A.G. Op. 117 (1978).

Expenditure of State Funds for Police Officers: A town may expend funds received pursuant to 19-10-305 (renumbered 19-19-305) to purchase an annuity for former members of its police department even though the town now has a consolidated department. 37 A.G. Op. 103 (1977).

Collateral References

62 C.J.S. Municipal Corporations §588.

7-32-4121. Action to recover salary.

Collateral References

62 C.J.S. Municipal Corporations §586.

7-32-4131. Compensation and allowance for sick or injured policemen.

Collateral References

Municipal Corporations *key* 187.

62 C.J.S. Municipal Corporations §588.

Right of policeman to recover under Workmen's Compensation Act. 81 ALR 478; 10 ALR 201.

7-32-4132. Payment of partial salary amount of officer injured in performance of duty.

Compiler's Comments

1999 Amendment: Chapter 562 near beginning of (1) substituted "of a municipality contracting for retirement coverage pursuant to 19-9-207" for "of a first- or second-class municipality". Amendment effective July 1, 1999.

Saving Clause: Section 100, Ch. 562, L. 1999, was a saving clause.

1993 Amendment: Chapter 251 in (1), near end after "difference between", substituted "the member's net salary, following adjustments for income taxes and pension contributions" for "his full salary"; inserted (2) requiring the inability to perform duties as a condition of qualification for partial salary payment; and made minor changes in style.

Attorney General's Opinions

Compensation of Police Officer Injured on Duty — No Accrual of Leave: Under this section, a police officer of a first- or second-class municipality (see 1999 amendment) who is injured in the performance of duty is entitled to the difference between any workers' compensation benefits received and the officer's regular salary. (See 1993 amendment.) However, this section does not provide for accrual of either vacation or sick leave benefits during the period of disability. 42 A.G. Op. 114 (1988).

Full Salary Payable From Date of Injury: This section requires a first- or second-class municipality (see 1999 amendment) to pay the full salary (see 1993 amendment) of a police officer injured while at work from the initial date of the injury. 42 A.G. Op. 69 (1988).

Salary Payments to Municipal Policemen After Disabling Injury: Section 7-32-4132 requires a municipality to pay an injured policeman's full salary (see 1993 amendment) during the period of disability or 1 year, whichever ends first. The Workers' Compensation Fund is not liable for any wage loss benefits during that period because the municipality pays the policeman in full and he has suffered no wage loss. 37 A.G. Op. 156 (1978).

Collateral References

62 C.J.S. Municipal Corporations §588.

Determination whether peace officer's disability is service-connected for disability pension purposes. 12 ALR 4th 1158.

7-32-4135. Discontinuation of salary when retirement allowance granted.

Collateral References

62 C.J.S. Municipal Corporations §588.

7-32-4139. Reimbursement of training expenses if minimum service not fulfilled.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

7-32-4151. Police commission required in all cities and some towns.

Case Notes

Statute of Limitations Not Applicable: Police Commission was not equitably estopped from preferring charges in reference to false statements on employment application 3 years after such application was submitted and 2 years 3 months after probationary period was completed as no mention is made in this section of any Statute of Limitations as to actions stemming from false information in employment application. Steer v. Missoula, 169 M 389, 547 P2d 843, 33 St. Rep. 332 (1976).

De Facto Officers: Where the Mayor of a city of the first class had appointed three residents to constitute the Examining and Trial Board (now Police Commission) of the police department created by this section, such persons, having qualified, were de facto officers whose official acts were legal, notwithstanding the City Council repeatedly refused to confirm them. State ex rel. Buckner v. Mayor, 41 M 377, 109 P 710 (1910).

Examining and Trial Board: The law, in effect, commands that there shall be an Examining and Trial Board (now Police Commission) of the police department, the members of which the Mayor is required to nominate; and as to cities of the first class, the law prior to amendment was mandatory, and as to other cities and towns, it was permissive only. State ex rel. Buckner v. Mayor, 41 M 377, 109 P 710 (1910).

Police Commission — Constitutionality: The statute establishing a Police Commission in cities and towns did not violate Art. V, sec. 36, 1889 Mont. Const., declaring that the Legislature could not delegate to any special commission the power to perform any municipal function. The Police Commission was held not to be a "special" commission within the meaning of the 1889 Montana Constitution, since the Mayor controlled the Commission. State ex rel. Quintin v. Edwards, 38 M 250, 99 P 940 (1908).

Attorney General's Opinions

Law Enforcement Commission Not Required for Consolidated City-County Agency: A consolidated city-county law enforcement agency governed by Title 7, ch. 11, part 3, does not require a law enforcement commission established under this section. 42 A.G. Op. 58 (1988).

Collateral References

Municipal Corporations *key* 181.

62 C.J.S. Municipal Corporations §564.

7-32-4152. Term and compensation of members of police commission.

Compiler's Comments

1993 Amendment: Chapter 468 in (1), in two places, substituted "appeal" for "case"; and made minor changes in style.

Case Notes

Validity of Acts of De Facto Public Officer: Dismissed police officer contended the Law Enforcement Commission that decided to discharge him was not properly empaneled at the time of his hearing because of technical defects in the manner of appointment of two of its members. With regard to one member, there was no merit to this objection. As to the second, he, at the least, was acting as a de facto officer at the time of the hearing. A de facto officer's acts are valid to the extent they involve the interest of the public and a third person. Wood v. Butorovich, 220 M 484, 716 P2d 608, 43 St. Rep. 546 (1986). See also City/County of Butte-Silver Bow v. Bd. of Personnel Appeals, 225 M 286, 732 P2d 835, 44 St. Rep. 237 (1987).

Holding Office Beyond Term: There was no express or implied language in the applicable statute which qualified or prohibited the right and duty of members of a city Police Commission to continue to discharge the duties of such office after expiration of the term of office until successors had qualified. Dewar v. Great Falls, 178 M 21, 582 P2d 1171, 35 St. Rep. 432 (1978).

Collateral References

62 C.J.S. Municipal Corporations §564.

7-32-4153. Meaning of word mayor.

Compiler's Comments

1993 Amendment: Chapter 468 substituted "and 7-32-4161" for "through 7-32-4163".

1987 Amendment: At beginning of section changed "7-32-4155" to "7-32-4160".

Case Notes

Administrator Statutorily Authorized to Modify Police Officer's Punishment: A police officer failed to report damage to an assigned patrol car at the beginning of the officer's shift. After an investigation established that the accident occurred during the officer's work shift, the Police Commission, following a hearing, suspended the officer for 3 weeks. Pursuant to the 1991 version of 7-32-4160, the city administrator modified the officer's punishment from suspension to termination. The District Court subsequently affirmed both the Commission's decision to suspend and the administrator's decision to modify the punishment to termination. On appeal, the Supreme Court affirmed, ruling that state law authorized a city administrator to modify a decision by the Police Commission. In re Termination of Abbey v. Billings Police Comm'n, 268 M 354, 886 P2d 922, 51 St. Rep. 1374 (1994).

City Manager Chief Executive Under Commissioner-Manager Form of Government: The city manager filed an order confirming the recommendation of the police commission directing the permanent discharge of a police officer. A few days later, the Mayor signed an order to retain the police officer subject to certain conditions and limitations. The city filed a declaratory judgment action appealing the decision of the Mayor. The District Court held that under 7-32-4153 the city manager, rather than the Mayor, was the proper party to review the decision of the police commission. The Supreme Court affirmed the District Court decision and held that under the commissioner-manager form of government, the city manager, not the Mayor, is the chief executive with power to affirm, modify, or veto decisions of the police commission. Raynes v. Great Falls, 215 M 114, 696 P2d 423, 42 St. Rep. 224 (1985).

7-32-4154. Role of police commission in examination of applicants for police force.

Collateral References

62 C.J.S. Municipal Corporations §§564, 571.

7-32-4155. Role of police commission in hearing and deciding appeals brought by policemen.

Compiler's Comments

1993 Amendment: Chapter 468 in (1), after "hear", substituted remainder of subsection concerning appeals by member or officer for "try, and decide all charges brought by any person or persons against any member or officer of the police department, including any charge that such member or officer:

(a) is incompetent or has become incapacitated, by age, disease, or otherwise, to discharge the duties of his office;

(b) has been guilty of neglect of duty, of misconduct in his office, or of conduct unbecoming a police officer;

(c) has been found guilty of any crime; or

(d) whose conduct has been such as to bring reproach upon the police force"; in (2) substituted "an appeal of a police officer, to hear and determine the appeal" for "a charge against a police officer, to forthwith proceed to hear, try, and determine the charge"; and made minor changes in style.

Case Notes

Statutory Due Process Safeguards for Police Officers Met — Continuance Properly Denied: Ex-wife served a citizen's complaint with the police department against her former husband Wong, a police officer, alleging an ongoing pattern of harassment against herself, her babysitters, certain friends, and others that took place while Wong was on duty. A formal complaint alleging 39 charges was served on Wong 22 days before the police commission hearing was scheduled to begin. Following problems in retaining counsel, Wong moved for a continuance before the hearing, but the motion was denied. Wong subsequently appeared at the hearing pro se. The District Court held that the notice for hearing was statutorily sufficient but that the commission's denial of a continuance was arbitrary, capricious, and an abuse of discretion that denied Wong of procedural due process. The District Court reversed and remanded for another hearing based on the commission's failure to grant a continuance. The Supreme Court reversed the lower court after finding that the statutory safeguards for police officers were met, including provision of proper notice and a hearing at which Wong appeared and presented witnesses in his defense. Wong's appearance without counsel was due to his own actions. Denial of the continuance was not error. In re Termination of Wong v. Billings, 252 M 111, 827 P2d 90, 49 St. Rep. 158 (1992).

No Wrongful Discharge Action — Police Officers Never Fired: Two police officers brought an action for wrongful discharge against the city. The Supreme Court affirmed the lower court's granting of a summary judgment dismissing their suit. The court held that the officers had never been taken before the police commission as required by law and therefore they had never been legally discharged and accordingly could not bring an action for wrongful discharge. McCracken v. Chinook, 242 M 21, 788 P2d 892, 47 St. Rep. 501 (1990).

Admissibility in Police Disciplinary Hearing of Fact Witness Took Polygraph Test: Although the results of a witness's polygraph exam were not admitted in evidence, she was asked if she took a test and answered that she had. There was no objection, and the chairman of the Police Commission sitting at a police officers' disciplinary hearing admonished the Commission that evidence of taking the exam was to be ignored. On appeal, the District Court found no prejudice. The Supreme Court agreed. Gentry v. Helena, 237 M 353, 773 P2d 309, 46 St. Rep. 862 (1989).

Unchallenged Three-Month Suspension: Section 7-32-4163 (now repealed) provided that a police officer could be suspended with or without pay for up to 10 days in a given month and provided for an appeal by the officer. Three officers were suspended with pay from September 4 through November 30. They did not appeal. The record showed no prejudice, and the Supreme Court found no reversible error. Gentry v. Helena, 237 M 353, 773 P2d 309, 46 St. Rep. 862 (1989).

No Prejudice to Defense From Twenty and One-Half-Hour Hearing: Police Commission's disciplinary hearing for three police officers began at about 9:45 a.m. At about 9:15 p.m., the city finished its case. The Commission chairman told defense counsel to present their case. At 12:30 a.m., the chairman told the defense that the hearing could be adjourned to a later date, but the defense elected to continue. The hearing was completed after about 20 ½ hours. The hearing was inordinately long and wearying, but no prejudice to defendants was shown, and there was no reversible error. Gentry v. Helena, 237 M 353, 773 P2d 309, 46 St. Rep. 862 (1989).

Review Standard on Appeal to District and Supreme Courts: A Police Commission's findings in a disciplinary proceeding against a police officer are final and conclusive if supported by substantial evidence. The District Court, sitting as an appellate court, is not authorized to determine penalties, sanctions, or disciplinary measures that may be taken. On appeal from the District Court, the Supreme Court will use the standard of review in 2-4-704(2) of the Montana Administrative Procedure Act, and the findings, inferences and conclusions, and decision will not be reversed or modified unless they are clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record. Gentry v. Helena, 237 M 353, 773 P2d 309, 46 St. Rep. 862 (1989).

Testimony at Administrative Hearing by Person Who Decides Appeal: Police officers at a disciplinary hearing before the Police Commission argued that because the city manager could veto or modify the Commission's decision, it was an inherent conflict of interest for him to testify against them at the hearing. On appeal, the District Court found no prejudice in the city manager's testimony, and the officers showed none on appeal to the Supreme Court. No rule prevented the testimony. The Supreme Court found no reversible error. Gentry v. Helena, 237 M 353, 773 P2d 309, 46 St. Rep. 862 (1989).

Validity of Acts of De Facto Public Officer: Dismissed police officer contended the Law Enforcement Commission that decided to discharge him was not properly empaneled at the time of his hearing because of technical defects in the manner of appointment of two of its members. With regard to one member, there was no merit to this objection. As to the second, he, at the least, was acting as a de facto officer at the time of the hearing. A de facto officer's acts are valid to the extent they involve the interest of the public and a third person. Wood v. Butorovich, 220 M 484, 716 P2d 608, 43 St. Rep. 546 (1986). See also City/County of Butte-Silver Bow v. Bd. of Personnel Appeals, 225 M 286, 732 P2d 835, 44 St. Rep. 237 (1987).

Police Officer's Right to Privacy Not Absolute: The constitutional right of privacy does not completely protect a police officer from discharge based solely upon his off-duty activities. The state has an overriding and compelling interest in protecting the public and preserving the integrity of the police department, and this interest overrode respondent's right to privacy. In re Raynes, 215 M 484, 698 P2d 856, 42 St. Rep. 569 (1985).

Records of Other Disciplinary Proceedings Not Relevant — Protective Order Proper: In a police commission proceeding for dismissal of a police officer, defendant police officer was denied, under Rule 26(c), M.R.Civ.P. (Title 25, ch. 20), access to records of other police disciplinary proceedings that he planned to introduce in support of his defense of "discriminatory law enforcement". The evidence was not relevant to the proceeding, and the protective order was properly granted. In re Raynes, 215 M 484, 698 P2d 856, 42 St. Rep. 569 (1985).

Removal Not Excessive Punishment: Removal of an 18-year veteran of the Great Falls police force for conduct unbecoming an officer was not excessive punishment when the evidence indicated that in the course of operating a private hypnosis business defendant had engaged in sexual relations with his hypnotized clients and used his status as a police officer to gain his clients' confidence and trust. In re Raynes, 215 M 484, 698 P2d 856, 42 St. Rep. 569 (1985).

Scope of District Court Review: The District Court's review of a police commission determination under 7-32-4164 is a review of the questions of law and fact implicit within the police commission's decision. The review of the law is to determine whether the rulings are correct. The review of the facts is made under the substantial evidence test. In re Raynes, 215 M 484, 698 P2d 856, 42 St. Rep. 569 (1985).

Summary Proceeding: Policeman charged with several acts of misconduct and subject to proceedings under this section could not also be suspended under 7-32-4163 (now repealed) on the basis of the same charges. The procedures outlined in 7-32-4155 through 7-32-4163 (7-32-4162 and 7-32-4163 now repealed) and the summary proceeding under 7-32-4163 (now repealed) were mutually exclusive, the former being intended to deal with serious charges which, if proven, could lead to the officer's dismissal and the latter being intended to deal with minor disciplinary problems capable of being handled within the department. Miskovich v. Helena, 170 M 138, 551 P2d 995 (1976).

Dismissal During Probationary Period: Where city ordinance provided that newly hired police officers must serve a probationary period of up to 6 months, during which time they might be summarily dismissed by the Mayor, dismissal of plaintiff after 5 months on the basis of his "performance of duty, attitude toward and lack of desire to co-operate with those in charge" and Police Commission's refusal to give him a hearing on the charges against him did not violate the 14th amendment Due Process Clause, since dismissal from one's job during the probationary period is not a deprivation of liberty or property within the meaning of the clause. Schend v. Thorson, 170 M 5, 549 P2d 809 (1976).

Factors in Identifying Witness: Whether the witness who told a police investigator that petitioner was "rumored" to have stolen two bicycles from the police storage garage ought to be ordered identified in a proceeding before the Police Commissioner was dependent upon the circumstances of the case and called for a balancing of various factors, including the nature of the crime charged, possible defenses, the significance of the informer's testimony, the necessity to protect the flow of information, and the impact of nondisclosure on the accused's right to present a defense. In re Dewar, 169 M 437, 548 P2d 149 (1976).

Testimony — Power to Compel: Police Commission has the power under this section to compel the testimony of reluctant witnesses, subject to the same restrictions as those imposed upon a District Court in the trial of like cases. In re Dewar, 169 M 437, 548 P2d 149 (1976).

Trial: Where policeman had been improperly dismissed but reinstated, then charged with misconduct, dishonesty, and failure to obey a superior's lawful order, found guilty at a hearing as provided for by 7-32-4162 (now repealed) and then dismissed again, the first dismissal did not so taint the subsequent proceedings as to render them mere ex post facto attempts to provide due process and justify the discharge; the error of the improper dismissal was completely cured by the reinstatement. Steer v. Missoula, 169 M 389, 547 P2d 843 (1976).

Chairman — Prohibition Wrongfully Issued: The chairman of a Police Commission, though restrained from officially participating in the trial of a policeman for misconduct in office by Writ of Prohibition, improperly issued, nevertheless was present at the trial throughout, though not acting as chairman. His right to join his colleagues in the final disposition of the case, after dismissal of the prohibition proceeding, was not affected by the issuance of the Writ. State ex rel. Mueller v. District Court, 87 M 108, 285 P 928 (1930).

Prohibition — Jurisdiction Question: The Writ of Prohibition lies only to arrest proceedings without or in excess of jurisdiction—the power to hear and determine the case. Where the affidavit for the Writ does not present a jurisdictional question, as where a policeman under charges for misconduct seeks to disqualify a member of the police board from participating in the hearing for bias and prejudice but the statute does not provide for such disqualification, leaving the question of jurisdiction unaffected, the Writ does not lie. State ex rel. Mueller v. District Court, 87 M 108, 285 P 928 (1930), distinguished in State ex rel. Stewart v. District Court, 103 M 487, 63 P2d 141 (1936).

Quasi-Judicial Power: Under the Metropolitan Police Law there is no inherent right of indefinite tenure in the office of policeman. When remiss in their duty, the members of the police force are subject to discipline or removal from office after trial before the Police Commission which has quasi-judicial powers not limited by the provisions of the Montana Constitution applicable to courts. State ex rel. Mueller v. District Court, 87 M 108, 285 P 928 (1930).

No Disqualification: In the absence of statutory provision for the disqualification of members of the Police Commission on the ground of bias or prejudice, vested as it is with exclusive jurisdiction to hear and determine charges against members of the police force, the right of a member of the Commission to participate in a hearing of charges against a policeman is not vulnerable to such attack, the rule of disqualification not applying to officers not judicial. State ex rel. Mueller v. District Court, 87 M 108, 285 P 928 (1930).

Charges — No Statute of Limitations: The sufficiency of charges against a police officer cannot be defeated by the fact that the specifications considered as a basis for criminal prosecution may be barred by the Statute of Limitations. State ex rel. O'Brien v. Mayor, 54 M 533, 172 P 134 (1918).

Fitness: In every proceeding for the removal of an officer, the charges against him are not to be tested by the rigid rules of criminal procedure, but the ultimate inquiry is the fitness of the accused to hold his position. Such inquiry is raised by the specific questions whether he is incompetent or has been guilty of neglect of duty or misconduct in office or conduct unbecoming an officer. State ex rel. O'Brien v. Mayor, 54 M 533, 172 P 134 (1918).

Trial: It is contemplated that charges against any officer in the department shall be heard by the Examining and Trial Board (now Police Commission). State ex rel. Dwyer v. Duncan, 49 M 54, 140 P 95 (1914).

What Is Sufficient Misconduct: A police officer, after having been notified of an obstruction on a sidewalk by a pedestrian who was injured by falling over it, paid no attention to the complaint further than to say that nothing could be done unless the complainant should swear out a warrant against the owner of the premises. He was guilty of misconduct in office, in view of police regulations governing such matters, as well as of neglect of duty. A charge substantially embodying these facts was sufficient to state either or both of these offenses made triable by the trial board of the police department. Bailey v. Examining & Trial Bd., 45 M 197, 122 P 572 (1912).

Illegal Mileage: Evidence was sufficient to support a finding of misconduct against the Chief of Police for claiming and collecting mileage fees for services performed by a subordinate. The Chief paid his subordinate his actual traveling expenses and retained for himself the balance of the total amount received. State ex rel. Wynne v. Examining & Trial Bd., 43 M 389, 117 P 77 (1911).

Police Chief as Officer — Removal: A Chief of Police whose duties are the same as those of an ordinary officer, except the additional duty of supervision and control of the force, is a "policeman". After appointment under the municipal police statutes, he is secure from removal in any manner other than provided in the statutes. State ex rel. Wynne v. Quinn, 40 M 472, 107 P 506 (1910).

Law Review Articles

Police Officers Accused of Crime: Prosecutorial and Fifth Amendment Risks Posed by Police-Elicited "Use Immunized" Statements, Bloch, 1992 U. Ill. L. Rev. 625 (1992).

Collateral References

Municipal Corporations *key* 185(1) through (15).

62 C.J.S. Municipal Corporations §§579, 582.

Sexual misconduct or irregularity as amounting to "conduct unbecoming an officer," justifying officer's demotion or removal or suspension from duty. 9 ALR 4th 614.

Termination of public employment: right to hearing under due process clause of Fifth or Fourteenth Amendment—Supreme Court cases. 48 L. Ed. 2d 996.

7-32-4156. Appeals to be in writing.

Compiler's Comments

1993 Amendment: Chapter 468 at beginning substituted "An appeal brought by" for "Any charge brought against", near middle substituted "mayor, city manager, or chief executive" for "accused officer or member", increased number of days from 15 to 30, and at end substituted "appeal" for "charge"; and made minor changes in style.

Case Notes

Unsigned Complaint: Although this section provides that a complaint against a police officer must be in writing, there is no requirement that a complainant sign it. There was no error when the filed complaint had no signature. (See 1993 amendment.) Gentry v. Helena, 237 M 353, 773 P2d 309, 46 St. Rep. 862 (1989).

Charge to Be in Writing: The requirement of this section that a complaint charging a police officer with any of the offenses triable by the Examining and Trial Board (now Police

Commission) of the police department shall be reduced to writing is met if it in substance makes out any of the offenses mentioned therein. (See 1993 amendment.) Bailey v. Examining & Trial Bd., 45 M 197, 122 P 572 (1912).

Collateral References

62 C.J.S. Municipal Corporations §§578, 579.

Assertion of immunity as ground for discharging police officer. 44 ALR 2d 796.

7-32-4157. Rights of police officer.

Compiler's Comments

1993 Amendment: Chapter 468 near beginning substituted "appealing police officer has" for "accused shall have", substituted "hearing" for "trial", and at end substituted "the police officer's appeal" for "his defense".

Case Notes

Identification of Witness — Balancing: Whether the witness who told a police investigator that petitioner was "rumored" to have stolen two bicycles from the police storage garage ought to be ordered identified in a proceeding before the Police Commission was dependent upon the circumstances of the case and called for a balancing of various factors, including the nature of the crime charged, possible defenses, the significance of the informer's testimony, the necessity to protect the flow of information, and the impact of nondisclosure on the accused's right to present a defense. In re Dewar, 169 M 437, 548 P2d 149 (1976).

Collateral References

62 C.J.S. Municipal Corporations §579.

Refusal to submit to polygraph examination as ground for discharge or suspension of public employees or officers. 15 ALR 4th 1207.

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of peace officer involved in the case. 86 ALR 3d 1170.

Termination of public employment: right to hearing under due process clause of Fifth or Fourteenth Amendment—Supreme Court cases. 48 L. Ed. 996.

7-32-4158. Police commission hearings open to public.

Compiler's Comments

1993 Amendment: Chapter 468 substituted "hearings must" for "trials shall".

Collateral References

62 C.J.S. Municipal Corporations §579.

7-32-4159. Subpoena authority of police commission.

Case Notes

Power to Compel Testimony: Police Commission has the power under this section to compel the testimony of reluctant witnesses, subject to the same restrictions as those imposed upon a District Court in the trial of like cases. In re Dewar, 169 M 437, 548 P2d 149 (1976).

7-32-4160. Decision by police commission.

Compiler's Comments

1993 Amendment: Chapter 468 after "hearing" deleted "or trial"; substituted "the appeal" for "whether the charge was proven or not proven"; substituted reference to decision regarding the disciplinary order for "discipline, suspend, remove, or discharge any officer who shall have been found guilty of the charge filed against him"; deleted (2) and (3) that read: "(2) Such action of the police commission shall, however, be subject to modification or veto by the mayor, made in writing and giving reasons therefor, which shall become a permanent record of the police commission; provided, however, that where and when the police commission decides the charge not proven, the decision is final and conclusive and is not subject to modification or veto by the mayor or to any review.

(3) Where the police commission decides the charge proven, the mayor, within 5 days from the date of the filing of such findings and decision with the city clerk, may modify or veto such findings and decision"; and made minor changes in style.

Case Notes

Termination of Police Officer Affirmed — Right of Employer to Compel Answers to Employment-Related Questions — Due Process: Wolny appealed his termination as a Bozeman police officer for inappropriate use of force, making inconsistent statements, and failing to orally

answer followup questions. The Supreme Court noted that Wolny was entitled to fundamental due process rights, including notice, an explanation of the evidence against him, and an opportunity to respond. However the court found that the officer's due process rights were not violated. The Police Commission properly considered the testimony of witnesses, correctly held that Wolny was insubordinate for failing to orally answer questions that were reasonably related to Wolny's fitness to perform duties or to his job performance, properly excluded the disciplinary history of other police officers, and adequately complied with its progressive discipline policy despite the fact that Wolny's personnel file was not offered as evidence. Wolny v. Bozeman, 2001 MT 166, 306 M 137, 30 P3d 1085 (2001), following In re Raynes, 215 M 484, 698 P2d 856 (1985), Boreen v. Christensen, 267 M 405, 884 P2d 761 (1994), and In re Termination of Abbey v. Billings Police Comm'n, 268 M 354, 886 P2d 922 (1994).

Administrator Statutorily Authorized to Modify Police Officer's Punishment: A police officer failed to report damage to an assigned patrol car at the beginning of the officer's shift. After an investigation established that the accident occurred during the officer's work shift, the Police Commission, following a hearing, suspended the officer for 3 weeks. Pursuant to the 1991 version of this section, the city administrator modified the officer's punishment from suspension to termination. The District Court subsequently affirmed both the Commission's decision to suspend and the administrator's decision to modify the punishment to termination. On appeal, the Supreme Court affirmed, ruling that state law authorized a city administrator to modify a decision by the Police Commission. In re Termination of Abbey v. Billings Police Comm'n, 268 M 354, 886 P2d 922, 51 St. Rep. 1374 (1994).

Discharge for Lying to Commission Under Oath: It was not reversible error for the city manager, on review of the Police Commission's hearing, to discharge three police officers who lied to the Commission under oath. (See 1993 amendment.) Gentry v. Helena, 237 M 353, 773 P2d 309, 46 St. Rep. 862 (1989).

Evidence in Support of Discharge for Harassing Citizen and Lying to Commission: Police Commission found three police officers guilty of lying to the Commission and two of them guilty under citizen's complaints and recommended suspensions without pay for two, a demotion for one, and a reprimand personnel file letter for one. The city manager, on review, terminated employment of all three. Substantial evidence supported the recommendation and termination. Two officers had been drinking for over 8 hours and had harassed a citizen while intoxicated. They made the rounds of a number of bars. The third had given the two a ride in a police car from a bar to their vehicle, and all three attempted to cover up the events before the Commission. Among the evidence was the testimony of several witnesses and an audiotaped record of a call one officer made for a ride in a police car. (See 1993 amendment.) Gentry v. Helena, 237 M 353, 773 P2d 309, 46 St. Rep. 862 (1989).

City Manager Chief Executive Under Commissioner-Manager Form of Government: The city manager filed an order confirming the recommendation of the police commission directing the permanent discharge of a police officer. A few days later, the Mayor signed an order to retain the police officer subject to certain conditions and limitations. The city filed a declaratory judgment action appealing the decision of the Mayor. The District Court held that under 7-32-4153 the city manager, rather than the Mayor, was the proper party to review the decision of the police commission. The Supreme Court affirmed the District Court decision and held that under the commissioner-manager form of government, the city manager, not the Mayor, is the chief executive with power to affirm, modify, or veto decisions of the police commission. (See 1993 amendment.) Raynes v. Great Falls, 215 M 114, 696 P2d 423, 42 St. Rep. 224 (1985).

Finding of Commission Binding Upon City Council: Relator sought a writ commanding the City Council to put him on the reserve list of police officers of the city, in accordance with a finding of the Police Commission submitted to the Council that relator was permanently disabled in line of duty so as to impair his ability as an active police officer. It recommended the Council and Board of Trustees of the police pension fund that he become a member of the police reserves. Such finding was binding on the Council to proceed under this section and by ordinance place him on the reserve list and ordered him paid as provided by statute. State ex rel. Goings v. Great Falls, 112 M 51, 112 P2d 1071 (1941).

7-32-4161. Enforcement of decision.

Compiler's Comments

1993 Amendment: Chapter 468 substituted present first sentence concerning mayor enforcing decision of police commission for "When a charge against a member of the police force is found proven by the board and is not vetoed by the mayor, the mayor must make an order

enforcing the decision of the board or the decision as modified if modified by the mayor"; and made minor changes in style.

Case Notes

City Manager Chief Executive Under Commissioner-Manager Form of Government: The city manager filed an order confirming the recommendation of the police commission directing the permanent discharge of a police officer. A few days later, the Mayor signed an order to retain the police officer subject to certain conditions and limitations. The city filed a declaratory judgment action appealing the decision of the Mayor. The District Court held that under 7-32-4153 the city manager, rather than the Mayor, was the proper party to review the decision of the police commission. The Supreme Court affirmed the District Court decision and held that under the commissioner-manager form of government, the city manager, not the Mayor, is the chief executive with power to affirm, modify, or veto decisions of the police commission. (See 1993 amendment.) Raynes v. Great Falls, 215 M 114, 696 P2d 423, 42 St. Rep. 224 (1985).

Collateral References

62 C.J.S. Municipal Corporations §§580 through 585.

7-32-4164. Right to appeal.

Compiler's Comments

1993 Amendment: Chapter 468 inserted introductory clause concerning right of appeal and (1) concerning grievance procedure in collective bargaining agreement; at beginning of (2) inserted "to the police commission. A final decision of the police commission may be appealed to the", at end of first sentence deleted "shall have jurisdiction to review all questions of fact and all questions of law in a suit brought by any officer or member of the police force, but no", inserted second sentence concerning District Court jurisdiction, and in third sentence substituted "a decision or an order" for "such hearing or trial" and near end, after "police commission", deleted "or order of the mayor"; and made minor changes in style.

Case Notes

Statutory Due Process Safeguards for Police Officers Met — Continuance Properly Denied: Ex-wife served a citizen's complaint with the police department against her former husband Wong, a police officer, alleging an ongoing pattern of harassment against herself, her babysitters, certain friends, and others that took place while Wong was on duty. A formal complaint alleging 39 charges was served on Wong 22 days before the police commission hearing was scheduled to begin. Following problems in retaining counsel, Wong moved for a continuance before the hearing, but the motion was denied. Wong subsequently appeared at the hearing pro se. The District Court held that the notice for hearing was statutorily sufficient but that the commission's denial of a continuance was arbitrary, capricious, and an abuse of discretion that denied Wong of procedural due process. The District Court reversed and remanded for another hearing based on the commission's failure to grant a continuance. The Supreme Court reversed the lower court after finding that the statutory safeguards for police officers were met, including provision of proper notice and a hearing at which Wong appeared and presented witnesses in his defense. Wong's appearance without counsel was due to his own actions. Denial of the continuance was not error. In re Termination of Wong v. Billings, 252 M 111, 827 P2d 90, 49 St. Rep. 158 (1992).

Review Standard on Appeal to District and Supreme Courts: A Police Commission's findings in a disciplinary proceeding against a police officer are final and conclusive if supported by substantial evidence. The District Court, sitting as an appellate court, is not authorized to determine penalties, sanctions, or disciplinary measures that may be taken. On appeal from the District Court, the Supreme Court will use the standard of review in 2-4-704(2) of the Montana Administrative Procedure Act, and the findings, inferences and conclusions, and decision will not be reversed or modified unless they are clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record. Gentry v. Helena, 237 M 353, 773 P2d 309, 46 St. Rep. 862 (1989).

Metropolitan Police Law Exclusive Remedy — Collective Bargaining Agreement Grievance Procedure Inapplicable: A police officer terminated pursuant to the metropolitan police law, Title 7, ch. 32, part 41, pursued remedies under the grievance procedure of his union's collective bargaining agreement. The Supreme Court noted that under the agreement a grievance arose only on a misapplication of a provision of the agreement. Neither party claimed a misapplication of the method of discharge. By the agreement's own terms, the metropolitan police law was applicable and provided adequate administrative and judicial determination and review. Butte-Silver Bow did not commit an unfair labor practice by refusing to grieve the matter as

being outside the grievance procedure provided by this section. (See 1993 amendment.) City/County of Butte-Silver Bow v. Bd. of Personnel Appeals, 225 M 286, 732 P2d 835, 44 St. Rep. 237 (1987).

Scope of District Court Review: The District Court's review of a police commission determination under this section is a review of the questions of law and fact implicit within the police commission's decision. The review of the law is to determine whether the rulings are correct. The review of the facts is made under the substantial evidence test. In re Raynes, 215 M 484, 698 P2d 856, 42 St. Rep. 569 (1985).

Review of Decision: Decision of Police Commission is subject to judicial review, but there is no right to jury trial or hearing de novo. Helena v. District Court, 166 M 74, 530 P2d 464 (1975).

Time Limitation: Where a statute creates a right which did not exist at the common law and prescribes the time within which the right must be exercised, the limitation does not affect the remedy merely but is the essence of the right itself—a condition attached to the right to sue. Under this rule of law, it was proper to dismiss a complaint of a police officer alleging that he was illegally removed from the force where the complaint was not filed until 5 months after the accrual of his cause of action. The 60-day limitation for such actions contained in the statute was an effective bar to his right to sue. King v. Mayor, 71 M 309, 230 P 62 (1924).

Removal of Officer — Certiorari: The Examining and Trial Board (now Police Commission) of the Butte police department discharged an officer under the Metropolitan Police Law. The officer contended that the complaint on which he was tried did not state facts sufficient to constitute the offense with which he was charged, or if the complaint was sufficient, that there was no substantial evidence tending to prove the charges. Certiorari was proper to review the action of the Board to determine if it had exceeded its jurisdiction or authority, but since no transcripts of the proceedings are required, the only remedy concerning sufficiency of the evidence is an independent suit in equity. State ex rel. Examining & Trial Bd. v. Jackson, 58 M 90, 190 P 295 (1920).

Collateral References

62 C.J.S. Municipal Corporations §580.

Part 42
Municipal Detention Centers

7-32-4201. Municipal detention centers authorized.

Compiler's Comments

1989 Amendment: Near beginning substituted "detention center, as defined in 7-32-2120" for "jail" and at end, after "same", deleted "and to cause the prisoners to work on streets or elsewhere within 3 miles of the city"; and made minor changes in phraseology.

Attorney General's Opinions

County Primarily Responsible for Postarrest Medical Care: A county is primarily responsible to third-party providers for postarrest medical care given to a person who is ultimately charged with a violation of state law. Following conviction, an inmate who has the means to pay is responsible for the ultimate payment of medical costs pursuant to 7-32-2245, and a county at that point may seek recovery from another party pursuant to state law. 47 A.G. Op. 2 (1997).

Collateral References

Prisons *key* 4.

72 C.J.S. Prisons §5.

Part 43
Powers of Municipal Council Related to Law Enforcement

Part Law Review Articles

The Extent of Governmental Immunity When Reporting or Investigating Suspected Child Abuse, Wimer, 13 J. Juv. L. 173 (1992).

The Meaning of "Under Color of" Law, Winter, 91 Mich. L. Rev. 323 (1992).

7-32-4301. Regulations governing arrest authorized.

Case Notes

City Police Officer Making Arrest Outside Territorial Jurisdiction — Probable Cause Required: A city police officer, investigating a phone call reporting a suspected drunk driver,

pursued Williamson outside city limits and arrested him, although the officer observed no erratic driving or other indicators of alcohol impairment prior to stopping Williamson's truck. Williamson moved to suppress all the evidence on the basis that the officer did not have probable cause to make the stop, contending that probable cause was necessary because the officer was acting outside his territorial jurisdiction as a city police officer and that the information within the officer's knowledge at the time of the stop did not rise to the level of probable cause. Williamson's motion was denied. Clarifying the difference between the probable cause necessary to effectuate a valid arrest and the particularized suspicion necessary to justify an investigative stop, the Supreme Court noted that although an officer ordinarily needs only a particularized suspicion for a traffic stop, under these circumstances, the officer was outside his jurisdiction when the stop was made and was thus not acting within the scope of his authority as a peace officer. The criminal procedures in 46-5-401 and 46-6-311 were not available to the officer. Rather, as a peace officer acting outside his territorial jurisdiction, his authority was limited to that provided to private citizens under 46-6-502, so probable cause was required. The citizen informant's telephone report was not sufficient to establish probable cause because the relayed report was devoid of information as to why the informant believed that Williamson was intoxicated and the officer did not inquire into the basis of the report before stopping Williamson's truck. The report created, at most, a suspicion that an offense was being committed, but that suspicion alone was insufficient to establish probable cause. Even if the informant had sufficient information to establish probable cause for a citizen's arrest of Williamson, that information was not relayed to the officer, who thus did not possess sufficient information to make the stop. The judgment was reversed because the District Court erred in refusing to suppress the evidence. St. v. Williamson, 1998 MT 199, 290 M 321, 965 P2d 231, 55 St. Rep. 843 (1998), distinguishing St. v. Schoffner, 248 M 260, 811 P2d 548 (1991).

Territorial Jurisdiction Not Controlling on Officer's Right to Make Arrest: Williams argued that Krausz, a Miles City police officer, did not have the authority to arrest him for driving under the influence because he was not stopped in Miles City or within 5 miles of the city limits. The Supreme Court held that Krausz was acting at the request of a highway patrol officer who did have jurisdiction over the incident and that therefore Krausz did have the authority to arrest Williams. St. v. Williams, 273 M 459, 904 P2d 1019, 52 St. Rep. 1085 (1995).

Arrest Outside City Limits by City Police Absent Local Ordinance — Arrest Lawful in Capacity as Private Citizen: The city of Eureka never enacted an ordinance giving city police jurisdiction outside the city limits pursuant to this section, and defendant contended that his arrest for DUI and hit-and-run made 0.8 mile outside Eureka was therefore illegal and that all evidence resulting from the arrest was inadmissible. The Supreme Court found that by enacting this section (authorizing city police arrests within 5 miles of town), 46-6-502 (authorizing arrests by private citizens), and 46-6-411 (authorizing out-of-state officers in close pursuit to make arrests in Montana), it is clear that Montana no longer adheres to the common-law rule strictly prohibiting arrests outside an officer's jurisdiction. A police officer outside his jurisdiction has not lost his characteristics of being a private citizen; therefore, if an arrest by a private citizen would be lawful under the circumstances, the arrest by an officer outside his jurisdiction would be lawful. St. v. McDole, 226 M 169, 734 P2d 683, 44 St. Rep. 561 (1987), followed in St. v. Williamson, 1998 MT 199, 290 M 321, 965 P2d 231, 55 St. Rep. 843 (1998).

Collateral References

Municipal Corporations *key* 596.

62 C.J.S. Municipal Corporations §134.

7-32-4302. Control of disturbances of the peace.

Case Notes

Narrow Construction of Disturbing the Peace Ordinance — No Vagueness or Overbreadth: Appellant was convicted of breach of the peace under Whitefish Municipal Ordinance, 9.64.010, which read: "No person within the municipality, or within three miles of the municipal limits, shall willfully and maliciously disturb the peace and quiet of any street, neighborhood, family, or person by loud, tumultuous noise, or by tumultuous or offensive conduct, or by using offensive, loud radio or television sets, or by threatening, quarreling, scolding, hallooing, hollering, challenging to fight, or fighting, or by cursing, swearing, uttering obscene, profane, vulgar, or indecent language in the presence of any person or persons, or by committing any obscene, vulgar, indecent, or lewd act in any public place, or in view of any person or persons". Appellant had been talking louder than normal on a city street at about 2 a.m., and when a police officer told appellant to "hold it down", appellant said "Well, [m.f.], I will holler and yell when and

wherever I want if I want to". The Supreme Court construed the ordinance narrowly as applying only to words spoken willfully and maliciously, and that constitute "fighting words" with a direct tendency to violence, and stated that as so construed the ordinance is not unconstitutional for vagueness or overbreadth. Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021, 42 St. Rep. 928 (1985).

Obscene "Fighting Words" Spoken to Police Officer — Disturbing the Peace Conviction Upheld: While on a city street at about 2 a.m. after closing his restaurant and bar, appellant and his friends were engaged in a louder-than-normal conversation. A police officer approached and told appellant to "hold it down". Appellant said, "Well, [m.f.], I will holler and yell when and wherever I want if I want to". The language constituted "fighting words", and by definition a threat of violence or violent response occurred. Appellant was properly convicted of disturbing the peace. Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021, 42 St. Rep. 928 (1985).

Protection of Public Morals: Notwithstanding repeal of the state prohibition laws, a city has the power to prohibit, by ordinance, traffic in intoxicating liquors under its general powers granted it by 7-5-4101 and this section under which it may pass ordinances to prevent acts or conduct calculated to disturb the public peace or which is offensive to public morals. State ex rel. Moreland v. Police Court, 87 M 17, 285 P 178 (1930).

Attorney General's Opinions

Authority to Enact Ordinances Regulating Breach of Peace: This section authorizes but does not require that a city or town council adopt ordinances to prevent acts or conduct calculated to disturb the public peace. In situations in which this authority has not been exercised, a city or town police officer acting within the officer's territorial jurisdiction may arrest a person for the violation of a state law prohibiting offenses against the public order. 45 A.G. Op. 9 (1993).

Enforceability of Ordinance Regulating Discharge of Firearms Within Three Miles of City: A city may adopt an ordinance prohibiting disorderly conduct resulting from the discharge of firearms and enforce the ordinance within 3 miles of the city limits pursuant to this section. 42 A.G. Op. 8 (1987).

No Local Authority to Prohibit Minors in Licensed Premises: An incorporated town with general powers does not have the authority to enact an ordinance prohibiting persons under the age of 19 from being on licensed premises where alcoholic beverages are sold and consumed. The local government may not enact an ordinance providing for greater penalties than those found in 45-5-624 for a person under the age of 19 convicted of possession of alcoholic beverages. 41 A.G. Op. 84 (1986).

Collateral References

Municipal Corporations *key* 596, 598.

62 C.J.S. Municipal Corporations §§132, 134, 135, 246.

Public regulation and prohibition of sound amplifiers or loud speaker broadcasts in streets. 10 ALR 2d 627.

7-32-4303. Control of shoplifting.

Compiler's Comments

1991 Amendment: After "shoplifting" deleted "as provided in 46-6-501"; and made minor change in style.

Severability Clause: Section 6, Ch. 274, L. 1974, was a severability clause.

Collateral References

62 C.J.S. Municipal Corporations §136.

7-32-4304. Control of disorderly conduct.

Compiler's Comments

2003 Amendment: Chapter 561 near middle after "power to" substituted "restrain and punish persons" for "define vagrancy and to restrain and punish vagrants, mendicants, and persons" and after "conduct" inserted "and aggressive solicitation, as defined by ordinance, that is included in the offense of disorderly conduct"; and made minor changes in style. Amendment effective May 5, 2003.

Retroactive Applicability: Section 6, Ch. 561, L. 2003, provided: "[Sections 1 and 3] [7-1-111 and 7-32-4304] apply retroactively, within the meaning of 1-2-109, to ordinances enacted prior to [the effective date of this act]." Effective May 5, 2003.

Case Notes

Vagrancy: City and Town Councils have express authority from the state to define and punish vagrancy under this section. State ex rel. Butte v. District Court, 37 M 202, 95 P 841 (1908).

Collateral References

Municipal Corporations *key* 591(1), 596.
62 C.J.S. Municipal Corporations §§246, 306.
Validity of vagrancy statutes and ordinances. 25 ALR 3d 792.

7-32-4311. Maintenance of police telegraph.

Attorney General's Opinions

Police Dispatch Services: A county may contract with a city or town to provide the municipal police department with police dispatch services operated through the County Sheriff's office. 37 A.G. Op. 10 (1977).

CHAPTER 33
FIRE PROTECTION

Chapter Attorney General's Opinions

Provision of Fire Protection Services Outside City Limits: A city may contract with entities to provide fire protection services outside the city limits. 42 A.G. Op. 80 (1988).

Chapter Collateral References

56 Am. Jur. 2d Municipal Corporations §§115, 133.

Part 21
Rural Fire Districts

Part Case Notes

Extension of Immunity to All Rural Fire Districts Regardless of Method of Formation: Plaintiffs contended that under 7-33-2208, immunity for rural firefighters extended only to rural fire crews and fire companies established on the initiative of a county government under part 22 of this chapter, but not to crews and companies established in response to a petition by landowners pursuant to this part. The Supreme Court found, after examining the legislative history of 7-33-2208, no logic or reason for granting or withholding immunity to a rural firefighting unit based on the method of its origin and extended immunity to districts established under both part 22 and this part. Allegations of negligent acts and omissions in fire suppression techniques outside the scope of 7-33-2208 did not constitute a genuine issue of material fact sufficient to preclude summary judgment based on immunity. Noting the 1989 amendment to 7-33-2208, the court further impliedly extended immunity to fire companies organized under part 23 and fire service areas organized under part 24. Hyde v. Evergreen Volunteer Rural Fire Dept., 252 M 299, 828 P2d 1377, 49 St. Rep. 259 (1992).

Part Attorney General's Opinions

Rural Fire District Not to Incorporate Under Nonprofit Corporation Act: Although the formation and operation of nonprofit corporations are generally controlled by the Montana Nonprofit Corporation Act (Title 35, ch. 2), the particular process relating to the creation and operation of fire districts is specifically mandated by Title 7, ch. 33, part 21. Therefore, a rural fire district may not be established or reestablished and operated under Title 35, ch. 2, in order to avoid personal liability. 43 A.G. Op. 2 (1989).

Provision of Fire Protection Services Outside City Limits: A city may contract with entities to provide fire protection services outside the city limits. 42 A.G. Op. 80 (1988).

Rural Firefighters — Not Within Workers' Compensation Coverage: A firefighter in a rural fire district is not an "employee" as defined in 39-71-118 and hence is not within the Workers' Compensation Act. Similar benefits are available to him under the provisions of Title 19, ch. 12 (renumbered Title 19, ch. 17). 40 A.G. Op. 9 (1983).

7-33-2101. Rural fire districts authorized — petition.

Attorney General's Opinions

Question of Rural Fire District as Taxing Unit: A rural fire district operated by a board of trustees is a taxing unit within the meaning of 15-10-412 (now repealed); however, a rural fire

district operated by the county and not by a board of trustees is not a taxing unit. 42 A.G. Op. 80 (1988).

Three-Year Contract — Call-for-Bid Requirements: Fire districts are not subject to the statutory 3-year contract and call-for-bid requirements. 36 A.G. Op. 73 (1976).

Status of County Fire District Salaried Employees: The county has authority to establish and equip a fire district, to levy taxes to fund the district, to contract for fire protection, or to appoint trustees to manage the district. Full-time salaried employees of the fire district are employees of the county in the absence of an intervening employer, such as a city, town, or private fire service, and not volunteers. As such they are entitled to vacation, sick leave, and group insurance benefits. They are subject to hours of employment as provided by statute for county employees and have tenure rights consistent with tenure rights of other paid fire companies. 35 A.G. Op. 71 (1974).

Collateral References

Municipal Corporations *key* 3, 27, 28, 51.

62 C.J.S. Municipal Corporations §§7, et seq., 41, 101.

7-33-2102. Notice of hearing.

Compiler's Comments

2001 Amendment: Chapter 354 deleted former (2) that read: "(2) by causing notices of the time and place of such hearing to be posted in at least three of the most public places within the area proposed to be established as a fire district"; and made minor changes in style. Amendment effective October 1, 2001.

1985 Amendment: In (1) substituted "as provided in 7-1-2122" for "by first-class mail"; and in (3) substituted "as provided in 7-1-2121" for "at least once, not less than 10 or more than 20 days prior to the time of the hearing, in a newspaper regularly published in the county in which such proposed district is situated."

7-33-2103. Hearing on petition — decision.

Compiler's Comments

1985 Amendment: Inserted (2) relating to adjustment of boundaries.

7-33-2104. Operation of fire districts.

Attorney General's Opinions

Response by Fire Service Organizations to Hazardous Materials Incidents: Unless otherwise provided by law, the decision to order a firefighter to respond to or investigate a hazardous materials incident is within the discretion of the supervising entity of each fire service organization. The State Fire Marshal (now the state fire prevention and investigation program of the Department of Justice) does not have specific rulemaking authority to prescribe which fire service organization should respond to such incidents. 42 A.G. Op. 104 (1988).

Trustee-Operated Fire District Liable for Indemnification: Employees of a fire district operated by trustees must be indemnified under the comprehensive state insurance plan and the Tort Claims Act by the fire district rather than by the county in which the fire district is located. 42 A.G. Op. 84 (1988), overruling a contrary holding in 35 A.G. Op. 71 (1974), and followed in 43 A.G. Op. 2 (1989).

Question of Rural Fire District as Taxing Unit: A rural fire district operated by a board of trustees is a taxing unit within the meaning of 15-10-412 (now repealed); however, a rural fire district operated by the county and not by a board of trustees is not a taxing unit. 42 A.G. Op. 80 (1988).

Rural Fire District Created After 1986 Not Subject to Property Tax Limitations: A rural fire district created after 1986 and established as a taxing unit is not subject to the property tax limitations of Title 15, ch. 10, part 4. There is no provision for new taxing units to limit their levies to their first year of existence or to 1986 amounts levied by another taxing unit. 42 A.G. Op. 80 (1988), followed in 42 A.G. Op. 109 (1988).

7-33-2105. Powers and duties of trustees.

Compiler's Comments

2001 Amendment: Chapter 443 in (2) in first sentence near middle after "facilities" inserted "including real property"; and made minor changes in style. Amendment effective April 30, 2001.

1991 Amendment: In first sentence of (2), after "firefighting", inserted "and emergency response" and after "equipment" inserted "personnel".

Attorney General's Opinions

Application of Property Tax Limitation: If the board of trustees of a rural fire district determines that it must acquire real property and construct a fire hall in order to "adequately operate" the fire district and if it requires funding in addition to that otherwise allowed under 15-10-412 (now repealed), it may proceed to increase revenue under subsection (9) of that section. 42 A.G. Op. 126 (1988).

Preparation of Bylaws by Fire Service Area Trustees: If the County Commissioners appoint a board of trustees to govern and manage the affairs of a fire service area, the fire service area trustees must prepare and adopt suitable bylaws. 42 A.G. Op. 102 (1988).

Financing Acquisition of Fire Equipment and Facilities: Fire district trustees have authority to enter into loan agreements to finance the acquisition of equipment and facilities needed by the district for fire protection. 38 A.G. Op. 87 (1980), followed in 42 A.G. Op. 126 (1988).

Power to Submit Budget to County Commissioners: Fire district trustees have the power to submit a proposed budget for capital outlay to the County Commissioners. 36 A.G. Op. 73 (1976).

7-33-2106. Details relating to board of trustees of fire district.

Compiler's Comments

1999 Amendment: Chapter 254 in third sentence in (2) after "vacancies" inserted "occurring during the term of office of a trustee"; inserted first and second sentences in (4) authorizing cancellation of election when number of candidates is equal to or less than number of positions and requiring election by acclamation for candidate filing petition and inserted fourth sentence regarding term of office for trustee elected by acclamation or appointment; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendments: Chapter 146 in (2), in fourth sentence after "in the district", substituted "or" for "are eligible to vote in the election, including", after "proof of" substituted "payment of taxes on the lands" for "interest in such land", and after "polling place" substituted "is eligible to vote in the election" for "regardless of whether he is registered to vote"; and made minor changes in style.

Chapter 591 in (1)(a), before "office", inserted language concerning staggered terms of office; inserted (1)(b) concerning initial trustees drawing lots to determine length of their terms; and inserted (1)(c) concerning trustees' terms being 3 years upon expiration of initial trustees' terms.

1985 Amendment: In (3) substituted "75 days" for "30 days".

1983 Amendment: Near end of (1), after "elected" inserted "or appointed"; in (2) in first sentence after "13-1-401" inserted "or appointed as provided in subsection (4) of this section", in second sentence after "election or" inserted "appointment and continuing" and after "elected" inserted "or appointed"; divided former (3) into (3) and (4); and in (4) near beginning of sentence after "are made" substituted "for one or more trustee offices, the county governing body shall appoint one or more trustees as necessary to fill those offices" for language formerly in (3), which read: "the electors of the district shall write on the ballots the name or names of the persons for whom they desire to vote. This subsection does not prevent an elector from voting for any qualified person, although the name does not appear on the official ballot."

1981 Amendment: Inserted "subsection (3) of this section" and "and 13-1-401" at the beginning of (2); substituted "district meeting" for "Monday in January" in second sentence of (2); deleted "Nominations for office shall be made as provided in 13-14-113.", formerly the fourth sentence of (2); in fourth sentence of (2) inserted "including any holder of title to lands within the district who presents a proof of interest in such land at the polling place, regardless of whether he is registered to vote"; and inserted (3) relating to nominations and appointment if there are no nominees.

Attorney General's Opinions

Officers to Remain Until Successors Properly Qualified: Officers of hospital, fire, irrigation, and drainage districts whose terms were due to expire in the spring of 1980 are entitled to remain in office until their successors are properly qualified following an election held in November 1980. 38 A.G. Op. 74 (1980).

7-33-2108. Mutual aid agreements — request if no agreement exists — definitions.

Compiler's Comments

1997 Amendment: Chapter 46 in (1), before "disasters", deleted "manmade" and after "disasters" inserted "incidents, or emergencies or disasters, incidents, or emergencies caused by persons"; in (2)(d), after "agencies", deleted "which have fire prevention services"; inserted (2)(h) regarding governing bodies of other political subdivisions; inserted (3) allowing assistance

requests if a mutual aid agreement has not been concluded; inserted (4) defining incidents, disasters, or emergencies; and made minor changes in style.

1993 Amendment: Chapter 149 inserted (2)(g) allowing a fire service area to enter into a mutual aid agreement with fire district trustees; and made minor changes in style. Amendment effective March 24, 1993.

7-33-2109. Tax levy, debt incurrence, and bonds authorized.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 29 in (4) after "exceed" substituted "1.1% of the total assessed value of taxable property, determined as provided in 15-8-111" for "18% of the taxable value of the property"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 443 in (1) in first sentence near middle after "facilities" inserted "including real property"; in (2) near end after "buildings" inserted "including real property"; and in (3) near end after "facilities" inserted "including real property". Amendment effective April 30, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1999 Amendment: Chapter 584 in (1) inserted reference to 15-10-420. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1995 Amendment: Chapter 170 inserted (2) allowing the Board of County Commissioners or board of trustees to pledge income of the district to secure financing of equipment and buildings; in (3), before "district", deleted "rural fire"; in (4) inserted two references to incurring debt; adjusted subsection references; and made minor changes in style.

1991 Amendment: In (1), after "within", substituted "a rural fire district" for "such districts" and after "apparatus" inserted "including emergency response apparatus"; inserted (2) authorizing rural fire district to sell bonds to fund purchase and maintenance of fire and emergency response equipment and facilities; inserted (3) prohibiting amount of bonds issued from exceeding 18% of taxable value of district property; inserted (4) subjecting bonds sold and issued to conditions and limitations prescribed for issuance of county general obligation bonds; and made minor changes in style.

Case Notes

Constitutionality: The provisions of this section, as amended in 1953, for levy of a special assessment upon property within districts without notice to property owners were unconstitutional as being in direct conflict with the Due Process of Law Clause in Art. III, sec. 27, 1889 Mont. Const. (now Art. II, sec. 17, 1972 Mont. Const.), and the first clause of the 14th amendment to the United States Constitution. Great N. Ry. v. Roosevelt County, 134 M 355, 332 P2d 501 (1958), distinguished in Bacus v. Lake County, 138 M 69, 354 P2d 1056 (1960).

Attorney General's Opinions

City Annexation of Rural Fire District — Loan Obligation Not Payable by Tax Incurred Prior to Annexation: A rural fire district has no authority to levy taxes against property that is not within the district boundaries, and recent legislative enactments did not extend the power of a rural fire district to allow taxation to retire nonbonded debts. A reduction in the amount of property subject to tax to retire a loan would not in any way diminish or change the responsibilities of the parties under the loan contract. Therefore, when a city annexes territory that has been part of a rural fire district, the district may not tax the annexed property to finance repayment of a nonbonded loan incurred by the fire district prior to annexation. 46 A.G. Op. 8 (1995).

Proportion of Vehicle-Related Taxes Applicable to Rural Fire Districts: Vehicle-related taxes referred to in subsection (1) of 61-3-509 must be distributed proportionately to rural fire districts on the basis of all mill levies applicable to personal property located within the geographical boundaries of the districts. For distribution entitlement purposes, the residence or assignment address appearing on the certificate of registration determines if a particular vehicle is within a district's boundaries. 43 A.G. Op. 4 (1989).

Application of Property Tax Limitation: If the board of trustees of a rural fire district determines that it must acquire real property and construct a fire hall in order to "adequately operate" the fire district and if it requires funding in addition to that otherwise allowed under 15-10-412 (now repealed), it may proceed to increase revenue under subsection (9) of that section. 42 A.G. Op. 126 (1988).

"Property" to Include Real and Personal Property: The term "property" as used in this section applies to all forms of real and personal property ordinarily subject to ad valorem taxation by counties. 42 A.G. Op. 109 (1988).

Financing Acquisition of Fire Equipment and Facilities: Fire district trustees have authority to enter into loan agreements to finance the acquisition of equipment and facilities needed by the district for fire protection. (See 1995 amendment.) 38 A.G. Op. 87 (1980), followed in 42 A.G. Op. 126 (1988).

7-33-2110. Volunteer fire districts or companies — fire departments — not affected by city-county consolidation.

Compiler's Comments

Preamble: The preamble to Ch. 193, L. 1979, reads as follows: "WHEREAS, confusion has arisen concerning the proper status of prior existing fire districts and fire companies following the formation of a city-county consolidated government with self-government powers; and

WHEREAS, the legislature wishes to clarify this situation with the clear understanding that the substance of the law is not changed; and

WHEREAS, Title 7, chapter 33, part 41, requires municipalities to provide fire services under that part; and

WHEREAS, and city-county consolidated government is neither a county government nor a municipality but under 7-3-1103 has the status of both; and

WHEREAS, this combined status allows the people of the local area to choose the most desirable means to provide local services, including fire services, within reasonable limits of interpreting applicable state law and so long as vested rights are not unreasonably abrogated; and

WHEREAS, the legislature finds that a local government charter that maintains rural fire services organizations as they were prior to consolidation is a reasonable interpretation of those laws; and

WHEREAS, to provide the desirable ratification of any existing charter interpretation to this effect and to clarify the application of such charters in the future,

THEREFORE, it is the purpose of this act to clarify the law on this point without establishing a presumption that the law is in any way substantively altered."

Collateral References

62 C.J.S. Municipal Corporations §595.

7-33-2111. Fire district capital improvement fund authorized.

Compiler's Comments

2003 Amendment: Chapter 35 at end substituted "in accordance with the provisions of Title 7, chapter 6, part 6" for former second and third sentences that read: "The fund may be used for the acquisition and replacement of equipment or facilities, including real property. The cost of the equipment must exceed $5,000, and the equipment must have a life expectancy of 5 years or more." Amendment effective July 1, 2003.

2001 Amendment: Chapter 443 at end of second sentence inserted "including real property"; and made minor changes in style. Amendment effective April 30, 2001.

Effective Date: Section 3, Ch. 224, L. 1991, provided: "[This act] is effective on passage and approval." Approved March 29, 1991.

7-33-2120. Consolidation of fire districts.

Attorney General's Opinions

Consolidation of Rural Fire Districts — Mill Levy Limitations Inapplicable to New Trustee-Operated District: Consolidation of two existing rural fire districts creates a new rural fire district for purposes of determining mill levy limitations. Consistent with 42 A.G. Op. 109 (1988), a new rural fire district established after tax year 1986 and managed by a board of trustees rather than a Board of County Commissioners is not subject to the property tax limitations in Title 15, ch. 10, part 4. 44 A.G. Op. 16 (1991).

7-33-2124. Distribution of assets and liabilities following division.

Attorney General's Opinions

City Annexation of Rural Fire District — Loan Obligation Not Payable by Tax Incurred Prior to Annexation: A rural fire district has no authority to levy taxes against property that is not within the district boundaries, and recent legislative enactments did not extend the power of a rural fire district to allow taxation to retire nonbonded debts. A reduction in the amount of property subject to tax to retire a loan would not in any way diminish or change the responsibilities of the parties under the loan contract. Therefore, when a city annexes territory that has been part of a rural fire district, the district may not tax the annexed property to finance repayment of a nonbonded loan incurred by the fire district prior to annexation. 46 A.G. Op. 8 (1995).

Provisions Regarding Division of Rural Fire District Inapplicable to Annexation: The annexation of rural fire district territory does not fit within the statutory context of the term "division". Because the statutory procedure for division of a rural fire district is not usually followed in cases of municipal annexation, this section has no application to property that leaves a rural fire district through annexation. 46 A.G. Op. 8 (1995).

7-33-2125. Annexation of adjacent territory not contained in a fire district.

Compiler's Comments

2001 Amendment: Chapter 354 in (1)(b) at end substituted "as provided in 7-1-2121" for "at least once a week for 2 successive weeks in a newspaper published within the county"; and made minor changes in style. Amendment effective October 1, 2001.

1983 Amendment: In (1)(a), after "assessment roll", inserted "shall be presented to the board of trustees of the district for approval, and if the proposed annexation is approved by the board of trustees, the petition"; in (1)(b) at beginning before "commissioners" inserted "At the first regular meeting of the board of county commissioners after the presentation of the petition", after "commissioners shall" inserted "set a date to", after "petition" deleted "in accordance with the procedure outlined in 7-33-2122 and shall allow the annexation of such proposed adjacent territory unless protests are presented at the hearing by the owners of 50% or more of the area of the privately owned lands included within the original district who constitute a majority of the taxpaying freeholders within the original district"; and inserted last two sentences concerning date of hearing and requirement of a published notice of the hearing; and inserted (2) relating to procedure at hearing.

7-33-2127. Withdrawal by owner of individual tract adjacent to municipality.

Case Notes

Annexation of Rural Fire District Land: Rural fire district land is not subject to annexation as long as the land remains in the rural fire district. The landowners desiring annexation may petition to have the land withdrawn from the rural fire district, and once the land is withdrawn, annexation may proceed if statutory annexation requirements are met. Missoula Rural Fire District v. Missoula, 168 M 70, 540 P2d 958 (1975).

Part 22
Rural Fire Protection

Part Case Notes

Extension of Immunity to All Rural Fire Districts Regardless of Method of Formation: Plaintiffs contended that under 7-33-2208, immunity for rural firefighters extended only to rural fire crews and fire companies established on the initiative of a county government under this part, but not to crews and companies established in response to a petition by landowners pursuant to part 21 of this chapter. The Supreme Court found, after examining the legislative history of 7-33-2208, no logic or reason for granting or withholding immunity to a rural firefighting unit based on the method of its origin and extended immunity to districts established under both part 21 and this part. Allegations of negligent acts and omissions in fire suppression techniques outside the scope of 7-33-2208 did not constitute a genuine issue of material fact sufficient to preclude summary judgment based on immunity. Noting the 1989 amendment to 7-33-2208, the court further impliedly extended immunity to fire companies organized under part 23 and fire service areas organized under part 24. Hyde v. Evergreen Volunteer Rural Fire Dept., 252 M 299, 828 P2d 1377, 49 St. Rep. 259 (1992).

Part Attorney General's Opinions

County Rural Fire Protection Not Required: County governing bodies have discretion as to whether they provide rural fire protection under this part. However, if they undertake to provide such services, they are required to comply with 7-33-2202. 42 A.G. Op. 109 (1988).

Provision of Fire Protection Services Outside City Limits: A city may contract with entities to provide fire protection services outside the city limits. 42 A.G. Op. 80 (1988).

7-33-2201. Authority of county governing body to protect range, farm, and forest resources.

Attorney General's Opinions

County Purchase Authority: Counties have express authority to purchase fire apparatus for volunteer rural fire crews. 37 A.G. Op. 105 (1978).

Collateral References

Woods and Forests *key* 7.

98 C.J.S. Woods and Forests §§3 through 7.

Constitutionality of reforestation or forest conservation legislation. 13 ALR 2d 1095.

7-33-2202. Functions of county governing body.

Compiler's Comments

1997 Amendment: Chapter 46 substituted (4)(a) through (4)(h) outlining entities with which mutual aid agreements may be entered for former language that read: "federal, state, local, and other fire protection agencies, including governing bodies of adjoining counties"; inserted (5) allowing assistance requests if a mutual aid agreement has not been concluded; and made minor changes in style.

1983 Amendment: Inserted (1)(b) relating to county volunteer companies; substituted (2), concerning rural fire chiefs, and (3), regarding protection of range, farm, and forest lands, for "(3) The county governing body shall, within the limitations of 7-33-2205 through 7-33-2209, protect the range, farm, and forest lands within the county from fire in cooperation with federal, state, and other fire protection agencies, including governing bodies of adjoining counties."; and changed phraseology.

Attorney General's Opinions

Response by Fire Service Organizations to Hazardous Materials Incidents: Unless otherwise provided by law, the decision to order a firefighter to respond to or investigate a hazardous materials incident is within the discretion of the supervising entity of each fire service organization. The State Fire Marshal (now state fire prevention and investigation program of the Department of Justice) does not have specific rulemaking authority to prescribe which fire service organization should respond to such incidents. 42 A.G. Op. 104 (1988).

County Purchase Authority: Counties have express authority to purchase fire apparatus for volunteer rural fire crews. 37 A.G. Op. 105 (1978).

7-33-2203. County rural fire chief.

Attorney General's Opinions

County Purchase Authority: Counties have express authority to purchase fire apparatus for volunteer rural fire crews. 37 A.G. Op. 105 (1978).

7-33-2204. District fire chief to serve without compensation.

Attorney General's Opinions

County Purchase Authority: Counties have express authority to purchase fire apparatus for volunteer rural fire crews. 37 A.G. Op. 105 (1978).

7-33-2205. Establishment of fire season — permit requirements — reimbursement of costs.

Compiler's Comments

2003 Amendment: Chapter 273 inserted (2) requiring a person who purposely ignites an illegal fire to reimburse the county or protection agency for fire suppression costs; and made minor changes in style. Amendment effective October 1, 2003.

Attorney General's Opinions

County Purchase Authority: Counties have express authority to purchase fire apparatus for volunteer rural fire crews. 37 A.G. Op. 105 (1978).

7-33-2206. Violations.

Attorney General's Opinions

County Purchase Authority: Counties have express authority to purchase fire apparatus for volunteer rural fire crews. 37 A.G. Op. 105 (1978).

7-33-2207. Voluntary urban fire crews for use in rural areas.

Attorney General's Opinions

County Purchase Authority: Counties have express authority to purchase fire apparatus for volunteer rural fire crews. 37 A.G. Op. 105 (1978).

Collateral References

Liability of owner or occupant of premises to fireman coming thereon in discharge of his duty. 11 ALR 4th 597.

7-33-2208. Fire control powers — liability.

Compiler's Comments

1997 Amendment: Chapter 46 in (2), at end of first sentence after "under", inserted "10-3-209 or" and inserted second sentence regarding immunity from suit; and made minor changes in style.

1989 Amendment: In middle of (1), after "deputy", inserted references to fire service area, fire company fire chief, or deputy; and in (2) inserted references to fire company and fire service area.

Governmental Immunity — Severability: Section 4, Ch. 75, L. 1989, provided: "Because the amendment to 7-33-2208(2) provides governmental immunity from suit for injury to a person or property, Article II, section 18, of the Montana constitution requires a vote of two-thirds of the members of each house for the enactment of the amendment to 7-33-2208(2). If [this act] is not approved by the required vote, the amendment to 7-33-2208(2) is void. The remaining sections and amendments to 7-33-2208 are valid and remain in effect in all valid applications upon enactment." House Bill No. 121 (Ch. 75, L. 1989) passed the House on a vote of 96 to 1 and passed the Senate on a vote of 47 to 3.

Case Notes

Extension of Immunity to All Rural Fire Districts Regardless of Method of Formation: Plaintiffs contended that under this section, immunity for rural firefighters extended only to rural fire crews and fire companies established on the initiative of a county government under part 22 of this chapter, but not to crews and companies established in response to a petition by landowners pursuant to part 21 of this chapter. The Supreme Court found, after examining the legislative history of this section, no logic or reason for granting or withholding immunity to a rural firefighting unit based on the method of its origin and extended immunity to districts established under both part 21 and part 22. Allegations of negligent acts and omissions in fire suppression techniques outside the scope of this section did not constitute a genuine issue of material fact sufficient to preclude summary judgment based on immunity. Noting the 1989 amendment to this section, the court further impliedly extended immunity to fire companies organized under part 23 and fire service areas organized under part 24. (See 1997 amendment.) Hyde v. Evergreen Volunteer Rural Fire Dept., 252 M 299, 828 P2d 1377, 49 St. Rep. 259 (1992).

No Waiver of Immunity by Purchase of Liability Insurance: Following the rationale in Crowell v. School District No. 7, 247 M 38, 805 P2d 522 (1991), plaintiffs contended that a rural fire district waived its grant of immunity to suit to the extent of the coverage of any liability insurance purchased by the district. Noting no pattern of joint legislative consideration of insurance and immunity in the legislative history of this section, the Supreme Court distinguished *Crowell* in holding that the purchase of liability insurance did not constitute waiver of immunity for a rural fire district. (See 1997 amendment.) Hyde v. Evergreen Volunteer Rural Fire Dept., 252 M 299, 828 P2d 1377, 49 St. Rep. 259 (1992).

Attorney General's Opinions

Nonliability on Federal or Adjoining County or City Property: The immunities of 7-33-2208 are applicable when a rural fire crew organized pursuant to 7-33-2201, et seq., responds to a request to suppress fires on property managed by a federal agency within the county or on property within an incorporated city or town within the county or in an adjacent county. (See 1997 amendment.) 38 A.G. Op. 100 (1980).

County Purchase Authority: Counties have express authority to purchase fire apparatus for volunteer rural fire crews. 37 A.G. Op. 105 (1978).

Law Review Articles

Qualified Immunity: A User's Manual, Blum, 26 Ind. L. Rev. 187 (1993).

Collateral References

Municipal liability for negligent fire inspection and subsequent enforcement. 69 ALR 4th 739.

Liability for personal injury or damage from operation of fire department vehicle. 82 ALR 2d 312.

7-33-2209. Finance of fire control activities.

Compiler's Comments

2001 Amendment: Chapter 574 at end of (2) substituted "levy a tax for the purposes of subsection (1)" for "levy a tax of up to 2 mills or at a rate that will raise $15,000, whichever is higher". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (2) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1991 Amendment: In (2), after "tax", substituted "of up to 2 mills or at a rate that will raise $15,000, whichever is higher" for "at such rate as in their judgment will be necessary to raise such needed sum, not to exceed $15,000". Amendment effective July 1, 1991.

Attorney General's Opinions

County Purchase Authority: Counties have express authority to purchase fire apparatus for volunteer rural fire crews. 37 A.G. Op. 105 (1978).

7-33-2210. State to be reimbursed for forest fire suppression activities in noncooperating counties.

Attorney General's Opinions

County Purchase Authority: Counties have express authority to purchase fire apparatus for volunteer rural fire crews. 37 A.G. Op. 105 (1978).

7-33-2211. Levy against certain properties prohibited.

Compiler's Comments

Effective Date: Section 3, Ch. 733, L. 1991, provided that this section is effective July 1, 1991.

Part 23
Fire Protection in Unincorporated Places

Part Case Notes

Extension of Immunity to All Rural Fire Districts Regardless of Method of Formation: Plaintiffs contended that under 7-33-2208, immunity for rural firefighters extended only to rural fire crews and fire companies established on the initiative of a county government under part 22 of this chapter, but not to crews and companies established in response to a petition by landowners pursuant to part 21 of this chapter. The Supreme Court found, after examining the legislative history of 7-33-2208, no logic or reason for granting or withholding immunity to a rural firefighting unit based on the method of its origin and extended immunity to districts established under both part 21 and part 22. Allegations of negligent acts and omissions in fire suppression techniques outside the scope of 7-33-2208 did not constitute a genuine issue of material fact sufficient to preclude summary judgment based on immunity. Noting the 1989 amendment to 7-33-2208, the court further impliedly extended immunity to fire companies organized under this part and fire service areas organized under part 24. Hyde v. Evergreen Volunteer Rural Fire Dept., 252 M 299, 828 P2d 1377, 49 St. Rep. 259 (1992).

7-33-2311. Fire companies authorized.

Compiler's Comments

1995 Amendment: Chapter 137 in (1), before "presiding officer", deleted "foreman or" and after "members" inserted reference to 19-17-402; and made minor changes in style.

Case Notes

Fire Limits in Unincorporated Towns — Mandamus Not Proper: The Board of County Commissioners of Chouteau County established fire limits for Square Butte, an unincorporated

town, and directed a special levy. It rescinded its action prior to any action or reliance on the resolution. Mandamus did not lie to compel the Board to establish fire limits in the unincorporated town, which had a volunteer fire department, because its authority to do so was discretionary and not mandatory. State ex rel. Peninsula Sec. Co. v. Bd. of County Comm'rs, 62 M 69, 202 P 1108 (1921).

7-33-2312. Organization of fire company.

Compiler's Comments

1981 Amendment: Substituted "7-33-2311" for "7-33-2312" in (1).

Collateral References

Jury *key* 55; Taxation *key* 106.

50 C.J.S. Juries §153; 84 C.J.S. Taxation §57.

7-33-2313. Powers and duties of chief — request for assistance — definitions.

Compiler's Comments

2003 Amendment: Chapter 429 in (2) in second sentence after "operation of the" inserted "training" and at end inserted requirement for maintaining training records for purposes of retirement board; and made minor changes in style. Amendment effective July 1, 2003.

1997 Amendment: Chapter 46 inserted (3) allowing assistance requests if a mutual aid agreement has not been concluded; inserted (4) defining incidents, disasters, or emergencies; and made minor changes in style.

Collateral References

Municipal liability for negligent fire inspection and subsequent enforcement. 69 ALR 4th 739.

7-33-2314. Certain exemptions for firefighters.

Compiler's Comments

1983 Amendment: Deleted former (2), which read: "exemption from jury duty".

Case Notes

No Exemption From Property Road Tax: The exemption statute, 7-33-2314, exempts firefighters from the per capita road tax, not from the property road tax. Missoula Rural Fire District v. Missoula County, 222 M 178, 720 P2d 1170, 43 St. Rep. 1153 (1986).

Attorney General's Opinions

Rural Firefighters — Not Within Workers' Compensation Coverage: A firefighter in a rural fire district is not an "employee" as defined in 39-71-118 and hence is not within the Workers' Compensation Act. Similar benefits are available to him under the provisions of Title 19, ch. 12 (renumbered Title 19, ch. 17). 40 A.G. Op. 9 (1983).

7-33-2315. Certificate of membership in fire company.

Compiler's Comments

1983 Amendment: Deleted "and jury" before "duty" at end of (2)(b) and in (3).

7-33-2316. Volunteer fire districts or companies — fire departments — not affected by city-county consolidation.

Compiler's Comments

Preamble: The preamble to Ch. 193, L. 1979, reads as follows: "WHEREAS, confusion has arisen concerning the proper status of prior existing fire districts and fire companies following the formation of a city-county consolidated government with self-government powers; and

WHEREAS, the legislature wishes to clarify this situation with the clear understanding that the substance of the law is not changed; and

WHEREAS, Title 7, chapter 33, part 41, requires municipalities to provide fire services under that part; and

WHEREAS, and city-county consolidated government is neither a county government nor a municipality but under 7-3-1103 has the status of both; and

WHEREAS, this combined status allows the people of the local area to choose the most desirable means to provide local services, including fire services, within reasonable limits of interpreting applicable state law and so long as vested rights are not unreasonably abrogated; and

WHEREAS, the legislature finds that a local government charter that maintains rural fire services organizations as they were prior to consolidation is a reasonable interpretation of those laws; and

WHEREAS, to provide the desirable ratification of any existing charter interpretation to this effect and to clarify the application of such charters in the future,

THEREFORE, it is the purpose of this act to clarify the law on this point without establishing a presumption that the law is in any way substantively altered."

Part 24
Fire Service Areas

Part Case Notes

Extension of Immunity to All Rural Fire Districts Regardless of Method of Formation: Plaintiffs contended that under 7-33-2208, immunity for rural firefighters extended only to rural fire crews and fire companies established on the initiative of a county government under part 22 of this chapter, but not to crews and companies established in response to a petition by landowners pursuant to part 21 of this chapter. The Supreme Court found, after examining the legislative history of 7-33-2208, no logic or reason for granting or withholding immunity to a rural firefighting unit based on the method of its origin and extended immunity to districts established under both part 21 and part 22. Allegations of negligent acts and omissions in fire suppression techniques outside the scope of 7-33-2208 did not constitute a genuine issue of material fact sufficient to preclude summary judgment based on immunity. Noting the 1989 amendment to 7-33-2208, the court further impliedly extended immunity to fire companies organized under part 23 and fire service areas organized under this part. Hyde v. Evergreen Volunteer Rural Fire Dept., 252 M 299, 828 P2d 1377, 49 St. Rep. 259 (1992).

Part Attorney General's Opinions

Preparation of Bylaws by Fire Service Area Trustees: If the County Commissioners appoint a board of trustees to govern and manage the affairs of a fire service area, the fire service area trustees must prepare and adopt suitable bylaws. 42 A.G. Op. 102 (1988).

7-33-2401. Fire service area — establishment — alteration — dissolution.

Compiler's Comments

2003 Amendment: Chapter 508 in (4) at end of first sentence after "using" substituted "the procedures provided in subsection (2)" for "the same procedures required for the creation of a fire service area" and inserted second sentence requiring board to alter boundaries of fire service area to exclude area annexed by city or town under procedures for establishing fire service area. Amendment effective October 1, 2003.

Saving Clause: Section 3, Ch. 508, L. 2003, was a saving clause.

1991 Amendment: In (2)(c)(ii), after "rates", substituted "kinds, types, or levels of service" for "service levels"; in (3), near end after "proposed", inserted "change the kinds, types, or levels of service"; in (4), near beginning after "boundaries", inserted "or the kinds, types, or levels of service".

Attorney General's Opinions

"Property Owner" Defined: For purposes of this section, "property owner" means an owner of real property in the fire service area. 42 A.G. Op. 75 (1988).

7-33-2402. Area services.

Compiler's Comments

1995 Amendments: Chapter 212 inserted (2) concerning fire code and plan for enforcement for fire service area; and made minor changes in style.

Chapter 418 in (1)(b) substituted "department of public health" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Chapter 546 in (1)(b) substituted "department of public health and human services" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: At end of introductory clause inserted "adequate and standard"; in (1)(a), at beginning after "fire", inserted "and emergency response", after "equipment" inserted "personnel", and substituted "facilities" for "housing for the equipment"; inserted (2) concerning

emergency medical services and equipment, personnel, facilities, and maintenance; and made minor changes in style.

Attorney General's Opinions

Dual Trusteeship in Volunteer Fire District and Fire Service Area — Not Conflict of Interest: Trusteeship in a volunteer fire department is not incompatible with simultaneous trusteeship in a fire service area. Volunteer fire departments and fire service areas are separate governmental entities. Neither owes its creation or continued existence to the other, and each lacks any form of supervisory authority with respect to the personnel of the other. There is no indication that dual trusteeship imposes an insurmountable obstacle to the proper discharge of the duties attendant in trusteeship; therefore, concurrent trusteeship of both a volunteer fire department and a fire service area does not constitute a conflict of interest. 43 A.G. Op. 47 (1989).

7-33-2403. Operation of fire service area.

Compiler's Comments

1999 Amendment: Chapter 254 in (2) inserted "whether the trustees are elected or appointed"; and made minor changes in style. Amendment effective October 1, 1999.

1989 Amendment: Inserted (1)(c) authorizing election of five fire service area trustees and setting term of office.

Attorney General's Opinions

Trustee-Operated Fire Service Area Liable for Indemnification: Employees of a fire service area operated by trustees must be indemnified under the comprehensive state insurance plan and the Tort Claims Act by the fire service area rather than by the county in which the fire service area is located. 42 A.G. Op. 84 (1988), overruling a contrary holding in 35 A.G. Op. 71 (1974).

7-33-2404. Financing of fire service area — fee on structures.

Compiler's Comments

2003 Amendment: Chapter 508 inserted (5) requiring county commissioners or trustees of fire service area to notify annexing municipality to prevent owners from assuming financial responsibility to municipality and fire service area if fire service area reduced or eliminated by annexation of area into city; and made minor changes in style. Amendment effective October 1, 2003.

Saving Clause: Section 3, Ch. 508, L. 2003, was a saving clause.

2001 Amendment: Chapter 29 in (4) after "exceed" substituted "1.1% of the total assessed value of taxable property, determined as provided in 15-8-111, within the area, as ascertained by the last assessment for state and county taxes prior to the incurring of the indebtedness" for "18% of the taxable valuation of the area". Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1997 Amendment: Chapter 459 in (4), in last sentence, increased indebtedness from "7%" to "18%"; and made minor changes in style.

1991 Amendment: In (1), near end before "services offered", deleted "fire"; in (4), near end of first sentence in two places before "equipment", deleted "fire"; and made minor changes in style.

1989 Amendment: In (4), after "if the", substituted "fire service area is governed by" for "commissioners have appointed".

Attorney General's Opinions

Fire Service Area Rates — Powers of County Commission: The County Commission has the sole power to set rate schedules in fire service areas to finance the budget prepared by the fire service area trustees. Further, this power precludes the trustees from requiring that rates be modified by a popular vote of the fire service area residents. 42 A.G. Op. 102 (1988).

Temporary Structures Taxable: The structures taxed under this section include temporary structures that would be benefited by the fire service district. 42 A.G. Op. 75 (1988).

7-33-2405. Mutual aid agreements — request if no agreement exists — definitions.

Compiler's Comments

1997 Amendment: Chapter 46 in (1), before "disasters", deleted "manmade" and after "disasters" inserted "incidents, or emergencies or disasters, incidents, or emergencies caused by

persons"; in (2)(d), after "agencies", deleted "that have fire prevention services"; inserted (2)(h) regarding governing bodies of other political subdivisions; inserted (3) allowing assistance requests if a mutual aid agreement has not been concluded; inserted (4) defining incidents, disasters, or emergencies; and made minor changes in style.

Effective Date: Section 5, Ch. 149, L. 1993, provided: "[This act] is effective on passage and approval." Approved March 24, 1993.

Part 41
Municipal Fire Departments

Part Case Notes

Limitation on Self-Governing Powers — Ordinance to Supersede Part: The city of Billings, a self-governing city, adopted an ordinance purporting to supersede all but two sections in Title 7, ch. 33, part 41, relating to municipal fire departments. The firefighters challenged the ordinance. The District Court held that the ordinance was a permissible exercise of a self-government power. On appeal, the Supreme Court held that under the shared sovereignty concept contained in the Montana Constitution, local governments with self-governing powers are limited only by express prohibitions in the constitution, state statute, or the local government charter itself. By statute, a local government may not establish standards or requirements lower or less stringent than those imposed by state law. The court held that because the ordinance did not contain standards governing several areas it purported to supersede, the ordinance provisions were lower or less stringent than the statutory provisions and therefore invalid. A local government must provide any service required by state law. State law requires every city to have a fire department. Pursuant to Art. XI, sec. 5(3), Mont. Const., the only statutory provisions a self-governing charter may control over are those establishing executive, legislative, and administrative structure and organization. The ordinance was invalid. Billings Firefighters Local 521 v. Billings, 214 M 481, 694 P2d 1335, 42 St. Rep. 112 (1985), followed in Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

State Fire Marshal (now State Fire Prevention and Investigation Program of Department of Justice) — No Conflict With Municipalities: The creation of a State Fire Marshal (now the state fire prevention and investigation program of the Department of Justice) is not unconstitutional as delegating municipal functions to the Marshal. The area of fire protection is one of concurrent jurisdiction between the state and municipalities. There is no objection to a city and the state legislating on the same subject so long as the municipal ordinances do not conflict with the state law. Fire protection is properly exercised under the police power of the state and may be exercised by the state or delegated for local administration to municipalities. State ex rel. Brooks v. Cook, 84 M 478, 276 P 958 (1929).

Part Collateral References

56 Am. Jur. 2d Municipal Corporations §§115, 133.

7-33-4101. Fire department authorized and required.

Compiler's Comments

1997 Amendment: Chapter 96 at end of section inserted exception clause authorizing a third-class city or town to contract or consolidate for fire protection services; and made minor changes in style.

Case Notes

Fire Department Operated in Proprietary Capacity by City: Before amendment of this section in 1937, it was held that under this section and 7-33-4201, 7-33-4202, and 7-33-4204, a city was empowered but not compelled to maintain a fire department. The city operated its fire department as a proprietary function, except when engaged in extinguishing or going to or from the scene of a fire or testing equipment for such occasions, when it was exercising governmental functions. State ex rel. Kern v. Arnold, 100 M 346, 49 P2d 976, 100 ALR 1071 (1935).

Civil Service: Mandamus lies to reinstate a fireman who has been discharged in violation of the act placing paid fire departments under civil service rules. State ex rel. Driffill v. Anaconda, 41 M 577, 111 P 345 (1910).

Attorney General's Opinions

Merger of Fire Services Between City and County With General Government Powers Not Allowed: A proposed city initiative would have merged a city fire department and a rural county fire district into a new fire protection district with an urban and a rural division. However, both

the city and county were local government units with general government powers and had not been consolidated as allowed by law. Under the provisions of the initiative, neither fire department would maintain its own identity; therefore, the proposed merger would abrogate the city fire department as a separate entity and would be an invalid exercise of general government powers. This opinion does not preclude the provision of fire protection services in a cooperative fashion through an interlocal agreement that city voters may, by initiative, require the city governing body to pursue. 43 A.G. Op. 56 (1990).

Collateral References

Municipal Corporations *key* 194.

62 C.J.S. Municipal Corporations §591.

Use beyond municipal limits of municipal equipment for extinguishment of fires. 122 ALR 1158.

Power of municipal corporation to extend its service beyond corporate limits. 98 ALR 1001; 49 ALR 1239.

7-33-4103. Composition of fire department.

Collateral References

Municipal Corporations *key* 194, et seq.

62 C.J.S. Municipal Corporations §§591, 592.

7-33-4104. Duties of chief and assistant chief of fire department.

Attorney General's Opinions

Response by Fire Service Organizations to Hazardous Materials Incidents: Unless otherwise provided by law, the decision to order a firefighter to respond to or investigate a hazardous materials incident is within the discretion of the supervising entity of each fire service organization. The State Fire Marshal (now the state fire prevention and investigation program of the Department of Justice) does not have specific rulemaking authority to prescribe which fire service organization should respond to such incidents. 42 A.G. Op. 104 (1988).

Collateral References

Municipal Corporations *key* 196.

62 C.J.S. Municipal Corporations §597.

7-33-4105. Appointment of chief engineer of fire department.

Case Notes

Authority to Abolish Volunteer Fire Department: This section and 7-33-4111 together clearly imply that a city government could abolish its volunteer fire department when in its judgment a paid department should be established in lieu thereof. State ex rel. Casey v. Brewer, 107 M 550, 88 P2d 49 (1939).

Collateral References

62 C.J.S. Municipal Corporations §§597, 598.

Municipal liability for negligent fire inspection and subsequent enforcement. 69 ALR 4th 739.

7-33-4106. Appointment of firefighters.

Case Notes

Appointment of Thirty-Nine-Year-Old Part-Paid Firefighter to Full-Time Position Not Statutory Violation: Before Link was 34 years old, he was a part-paid firefighter and member of the Firefighters' Unified Retirement System (FURS). At age 39, he applied for a position as full-time firefighter. Despite the recommendation of the fire chief, who was granted authority pursuant to city ordinances and personnel rules to make appointments of part-paid firefighters, Link's appointment was denied by City Council members who feared a violation of 7-33-4107, which states that firefighters may not be more than 34 years of age at the time of original appointment. Link complained in District Court that the city discriminated against him on the basis of age. Relying on the language of this section, the District Court granted summary judgment to the city, reasoning that because the Mayor and City Council did not have input into Link's appointment as a part-paid firefighter, his appointment to that position was not an original appointment under 7-33-4107. The Supreme Court reversed, holding that having delegated its authority to appoint part-paid firefighters, the city was now estopped from denying the validity of that delegation of authority. Noting a Montana Human Rights Commission decision in Elliott v. Helena, Cause No. 8701003108 (1989), that original appointment includes

appointment as a part-time volunteer firefighter and that participation in FURS indicates a legislative intent that the maximum age provision apply to part-paid as well as full-time firefighters, the Supreme Court found that the narrow interpretation given to 7-33-4107 by the District Court resulted in the likelihood that the statute would violate age discrimination laws. Link v. Lewistown, 253 M 481, 833 P2d 1070, 49 St. Rep. 529 (1992). See also 44 A.G. Op. 8 (1991).

Attorney General's Opinions

Fire Chief or Assistant Chief as Member of Relief Association: Under 7-33-4106 and 7-33-4122, a chief or assistant chief of a municipal fire department is a confirmed member of the fire department. Section 19-11-102 (renumbered 19-18-102) authorizes the formation of a fire department relief association by the confirmed members of a fire department. Because a chief or an assistant chief is a confirmed member of his fire department, he could be a member of the fire department relief association. 39 A.G. Op. 22 (1981).

7-33-4107. Qualifications of firefighters.

Compiler's Comments

1981 Amendment: Added the first sentence relating to age qualification; substituted "more than 34" for "over 31" before "years of age" in (1).

Case Notes

Appointment of Thirty-Nine-Year-Old Part-Paid Firefighter to Full-Time Position Not Statutory Violation: Before Link was 34 years old, he was a part-paid firefighter and member of the Firefighters' Unified Retirement System (FURS). At age 39, he applied for a position as full-time firefighter. Despite the recommendation of the fire chief, who was granted authority pursuant to city ordinances and personnel rules to make appointments of part-paid firefighters, Link's appointment was denied by City Council members who feared a violation of this section, which states that firefighters may not be more than 34 years of age at the time of original appointment. Link complained in District Court that the city discriminated against him on the basis of age. Relying on the language of 7-33-4106, the District Court granted summary judgment to the city, reasoning that because the Mayor and City Council did not have input into Link's appointment as a part-paid firefighter, his appointment to that position was not an original appointment under this section. The Supreme Court reversed, holding that having delegated its authority to appoint part-paid firefighters, the city was now estopped from denying the validity of that delegation of authority. Noting a Montana Human Rights Commission decision in Elliott v. Helena, Cause No. 8701003108 (1989), that original appointment includes appointment as a part-time volunteer firefighter and that participation in FURS indicates a legislative intent that the maximum age provision apply to part-paid as well as full-time firefighters, the Supreme Court found that the narrow interpretation given to this section by the District Court resulted in the likelihood that the statute would violate age discrimination laws. Link v. Lewistown, 253 M 481, 833 P2d 1070, 49 St. Rep. 529 (1992). See also 44 A.G. Op. 8 (1991).

Right to Membership in Relief Association: Relator brought a proceeding in mandamus to compel the defendant fire department relief association to accept relator's application for membership in such association. It was shown that relator was carried on the city payroll for a number of years as a mechanic, occasionally performing some of the duties of a fireman, but had never been confirmed as such. Everything showed that the Council had no intent to confirm him. He was over 45 years of age at his original appointment. He failed to show a clear legal right to membership or a legal duty of the association in the premises, hence the writ was properly denied. State ex rel. Russ v. Fire Dept. Relief Ass'n, 114 M 430, 136 P2d 989 (1943).

Affidavit as to Qualifications: Where a discharged fireman seeks reinstatement by mandamus, a statement in his affidavit that he had been duly appointed and confirmed as a member of the fire department and that at all times he had the physical ability to perform his duties as such was a sufficient allegation that he possessed the qualifications of a fireman as defined by this section. Otherwise he would not have been appointed in the first instance. State ex rel. Driffill v. Anaconda, 41 M 577, 111 P 345 (1910).

Attorney General's Opinions

Eligibility of Firefighter Over Thirty-Four Years of Age for Membership in Firefighters' Unified Retirement System: An individual older than 34 years of age when first hired as a firefighter by a firefighters' unified retirement system employer is in compliance with this section if the first appointment as a firefighter, irrespective of place of employment, occurred when the individual was not over 34 years of age. A firefighter over the age of 34 years at the time

of original appointment is not eligible for membership in the firefighters' unified retirement system. 44 A.G. Op. 8 (1991).

Collateral References

Municipal Corporations *key* 197.

62 C.J.S. Municipal Corporations §603.

Validity, construction, and application of enactments relating to requirement of residency within or near specified governmental unit as condition of continued employment for policemen or firemen. 4 ALR 4th 380.

Action under Title VII of 1964 Civil Rights Act (42 USCS §§2000e et seq.) as precluding action under 42 USCS §1983 for employment discrimination by state or local government. 78 ALR Fed. 492.

7-33-4108. Physical examination.

Collateral References

62 C.J.S. Municipal Corporations §603.

7-33-4109. Supplementary volunteer fire department authorized for cities of second class.

Compiler's Comments

1983 Amendment: At beginning of (2), deleted "The volunteer fire department shall be exempt from obligations in 7-33-4126 set out as applying to the paid department."; in middle of (2) deleted "7-33-4126 and" before "7-33-4128".

Attorney General's Opinions

Dual Trusteeship in Volunteer Fire District and Fire Service Area — Not Conflict of Interest: Trusteeship in a volunteer fire department is not incompatible with simultaneous trusteeship in a fire service area. Volunteer fire departments and fire service areas are separate governmental entities. Neither owes its creation or continued existence to the other, and each lacks any form of supervisory authority with respect to the personnel of the other. There is no indication that dual trusteeship imposes an insurmountable obstacle to the proper discharge of the duties attendant in trusteeship; therefore, concurrent trusteeship of both a volunteer fire department and a fire service area does not constitute a conflict of interest. 43 A.G. Op. 47 (1989).

Response by Fire Service Organizations to Hazardous Materials Incidents: Unless otherwise provided by law, the decision to order a firefighter to respond to or investigate a hazardous materials incident is within the discretion of the supervising entity of each fire service organization. The State Fire Marshal (now the state fire prevention and investigation program of the Department of Justice) does not have specific rulemaking authority to prescribe which fire service organization should respond to such incidents. 42 A.G. Op. 104 (1988).

Volunteer Firemen: A first-class city shall not supplement its paid fire department with volunteer firemen while a second-class city may, and such volunteer firemen are entitled to all benefits provided in Title 19, ch. 11, part 6 (renumbered Title 19, ch. 18, part 6), except for the service pension provided therein. 35 A.G. Op. 67 (1974).

Collateral References

Municipal Corporations *key* 194.

62 C.J.S. Municipal Corporations §595.

7-33-4111. Tax levy for volunteer fire departments.

Compiler's Comments

2001 Amendment: Chapter 574 at end substituted "a tax on the taxable value of all taxable property in the city or town" for "a special tax not exceeding 4 mills upon all of the property of the city or town subject to taxation". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1983 Amendment: Near end of section, after "special tax" substituted "not exceeding 4 mills upon all of the property" for "not exceeding 2 mills on each dollar of the taxable value of the property".

Case Notes

Authority to Abolish Volunteer Fire Department: This section and 7-33-4105 together clearly imply that a city government could abolish its volunteer fire department when in its judgment a paid department should be established in lieu thereof. State ex rel. Casey v. Brewer, 107 M 550, 88 P2d 49 (1939).

Attorney General's Opinions

All-Purpose Mill Levy — Forfeiture of Powers: Municipalities that adopt the all-purpose mill levy authorized in 7-6-4452 (now repealed) forfeit the power to impose levies for any particular purpose not clearly excepted by statute. Thus, the all-purpose mill levy supplants the taxing authority granted in 7-33-4111, 19-10-301 (renumbered 19-19-301), and 19-11-503 (renumbered 19-18-503) but does not supplant the taxing authority granted in 7-32-4117, 7-33-4130, 19-3-204, 19-9-704 (renumbered 19-9-209), sec. 2, Ch. 324, L. 1975 (not codified), sec. 2, Ch. 359, L. 1975 (not codified), and sec. 3, Ch. 438, L. 1975 (not codified). 38 A.G. Op. 112 (1980).

Volunteer Firemen: A first-class city shall not supplement its paid fire department with volunteer firemen while a second-class city may, and such volunteer firemen are entitled to all benefits provided in Title 19, ch. 11, part 6 (renumbered Title 19, ch. 18, part 6), except for the service pension provided therein. 35 A.G. Op. 67 (1974).

Collateral References

Municipal Corporations *key* 961.

64 C.J.S. Municipal Corporations §1992.

7-33-4112. Mutual aid agreements — request if no agreement exists — definitions.

Compiler's Comments

1997 Amendment: Chapter 46 in (1), before "disasters", deleted "manmade" and after "disasters" inserted "incidents, or emergencies or disasters, incidents, or emergencies caused by persons"; in (2)(d), after "agencies", deleted "which have fire protection services"; inserted (2)(h) regarding governing bodies of other political subdivisions; inserted (3) allowing assistance requests if a mutual aid agreement has not been concluded; inserted (4) defining incidents, disasters, or emergencies; and made minor changes in style.

1993 Amendment: Chapter 149 inserted (2)(g) allowing a fire service area to enter into a mutual aid agreement with councils or commissions; and made minor changes in style. Amendment effective March 24, 1993.

Attorney General's Opinions

Merger of Fire Services Between City and County With General Government Powers Not Allowed: A proposed city initiative would have merged a city fire department and a rural county fire district into a new fire protection district with an urban and a rural division. However, both the city and county were local government units with general government powers and had not been consolidated as allowed by law. Under the provisions of the initiative, neither fire department would maintain its own identity; therefore, the proposed merger would abrogate the city fire department as a separate entity and would be an invalid exercise of general government powers. This opinion does not preclude the provision of fire protection services in a cooperative fashion through an interlocal agreement (see 1993 amendment) that city voters may, by initiative, require the city governing body to pursue. 43 A.G. Op. 56 (1990).

7-33-4113. Personnel of fire department not considered municipal officers.

Case Notes

Fireman Not a Municipal Officer: Section 7-4-4105 has no application to a fireman since this section declares that he is not to be deemed a municipal officer. State ex rel. Driffill v. Anaconda, 41 M 577, 111 P 345 (1910).

Collateral References

62 C.J.S. Municipal Corporations §599.

7-33-4114. Limitation on liability for delays by persons authorized to receive and transmit fire reports.

Collateral References

62 C.J.S. Municipal Corporations §601.

7-33-4121. Rules governing employment in fire departments.

Collateral References

Municipal Corporations *key* 194.

62 C.J.S. Municipal Corporations §§591, 603.

Who are employees forbidden to strike under state enactments or state common-law rules prohibiting strikes by public employees or stated classes of public employees. 22 ALR 4th 1103.

Labor law: right of public employees to strike or engage in work stoppage. 37 ALR 3d 1147.

Action under Title VII of 1964 Civil Rights Act (42 USCS §§2000e et seq.) as precluding action under 42 USCS §1983 for employment discrimination by state or local government. 78 ALR Fed. 492.

7-33-4122. Term of appointment of firefighters — probationary period.

Case Notes

Extension of Firefighter's Probationary Employment — No Wrongful Discharge Within Probationary Period: Hunter was a probationary firefighter with the city of Great Falls. Hunter's probationary status was extended beyond the initial 6-month period and subjected to monthly review. Based on the review, Hunter was terminated from employment. Hunter filed a grievance for wrongful discharge and sought relief under 42 U.S.C. 1983. The District Court summarily dismissed both claims, and Hunter appealed, contending that the District Court erred in finding that Hunter was not entitled to relief under the Wrongful Discharge From Employment Act or federal law because of the ongoing status as a probationary employee. The Supreme Court affirmed. The Legislature did not set a maximum probationary period for firefighters. Thus, the city was entitled to extend Hunter's status as a probationary employee, and the city met its burden of showing that a probationary period was in effect at the time of Hunter's discharge. As a probationary employee, Hunter was not entitled to relief under state or federal law, and the District Court properly dismissed Hunter's claims. Hunter v. Great Falls, 2002 MT 331, 313 M 231, 61 P3d 764 (2002), distinguishing Whidden v. John S. Nerison, Inc., 1999 MT 110, 294 M 346, 981 P2d 271 (1999), and Hobbs v. Thompson Falls, 2000 MT 336, 303 M 140, 15 P3d 418 (2000).

Property Interest in Position as Firefighter — Constitutional Right to Hearing Before Termination for Physical Disability: Plaintiff, who was undisputably physically unable to continue working as a firefighter, sued for wrongful discharge when his employment was terminated without a hearing. In reversing the District Court's judgment denying all relief, the Supreme Court held that this section creates a property interest in a position such as that of firefighter once the probationary period is satisfied and, although statutory hearing requirements do not apply to cases of termination for physical disability, plaintiff was entitled to a pretermination hearing under the Due Process Clause of the Montana Constitution. Termination without a hearing was improper and void, and plaintiff was entitled to full pay and benefits from the time of his termination until the final disposition of the case. Welsh v. Great Falls, 212 M 403, 690 P2d 406, 41 St. Rep. 1826 (1984).

Attorney General's Opinions

Fire Chief or Assistant Chief as Member of Relief Association: Under 7-33-4106 and 7-33-4122, a chief or assistant chief of a municipal fire department is a confirmed member of the fire department. Section 19-11-102 (renumbered 19-18-102) authorizes the formation of a fire department relief association by the confirmed members of a fire department. Because a chief or an assistant chief is a confirmed member of his fire department, he could be a member of the fire department relief association. 39 A.G. Op. 22 (1981).

Collateral References

62 C.J.S. Municipal Corporations §603.

7-33-4123. Authority to suspend firefighters.

Case Notes

Conduct Unbecoming a Fire Chief: Evidence that fire chief did not have a driver's license for almost a year, that he was the licensee of a bar, and that he had been convicted twice of selling liquor to minors warranted his discharge for personal conduct unbecoming a fire chief. State ex rel. Burns v. Livingston, 144 M 248, 395 P2d 971 (1964).

Discharge Without Suspension: Where fire chief was on sick leave, it was not necessary for the Mayor to suspend him as a condition precedent to filing formal charges against him or holding a hearing thereon. State ex rel. Burns v. Livingston, 144 M 248, 395 P2d 971 (1964).

Hearing of Charges:

Charges of personal conduct unbecoming a fire chief were not so broad as to preclude the preparation of an effective defense where chief actively participated, took over the examination, was fully aware of the proceedings, and was in no way prejudiced. The removed officer was given an opportunity for explanation, and in attempting to explain, spelled out the behavior or lack of good behavior set forth in this section. State ex rel. Burns v. Livingston, 144 M 248, 395 P2d 971 (1964).

The three charging members of fire and police committee were not disqualified from sitting with City Council to hear charges against fire chief since the Council, under this section, had exclusive jurisdiction to hear the charges. State ex rel. Burns v. Livingston, 144 M 248, 395 P2d 971 (1964).

Collateral References

Municipal Corporations *key* 198(1) through (5).

62 C.J.S. Municipal Corporations §§609, 611.

What constitutes unfair labor practice under state public employee relations acts. 9 ALR 4th 20.

7-33-4124. Suspension procedure.

Case Notes

Collective Bargaining Agreement Requirement for Presuspension Hearing Not Inconsistent With Requirements of Statute — Other Terms of Agreement — Grievance Procedure Consistent With Statute: Elsenpeter, a Billings firefighter, was suspended from duty by the Billings fire chief, and the firefighters' union filed an action in District Court, contending that the city had failed to follow the requirements of this section. The city responded that the requirements of the firefighters' union disciplinary procedure contained in its collective bargaining agreement (CBA) with the city were inconsistent with the requirements of this section and that by entering into the CBA, the union effectively waived the requirements of this section. The District Court held that the requirements of the CBA were not inconsistent with this section. The Supreme Court agreed with the District Court, concluding that even though the application of both the CBA and the statute might result in some duplication of procedure, the two were not inconsistent and that under both procedures, the final result would be binding arbitration. Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Suspension of Firefighters — All Cities Required to Present Charges to City Council for Hearing — Suspension Procedure Not Part of "Structure" of City Government Under Applicable Definitions — Statute Not Superseded by Charter: Elsenpeter, a Billings firefighter, was suspended from duty by the Billings fire chief. The firefighters' union filed a lawsuit in which the union contended that the suspension procedure used by the city was unlawful because the charges against Elsenpeter were not presented to the Billings City Council for hearing pursuant to this section. The city contended that the suspension procedure that it used is part of the structure and organization of the city under its charter and that, pursuant to Art. XI, sec. 5, Mont. Const., and 7-3-701(2), which allow the structure of a chartered city government to supersede statutory requirements, the city may override the statutory requirements for hearing contained in this section because the definition of "structure" contained in 7-1-4121(24) is the definition that should apply. The Supreme Court held that in as much as the definitions in 7-1-4121 are, by the terms of that section, limited in their application to 7-1-4121 through 7-1-4149, the dictionary definition of "structure" is the definition that applies. Because the dictionary definition of structure was narrower, the Supreme Court held that the disciplinary suspension procedure used by the city was not part of the "structure" of city government. Therefore, the Supreme Court held that the statutory procedure contained in this section, requiring presentment of the charges to the City Council, was not superseded by the city charter and had to be followed for the purposes of the suspension of Elsenpeter. Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Mandamus Appropriate Remedy to Require City Commission to Hold Employee Discharge Hearing — Employee Entitled to Reinstatement: Phillips was terminated from his employment as a full-time firefighter for the city of Livingston. Before his termination, the city manager held a termination hearing. Phillips argued that the hearing was held in violation of this section, requiring the hearing to be held before the City Commission. The Supreme Court found that the hearing should have been held by the City Commission. The court also held that mandamus was the proper remedy to require the City Commission to hold the discharge hearing and that because there was a clear statutory duty for the City Commission to hold the hearing, there was

no obligation on Phillips' part to exhaust grievance remedies contained in the firefighters' collective bargaining agreement. Finally, the Supreme Court held that because Phillips did not have a plain, adequate, and speedy remedy at law, under subsection (2) of this section, he was entitled to reinstatement and backpay. Phillips v. Livingston, 268 M 156, 885 P2d 528, 51 St. Rep. 1227 (1994).

Statutory Duty of City Council to Hold Termination Hearing Not Superseded by City Policy or Collective Bargaining Agreement: Phillips was terminated from his employment as a full-time firefighter for the city of Livingston. Before his termination, the city manager held a termination hearing. Phillips argued that the hearing was held in violation of this section, requiring the hearing to be held before the City Council. The city responded that the termination procedures followed were provided in the city policy and procedures manual that was included in the firefighters' collective bargaining agreement and that the provisions of that agreement controlled pursuant to 39-31-306(3). The Supreme Court noted that the agreement adopted the city's procedures manual that allowed the manager to hold the hearing but that the agreement also referenced termination action "by the appropriate authority". Because the appropriate authority under this section was the City Council, the Supreme Court held that the agreement and the city's policies did not supersede state statute. Phillips v. Livingston, 268 M 156, 885 P2d 528, 51 St. Rep. 1227 (1994), followed, as to the inability of a city charter to supersede the statutory duty of a City Council to hold a disciplinary hearing, in Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Property Interest in Position as Firefighter — Constitutional Right to Hearing Before Termination for Physical Disability: Plaintiff, who was undisputably physically unable to continue working as a firefighter, sued for wrongful discharge when his employment was terminated without a hearing. In reversing the District Court's judgment denying all relief, the Supreme Court held that 7-33-4122 creates a property interest in a position such as that of firefighter once the probationary period is satisfied and, although statutory hearing requirements do not apply to cases of termination for physical disability, plaintiff was entitled to a pretermination hearing under the Due Process Clause of the Montana Constitution. Termination without a hearing was improper and void, and plaintiff was entitled to full pay and benefits from the time of his termination until the final disposition of the case. Welsh v. Great Falls, 212 M 403, 690 P2d 406, 41 St. Rep. 1826 (1984).

Conduct Unbecoming a Fire Chief:

Charges of personal conduct unbecoming a fire chief were not so broad as to preclude the preparation of an effective defense where chief actively participated, took over the examination, was fully aware of the proceedings, and was in no way prejudiced. The removed officer was given an opportunity for explanation, and in attempting to explain, spelled out the behavior or lack of good behavior set forth in this section. State ex rel. Burns v. Livingston, 144 M 248, 395 P2d 971 (1964).

Evidence that fire chief did not have a driver's license for almost a year, that he was the licensee of a bar, and that he had been convicted twice for selling liquor to minors warranted his discharge for personal conduct unbecoming a fire chief. State ex rel. Burns v. Livingston, 144 M 248, 395 P2d 971 (1964).

Role of Court in Review: A fireman was suspended for allegedly receiving stolen property. The role of the District Court reviewing the action of the Mayor and City Council under a Writ of Certiorari is to determine whether the charges were supported by the evidence presented, not to determine its preponderance. State ex rel. Wentworth v. Baker, 101 M 226, 53 P2d 440 (1935).

Failure to Follow Procedure: The fire chief of Helena, which had a commission form of government, was removed by the City Council. His name was restored to the roll of members of the department, entitling him to the safeguards afforded to members under the civil service rules of the firemen's statutes. He was later suspended without hearing his appeal. The failure to hear his appeal rendered the suspension ineffective, entitling him to automatic reinstatement and compensation for the period of his suspension. State ex rel. Daly v. Dryburgh, 62 M 36, 203 P 508 (1921).

Removal of Chief — Violation of Duty: The evidence was sufficient to support the removal of a fire chief where it was shown that the department did not respond promptly to fire alarms and that the chief did not know the location of hydrants, was incompetent to direct the fighting of fires, and failed to tear down certain buildings as required by the State Fire Marshal (now the state fire prevention and investigation program of the Department of Justice). State ex rel. Griffiths v. Mayor, 57 M 368, 188 P 367 (1920).

Removal Without Written Charges: If a fireman has been removed without written charges, his action in asking for reinstatement after his discharge did not constitute a waiver of his right

to be confronted with written charges, as there can be no waiver of a right that has been lost. State ex rel. Driffill v. Anaconda, 41 M 577, 111 P 345 (1910).

Collateral References

62 C.J.S. Municipal Corporations §609.

7-33-4125. Reduction and subsequent increase in number of firefighters based on seniority.

Case Notes

Action of Council Not Discretionary: The City Council must, if it deems it necessary to reduce the number of paid firemen, retire the one last appointed and may not exercise any discretion in the premises and discharge the one thought least efficient even though oldest in point of service. State ex rel. Driffill v. Anaconda, 41 M 577, 111 P 345 (1910).

Collateral References

62 C.J.S. Municipal Corporations §610.

7-33-4127. Compensation of fire department personnel.

Collateral References

62 C.J.S. Municipal Corporations §612.

7-33-4128. Minimum wages of firefighters in cities of first and second class.

Attorney General's Opinions

Determination of Longevity: Longevity for purposes of determining the minimum wage for a firefighter in a city of the second class under this section begins at the date of confirmation as a member of the fire department. 38 A.G. Op. 4 (1979).

Computation of Salaries: An active firefighter in a first- or second-class city shall be paid for his total years of service with the fire department at a wage not less than the statutory minimum for each year of service with the department. The determination of this salary is based on total years of service. However, the payment for any service over 20 years begins July 1, 1975. 37 A.G. Op. 8 (1977).

Basis for Determining Pensions: The basis used by fire department relief associations in first- and second-class cities in determining pensions of firefighters retiring prior to July 1, 1973, is the regular monthly salary paid confirmed active firefighters as set by the budget of the city each year. 37 A.G. Op. 3 (1977).

All-Purpose Levy Encompassing Multiple Levies: The levy for minimum wages for firefighters may be encompassed as part of but not in addition to the all-purpose levy authorized by law. 36 A.G. Op. 94 (1976).

Collateral References

62 C.J.S. Municipal Corporations §612.

7-33-4130. Group insurance for firefighters — funding.

Compiler's Comments

2001 Amendment: Chapter 574 in (2) near middle after "levy" deleted "on property" and substituted "a tax on the taxable value of all taxable property" for "a tax not to exceed 2 mills on the dollar upon all property". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (2) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1981 Amendment: Substituted the requirement that first- and second-class cities are to pay no less than the premium rate in effect as of July 1, 1980, for insurance coverage for firefighters and their dependents for the requirement that cities pay 100% of the premium for insurance for each fireman and his dependents in (1)(b); and inserted (1)(c) relating to collective bargaining.

Interim Study Committee Bill: Chapter 88, L. 1981 (HB 3), was introduced at the request of the interim Study Committee on State Mandates and the Effects of State-Owned Property on Local Governments. See committee report, Legislative Council, 1980.

Attorney General's Opinions

Insurance for Volunteer Firefighters — Third-Class Cities: Pursuant to 7-33-4130, only cities of the first and second class are required to provide group insurance to their firefighters if they

provide such insurance for other employees. Cities of the third class are not mentioned in the statute and therefore are not required to provide group health and life insurance for volunteer firefighters. 41 A.G. Op. 18 (1985).

All-Purpose Mill Levy — Forfeiture of Powers: Municipalities that adopt the all-purpose mill levy authorized in 7-6-4452 (now repealed) forfeit the power to impose levies for any particular purpose not clearly excepted by statute. Thus, the all-purpose mill levy supplants the taxing authority granted in 7-33-4111, 19-10-301 (renumbered 19-19-301), and 19-11-503 (renumbered 19-18-503) but does not supplant the taxing authority granted in 7-32-4117, 7-33-4130, 19-3-204, 19-9-704 (renumbered 19-9-209), sec. 2, Ch. 324, L. 1975 (not codified), sec. 2, Ch. 359, L. 1975 (not codified), and sec. 3, Ch. 438, L. 1975 (not codified). 38 A.G. Op. 112 (1980).

All-Purpose Levy Encompassing Multiple Levies: The levy for group insurance for firefighters may be encompassed as part of but not in addition to the all-purpose levy authorized by law. 36 A.G. Op. 94 (1976).

Collateral References

62 C.J.S. Municipal Corporations §614.

7-33-4131. Firefighter's rights in event of city-county consolidation.

Collateral References

Municipal Corporations *key* 200.

62 C.J.S. Municipal Corporations §614.

Part 42
Powers of Municipal Council Related to Fire Services

Part Case Notes

Police Power: Measures for the protection of life and property against fire hazards fall within the police power of the state, which power may either be exercised by the state through proper machinery or delegated for local administration to cities or towns. State ex rel. Brooks v. Cook, 84 M 478, 276 P 958 (1929), explained in State ex rel. Kern v. Arnold, 100 M 346, 49 P2d 976 (1935).

Part Attorney General's Opinions

Authority of City and Town Councils to Prescribe Building Regulations — Impliedly Repealed by State Building Code: The authority of city and town councils to prescribe building construction regulations pursuant to 7-15-4122 (now repealed), and to prescribe limits within which combustible buildings must not be erected pursuant to 7-33-4203 (now repealed), was impliedly repealed by the enactment in 1969 of the state building code, Title 50, ch. 60, part 2. 40 A.G. Op. 76 (1984).

Part Law Review Articles

Liability and Private Causes of Action for Damages Which Result From Illegal Firefighter Strikes, 34 Wash. U.J. Urb. & Contemp. L. 231.

Torts—The "Fireman's Rule"—Injured Firemen May Recover Damages for Harm Caused by Willful and Wanton Misconduct—Mahoney v. Carus Chemical Co., Inc., 510 A.2d 4 (N.J.), 17 Seton Hall L. Rev. 857 (1987).

7-33-4201. Establishment of fire department and fire alarm system.

Case Notes

Maintenance of Fire Department Proprietary Function of City: Under this section, 7-33-4101 (before amendment), 7-33-4126 (now repealed), and 19-11-201 (renumbered 19-18-201), a city was empowered but not compelled to maintain a fire department. Under 7-33-4113, firemen are not officers of the city. A city operates such department in its proprietary capacity except when it is engaged in extinguishment of fires, going to and from the scene of a fire, or testing equipment for such occasions, when it is exercising governmental functions. State ex rel. Kern v. Arnold, 100 M 346, 49 P2d 976 (1935).

Collateral References

Municipal Corporations *key* 603.

62 C.J.S. Municipal Corporations §255.

7-33-4202. Provision for fire equipment.

Collateral References

Liability for personal injury or damage from operation of fire department vehicle. 82 ALR 2d 312.

7-33-4204. Inspection and regulation of fire hazards.

Collateral References

Municipal liability for negligent fire inspection and subsequent enforcement. 69 ALR 4th 739.

Liability of municipal corporation for negligent performance of building inspector's duties. 41 ALR 3d 567.

7-33-4205. Regulation of explosives and inflammable materials.

Compiler's Comments

1989 Amendment: At beginning inserted exception clause. See contingent effective date compiler's comment.

Contingent Effective Date: Section 9, Ch. 506, L. 1989, was a contingency section that provided: "(1) [This act] is void if:

(a) the western fire chiefs association adopts at its annual meeting in August 1989 the proposed changes to article 77 of the uniform fire code that are specifically referred to as amendments to division II "storage", regarding smokeless powder and small arms primers for retail sales;

(b) the proposed changes are no more restrictive than the terms of [this act]; and

(c) the state fire marshal [now the state fire prevention and investigation program of the department of justice] adopts the amended provisions for storage of smokeless powder and small arms primers for retail sales by March 31, 1990.

(2) [This act] is effective April 1, 1990." The contingency did not occur, so the 1989 amendments became effective April 1, 1990.

Case Notes

Gasoline Within Three-Mile Limit: Ordinance regulating installation and use of coin-operated gasoline dispensing devices located outside but within 3 miles of city limits was proper exercise of city's authority under this statute. State ex rel. Pat Griffin Co. v. Butte, 151 M 546, 445 P2d 739 (1968).

Collateral References

Explosives *key* 2, 3.

35 C.J.S. Explosives §§4 through 7.

Municipality's liability for injury or damage from explosion or burning of substance stored by third person under municipal permit. 17 ALR 2d 683.

7-33-4206. Regulation of bonfires, fireworks, and other fire-causing agents.

Collateral References

Municipal Corporations *key* 604.

62 C.J.S. Municipal Corporations §254.

Validity and application of statutes imposing upon the owner or occupant liability for expense of fighting fire starting on his land or property. 90 ALR 2d 873.

Municipality's liability for injury or damage from explosion or burning of substance stored by third person under municipal permit. 17 ALR 2d 683.

7-33-4207. Regulation of industries with fire-causing potential.

Collateral References

Municipal Corporations *key* 595, 603.

53 C.J.S. Licenses §§132, 254.

7-33-4208. Adoption of fire code.

Attorney General's Opinions

Fire Code — Key Lock Gas Stations: Under the uniform fire code, adopted pursuant to this section, service stations may operate unattended key lock systems for commercial, industrial, governmental, and manufacturing establishments during the hours they are not open to the public. 39 A.G. Op. 16 (1981).

Collateral References
Municipal Corporations *key* 106(1), et seq.
62 C.J.S. Municipal Corporations §§416 through 420.

CHAPTER 34
MEDICAL SERVICES AND BOARDING HOMES FOR THE AGED

Part 1
Ambulance Services

Part Case Notes
Unpaid Emergency Medical Technician Trainees, Volunteers, and Students Not Considered Employees: The definition of emergency medical services personnel in 50-6-202 does not include an unpaid emergency medical technician (EMT) trainee. Therefore, an unpaid EMT trainee who has not been certified to provide medical services is not considered an employee as defined in 39-71-118 for workers' compensation purposes. Further, because volunteers are generally not considered employees unless designated by law, a volunteer involved in ambulance services is also not considered an employee as defined in 39-71-118 for workers' compensation purposes. Similarly, an unpaid student, such as an unpaid EMT trainee, who is learning skills in a work environment is considered a volunteer and is not considered an employee as defined in 39-71-118 for workers' compensation purposes. The general statement of public policy in Great W. Sugar Co. v. District Court, 188 M 1, 610 P2d 717 (1980), that all forms of employment are subject to the Workers' Compensation Act, does not apply to unpaid EMT trainees and volunteers because those persons are not considered employees. Dyess v. Meagher County, 2003 MT 78, 315 M 35, 67 P3d 281 (2003).

7-34-101. Ambulance services authorized.

Collateral References
Municipal Corporations *key* 597.
62 C.J.S. Municipal Corporations §133.
Liability of operator of ambulance service for personal injuries to person being transported. 68 ALR 4th 14.
Liability for personal injury or property damage from operation of ambulance. 84 ALR 2d 121.

7-34-102. Ambulance service mill levy permitted.

Compiler's Comments
2001 Amendments — Composite Section: Chapter 495 in (1) after "1 mill on" deleted "the dollar of"; and in (2) inserted "held as provided in 15-10-425". Amendment effective October 1, 2001. The amendment by Ch. 574 rendered the amendment by Ch. 495 void.
Chapter 574 near middle substituted "annual tax on the taxable value" for "annual tax up to 1 mill on the dollar of the taxable value"; deleted former (2) that read: "(2) In addition to the levy authorized by subsection (1), a county, city, or town may levy an additional 2 mills for the support of ambulance services if, at a regularly scheduled election, the electorate of the county, city, or town approves the imposition of the additional levy"; and made minor changes in style. Amendment effective July 1, 2001.
1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.
Severability: Section 172, Ch. 584, L. 1999, was a severability clause.
Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.
1991 Amendment: Inserted (2) concerning 2-mill levy for ambulance service by county, city, or town if approved by electorate. Amendment effective April 26, 1991.

Collateral References
Municipal Corporations *key* 597.
62 C.J.S. Municipal Corporations §133.

7-34-103. Manner of providing ambulance service.

Compiler's Comments

2001 Amendment: Chapter 13 inserted (1)(c) allowing governing board to sell or contract for the sale of ambulance service insurance; inserted (2) exempting local government ambulance service from the insurance code; and made minor changes in style. Amendment effective February 14, 2001.

Attorney General's Opinions

Deputies as Ambulance Drivers — Stipends: Deputy Sheriffs receiving maximum statutory salary may receive a stipend in addition to their regular salary for operating the county ambulance. 37 A.G. Op. 13 (1977).

Part 21
Hospital Districts

Part Collateral References

40 Am. Jur. 2d Hospitals and Asylums §23.

Action of private hospital as state action under 42 USCS §1983 or Fourteenth Amendment. 42 ALR Fed. 463

Emergency Medical Services: Yet Another Developing Crisis in Rural America, Ott & Hasanen, St. & Loc. Gov't Rev. (1995).

7-34-2101. Purpose of part.

Compiler's Comments

1991 Amendment: After "services" inserted "and health care facilities and services"; and made minor change in style.

1991 Statement of Intent: The statement of intent attached to Ch. 453, L. 1991, provided: "A statement of intent has been prepared for this bill to clarify the provisions of this bill that authorize the board of trustees of a hospital district to provide educational benefits to qualified individuals.

It is the intent of the legislature that, in providing educational benefits, the board of trustees follow current procedures established in the district bylaws governing decisions of the board in order to ensure:

(1) a fair assessment of the qualifications and financial need of individuals applying for educational benefits; and

(2) the equitable distribution of funds available for educational benefits offered by the hospital district."

Attorney General's Opinions

Hospital District — Construction of Medical Facility: A public hospital district may construct a medical building for county doctors' offices, but the county may not distribute federal revenue sharing funds or payments in lieu of taxes for construction financing. 37 A.G. Op. 61 (1977).

Transferring Title to Assets: A hospital district may not transfer title to its assets to the county in which it is located unless the district is dissolved. 37 A.G. Op. 14 (1977).

Law Review Articles

Doing What Comes Naturally: Antitrust Law and Hospital Mergers, Matthew, 31 Hous. L. Rev. 813 (1994).

Qualified Immunity: A User's Manual, Blum, 26 Ind. L. Rev. 187 (1993).

Hospitals, New Medical Practice Guidelines, CQI, and Potential Liability Outcomes, Blum, 36 St. Louis U.L.J. 913 (1992).

Collateral References

Hospitals *key* 2.

41 C.J.S. Hospitals §6.

Immunity from liability for damages in tort of state or governmental unit or agency in operating hospital. 25 ALR 2d 203, §17 superseded by 18 ALR 4th 858.

7-34-2102. Definitions.

Compiler's Comments

1999 Amendment: Chapter 98 in definition of hospital facilities substituted "outpatient centers for primary care" and "outpatient centers for surgical services" for "outpatient facilities". Amendment effective October 1, 1999.

Saving Clause: Section 6, Ch. 98, L. 1999, was a saving clause.

Applicability: Section 7, Ch. 98, L. 1999, provided: "[This act] applies to health care facility licenses or certificates of need issued pursuant to Title 50, chapter 5, after October 1, 1999."

1997 Amendment: Chapter 93 inserted definition of public health center; and made minor changes in style. Amendment effective March 19, 1997.

Saving Clause: Section 21, Ch. 93, L. 1997, was a saving clause.

1991 Amendment: At end, after "infirmaries", inserted "and health care facilities, all as defined in 50-5-101"; and made minor change in style.

1991 Statement of Intent: The statement of intent attached to Ch. 453, L. 1991, provided: "A statement of intent has been prepared for this bill to clarify the provisions of this bill that authorize the board of trustees of a hospital district to provide educational benefits to qualified individuals.

It is the intent of the legislature that, in providing educational benefits, the board of trustees follow current procedures established in the district bylaws governing decisions of the board in order to ensure:

(1) a fair assessment of the qualifications and financial need of individuals applying for educational benefits; and

(2) the equitable distribution of funds available for educational benefits offered by the hospital district."

Attorney General's Opinions

Funding of Private, Nonprofit Nursing Home by Hospital District Allowed: A hospital district may fund a private, nonprofit nursing home operating for the benefit of county residents if the home complies with the admission standards set out in 7-34-2123, provides the kinds of facilities that are reasonable and appropriate in advancing public health as outlined in 50-5-101, and meets other legal requirements concerning the operation of a long-term care facility. 43 A.G. Op. 70 (1990).

7-34-2103. Petition required to create hospital district.

Attorney General's Opinions

Taxpayer Qualifications in Petition: Taxpayer qualifications for petitioning have not been ruled invalid by the Montana Supreme Court and must therefore be presumed valid. 34 A.G. Op. 47 (1972).

Collateral References

41 C.J.S. Hospitals §6.

7-34-2107. Notice of hearing.

Compiler's Comments

1985 Amendment: Substituted "A notice of the hearing required by 7-34-2106 shall be published as provided in 7-1-2121" for: "(1) A notice of the hearing required by 7-34-2106 shall be published in a newspaper having general circulation in the territory within the boundaries of the proposed hospital district once each week for at least 2 weeks, the last publication to be at least 2 weeks before the hearing. If there is no newspaper having general circulation within the boundaries of the proposed hospital district, the notice of hearing shall be posted in at least three public places within the boundaries of the proposed district for 2 weeks before the hearing.

(2) The notice shall state the time, date, place, and purpose of the hearing, describe the boundaries of the proposed hospital district, and state that any person residing in or owning property within the proposed hospital district may appear in support of or in opposition to the petition at such hearing."

7-34-2110. Resolution calling for election.

Compiler's Comments

1995 Amendment: Chapter 387 in (2), at end, inserted "The special election must be held in conjunction with a regular or primary election"; and made minor changes in style.

7-34-2111. Territory of hospital district.

Attorney General's Opinions

Hospital District — Construction of Medical Facility: A public hospital district may construct a medical building for county doctors' offices, but the county may not distribute federal revenue sharing funds or payments in lieu of taxes for construction financing. 37 A.G. Op. 61 (1977).

Transferring Title to Assets: A hospital district may not transfer title to its assets to the county in which it is located unless the district is dissolved. 37 A.G. Op. 14 (1977).

7-34-2115. District to be governed by elected trustees — legal assistance.

Compiler's Comments

1991 Amendment: Inserted (3) allowing hospital district trustees to call on County Attorney for legal services; and made minor changes in style.

Attorney General's Opinions

Election of Trustees: Under this section an initial Board of Trustees for a public hospital district must be elected unless no one files a nomination petition, in which case the County Commissioners must appoint the trustees. 36 A.G. Op. 12 (1975).

7-34-2116. Election of first board of trustees.

Compiler's Comments

1981 Amendment: Substituted "7-34-2117" for "13-14-113" in (2).

7-34-2117. Procedure for conduct of election for trustees — appointment of trustees.

Compiler's Comments

1999 Amendment: Chapter 254 at end of first sentence in (3) after "term" deleted "the term to be the same as if the trustee were elected" and inserted second sentence authorizing cancellation of election when only one nominee and requiring election by acclamation for candidate filing petition; inserted (4) regarding term of office for trustee elected by acclamation or appointment; and made minor changes in style. Amendment effective October 1, 1999.

1985 Amendment: In (2) substituted "75 days" for "30 days".

1981 Amendment: Deleted "and nominations for election" after "All elections" in (1); inserted "provided in 13-1-104(3)" in (1); substituted "13-1-401" for "Title 13" at the end of (1); inserted (2) relating to nomination of candidates.

Attorney General's Opinions

Officers to Remain Until Successors Properly Qualified: Officers of hospital, fire, irrigation, and drainage districts whose terms were due to expire in the spring of 1980 are entitled to remain in office until their successors are properly qualified following an election held in November 1980. 38 A.G. Op. 74 (1980).

7-34-2118. Term of office.

Compiler's Comments

1981 Amendment: Substituted "district meeting" for "Monday in January" in (1) and (2).

7-34-2119. Organization of board of trustees.

Collateral References

41 C.J.S. Hospitals §7.

7-34-2120. Compensation of trustees.

Attorney General's Opinions

Doctrine of Incompatible Positions Precluding Hospital District Employee From Holding Office as Trustee of Hospital District: An individual serving in the dual roles of hospital district employee and hospital district trustee would be in the position as trustee of controlling actions and decisions of that individual's supervisor, which could directly affect that individual's job duties and compensation. Therefore, under the common-law doctrine of incompatible public offices, the office of hospital district trustee and the position of hospital district employee are incompatible and one person may not hold both jobs simultaneously. 47 A.G. Op. 19 (1998). See also 41 A.G. Op. 81 (1986), and 46 A.G. Op. 26 (1996).

7-34-2121. Vacancies.

Compiler's Comments

1999 Amendment: Chapter 254 after "trustees" inserted "occurring during the term of office of a trustee"; and made minor changes in style. Amendment effective October 1, 1999.

7-34-2122. Powers of district.

Compiler's Comments

1999 Amendment: Chapter 584 in (7) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1991 Amendments: Chapter 349 in (3), after "contract for deed", deleted "conditional sales contract"; in (8), after "money", substituted "by the issuance of its bonds" for "and issue bonds"; and inserted (9) concerning borrowing money by issuing notes.

Chapter 453 inserted (13) authorizing a hospital district to provide educational incentives for a person in exchange for services provided to the district.

1991 Statement of Intent: The statement of intent attached to Ch. 453, L. 1991, provided: "A statement of intent has been prepared for this bill to clarify the provisions of this bill that authorize the board of trustees of a hospital district to provide educational benefits to qualified individuals.

It is the intent of the legislature that, in providing educational benefits, the board of trustees follow current procedures established in the district bylaws governing decisions of the board in order to ensure:

(1) a fair assessment of the qualifications and financial need of individuals applying for educational benefits; and

(2) the equitable distribution of funds available for educational benefits offered by the hospital district."

Attorney General's Opinions

Doctrine of Incompatible Positions Precluding Hospital District Employee From Holding Office as Trustee of Hospital District: An individual serving in the dual roles of hospital district employee and hospital district trustee would be in the position as trustee of controlling actions and decisions of that individual's supervisor, which could directly affect that individual's job duties and compensation. Therefore, under the common-law doctrine of incompatible public offices, the office of hospital district trustee and the position of hospital district employee are incompatible and one person may not hold both jobs simultaneously. 47 A.G. Op. 19 (1998). See also 41 A.G. Op. 81 (1986), and 46 A.G. Op. 26 (1996).

Lease of Hospital Facility to Nonprofit Corporation — Indebtedness Incurred by Corporation for Running Facility: A hospital district possesses the power to lease a hospital facility to a nonprofit corporation, and that arrangement creates a valid lessor-lessee relationship. Absent a controlling provision to the contrary in the lease, the corporation would have a right, as an entity independent from the district, to incur indebtedness by borrowing from a commercial lender institution for the purpose of running the hospital. 43 A.G. Op. 71 (1990).

No Authority for Hospital District to Borrow Money by Use of Promissory Note: Section 7-34-2131 is the only provision in the law governing hospital districts that prescribes a method by which districts are authorized to borrow money, namely through the issuance of bonds. Therefore, 7-34-2131 and this section may not be construed as a grant of authority to a hospital district to borrow money by use of a promissory note. (See Ch. 349, L. 1991, amendment.) 43 A.G. Op. 71 (1990).

Funding of Private, Nonprofit Nursing Home by Hospital District Allowed: A hospital district may fund a private, nonprofit nursing home operating for the benefit of county residents if the home complies with the admission standards set out in 7-34-2123, provides the kinds of facilities that are reasonable and appropriate in advancing public health as outlined in 50-5-101, and meets other legal requirements concerning the operation of a long-term care facility. 43 A.G. Op. 70 (1990).

County Attorney Not Obligated to Serve Hospital District: A County Attorney has no obligation to act as legal counsel for a hospital district formed under 7-34-2101. 43 A.G. Op. 15 (1989).

Hospital District Employees — Vacation and Sick Leave: Employees of county hospital districts are employees of a subdivision of the county and are therefore entitled to receive the vacation and sick leave benefits provided public employees. 37 A.G. Op. 102 (1977).

Hospital District — Construction of Medical Facility: A public hospital district may construct a medical building for county doctors' offices, but the county may not distribute federal revenue sharing funds or payments in lieu of taxes for construction financing. 37 A.G. Op. 61 (1977).

Transferring Title to Assets: A hospital district may not transfer title to its assets to the county in which it is located unless the district is dissolved. 37 A.G. Op. 14 (1977).

Collateral References

41 C.J.S. Hospitals §6.

40 Am. Jur. 2d Hospitals and Asylums §24.

Right of voluntary disclosure of privileged proceedings of hospital medical review or doctor evaluation processes. 60 ALR 4th 1273.

7-34-2123. Admission to district hospital facilities.

Attorney General's Opinions

Funding of Private, Nonprofit Nursing Home by Hospital District Allowed: A hospital district may fund a private, nonprofit nursing home operating for the benefit of county residents if the home complies with the admission standards set out in this section, provides the kinds of facilities that are reasonable and appropriate in advancing public health as outlined in 50-5-101, and meets other legal requirements concerning the operation of a long-term care facility. 43 A.G. Op. 70 (1990).

7-34-2131. Hospital district bonds and notes authorized.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 29 in (1)(b) after "exceed" substituted "1.4% of the total assessed value of taxable property, determined as provided in 15-8-111, within the district" for "22.5% of the taxable value of the property therein"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 in (2)(b) and (2)(d) deleted reference to 7-34-2134; at beginning of (3) substituted "This section may not be construed to amend or repeal" for "Nothing herein shall be construed to preclude"; and made minor changes in style. Amendment effective July 1, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1991 Amendment: Inserted (2) concerning borrowing of money by hospital districts through the issuance of notes; and made minor changes in style.

1987 Amendment: Near end of (3), after "bonds of", deleted "second- or third-class".

1981 Amendment: Substituted "may not exceed 22.5% of the taxable value of the property" for "shall not exceed 5% of taxable property" in (2).

Validation: Section 64, Ch. 614, L. 1981, provided: "Notwithstanding any provisions of this act, any outstanding indebtedness or bond issue on January 1, 1982, of any governmental subdivision is not invalidated because of any changes in the taxable valuation of the subdivision due to removal of automobiles and trucks having a rated capacity of three-quarters of a ton or less from the tax base."

Effect of 1981 Amendment: The primary purpose of Ch. 614, L. 1981, was to replace the system of taxation of automobiles and light trucks with a fee system. With the adoption of the fee system, automobiles and light trucks are no longer taxable property. The resulting loss of taxable valuation has a direct effect on the amount of indebtedness a political subdivision can incur. Thus it was necessary in Ch. 614 to increase the percentage of taxable valuation used as a limitation on indebtedness to offset the loss of taxable valuation attributable to automobiles and light trucks.

Attorney General's Opinions

No Authority for Hospital District to Borrow Money by Use of Promissory Note: This section is the only provision in the law governing hospital districts that prescribes a method by which districts are authorized to borrow money, namely through the issuance of bonds. Therefore, 7-34-2122 and this section may not be construed as a grant of authority to a hospital district to borrow money by use of a promissory note. (See 1991 amendment.) 43 A.G. Op. 71 (1990).

Transferring Title to Assets: A hospital district may not transfer title to its assets to the county in which it is located unless the district is dissolved. 37 A.G. Op. 14 (1977).

Limitation: The 5% limitation refers to the bonded debt of a hospital district that may be incurred only by issuing bonds. 36 A.G. Op. 88 (1976).

Assessed Value Not Taxable Value: The valuation used in determining the 5% limitation on the amount of bonds that may be issued under this section refers to assessed valuation. 36 A.G. Op. 12 (1975).

7-34-2133. Levy of district taxes.

Compiler's Comments

2001 Amendment: Chapter 574 near middle substituted "tax on the taxable value of all taxable property" for "tax upon all property"; deleted former (2) that read: "(2) The tax levied for all hospital district purposes other than payment of bonded indebtedness may not in any year exceed 3 mills on each dollar of taxable valuation of property within the district"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning of (1) inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-34-2137. Collection of taxes and disposition of funds.

Attorney General's Opinions

Registration and Redemption of Unpaid Hospital District Warrants — Procedure: A hospital district's board of trustees may enact an appropriate resolution directing the County Treasurer, as ex officio treasurer of the district, to: (1) register unpaid hospital district warrants; (2) redeem the warrants in the order of their registration; and (3) pay a particular rate of interest on unpaid warrants. 43 A.G. Op. 71 (1990).

7-34-2151. Annexation of land to hospital district.

Collateral References

Validity and construction of zoning regulations expressly referring to hospitals, sanitariums, nursing homes. 27 ALR 3d 1022.

7-34-2153. Hearing on petition for annexation — notice.

Compiler's Comments

1985 Amendment: In (1) substituted "as provided in 7-1-2121" for "in two successive issues of a newspaper published in the county".

7-34-2156. Withdrawal of land from hospital district.

Case Notes

Withdrawal From Hospital District: Because uncontradicted testimony before the Board of County Commissioners showed a petitioning area would not be benefited by remaining in the county's hospital district, the District Court properly ruled the Board had abused its discretion in denying the withdrawal petition and summary judgment was proper. Sorenson v. Bd. of County Comm'rs, 176 M 232, 577 P2d 394 (1978).

7-34-2157. Hearing on petition for withdrawal — notice.

Compiler's Comments

1985 Amendment: In (3) deleted "at least 2 weeks prior to the time so fixed" after "The board shall" and substituted "as provided in 7-1-2121" for "in two successive issues of a newspaper published in the county".

Case Notes

Withdrawal From Hospital District: Because uncontradicted testimony before the Board of County Commissioners showed a petitioning area would not be benefited by remaining in the county's hospital district, the District Court properly ruled the Board had abused its discretion in denying the withdrawal petition and summary judgment was proper. Sorenson v. Bd. of County Comm'rs, 176 M 232, 577 P2d 394 (1978).

7-34-2158. Decision on withdrawal petition — appeal.

Case Notes

Withdrawal From Hospital District: Because uncontradicted testimony before the Board of County Commissioners showed a petitioning area would not be benefited by remaining in the county's hospital district, the District Court properly ruled the Board had abused its discretion in denying the withdrawal petition and summary judgment was proper. Sorenson v. Bd. of County Comm'rs, 176 M 232, 577 P2d 394 (1978).

7-34-2161. Dissolution of hospital district.

Attorney General's Opinions

Transferring Title to Assets: A hospital district may not transfer title to its assets to the county in which it is located unless the district is dissolved. 37 A.G. Op. 14 (1977).

7-34-2162. Hearing on petition for dissolution — notice.

Compiler's Comments

2001 Amendment: Chapter 354 substituted "publish a notice of the hearing" for "cause notice thereof to be posted in at least three separate public places within said district for at least 2 weeks prior to the hearing. The notice shall also be published"; and made minor changes in style. Amendment effective October 1, 2001.

1985 Amendment: Substituted "as provided in 7-1-2121" for "for at least two successive issues in a newspaper published in the county prior to such hearing".

Part 22
County Hospital Services

7-34-2201. Erection and management of county health care facilities — definition — provision of health care services.

Compiler's Comments

2001 Amendment: Chapter 192 in (3) near beginning after "a medical assistance facility" inserted "a critical access hospital"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 98 in (3) in definition of health care facility substituted "an outpatient center for surgical services" and "an outpatient center for primary care" for "an ambulatory surgical facility" and "an outpatient facility"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 6, Ch. 98, L. 1999, was a saving clause.

Applicability: Section 7, Ch. 98, L. 1999, provided: "[This act] applies to health care facility licenses or certificates of need issued pursuant to Title 50, chapter 5, after October 1, 1999."

1997 Amendments: Chapter 42 in (3) substituted "an end-stage renal dialysis facility" for "a kidney treatment center". Amendment effective March 12, 1997.

Chapter 93 in (3), after "outpatient facility", deleted "a public health center" and after "50-5-101" inserted "a public health center, as defined in 7-34-2102". Amendment effective March 19, 1997.

Saving Clause: Section 21, Ch. 93, L. 1997, was a saving clause.

1995 Amendment: Chapter 520 in (1) and (2) substituted references to health care facilities, services, and purposes for references to hospital facilities, services, and purposes; inserted (3) defining health care facility; and made minor changes in style. Amendment effective April 25, 1995.

Attorney General's Opinions

County Construction of Medical Building: A county may use federal revenue sharing funds and payments in lieu of taxes to construct a medical building to be used for public purposes that the County Commissioners are empowered to effectuate. 37 A.G. Op. 89 (1977).

County Authority to Construct Medical Facility: A county has no authority under 7-34-2201 or 53-2-321 (now repealed) to construct a medical facility for doctors. A county does have power under Title 90, ch. 5, part 1, to construct such facility using industrial revenue bonds or gifts but may not use federal revenue sharing funds or payments in lieu of taxes and may lease the facility to a hospital district in the county. 37 A.G. Op. 61 (1977).

Collateral References

Counties *key* 105(1).

20 C.J.S. Counties §167; 41 C.J.S. Hospitals §6.

40 Am. Jur. 2d Hospitals and Asylums §21.

Validity and construction of zoning regulations expressly referring to hospitals, sanitariums, nursing homes. 27 ALR 3d 1022.

Liability of county for injury or death of child caused by cut or puncture from broken glass or other sharp object. 47 ALR 2d 1053.

Immunity of county from liability for damages in tort in operating hospital. 25 ALR 2d 221.

7-34-2202. Health care facilities commission.

Compiler's Comments

1995 Amendment: Chapter 520 substituted "health care facilities" for "hospitals"; and made minor changes in style. Amendment effective April 25, 1995.

Collateral References

41 C.J.S. Hospitals §7.

7-34-2203. Provision of health care services.

Compiler's Comments

1995 Amendment: Chapter 520 substituted "health care facility may be used to provide health care services" for "hospital so erected and furnished may be used for the hospitalization of the indigent sick of the county"; and deleted second sentence allowing a hospital to be used for the nonindigent sick for a reasonable fee if no indigent sick would be deprived of care. Amendment effective April 25, 1995.

Collateral References

False imprisonment in connection with confinement in nursing home or hospital. 4 ALR 4th 449.

7-34-2204. Use of county property and funds for health care purposes.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 571 in (1) in second sentence at end after "general fund of the county" deleted "or if the lease is of a long-term care facility or portion of a long-term care facility, the rentals must be paid into the county poor fund, except as provided in subsection (2)(a)"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 near end of (1) after "county" deleted "or if the lease is of a long-term care facility or portion of a long-term care facility, the rentals must be paid into the county poor fund"; inserted (3) concerning use of county general fund as match for federal funds; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 520 in (1), near middle of first sentence, substituted "health care facility" for "hospital" and at end of second sentence inserted "or if the lease is of a long-term care facility or portion of a long-term care facility, the rentals must be paid into the county poor fund, except as provided in subsection (2)(a)"; in (2)(a) substituted "in which bonds are to be or have been issued" for "of financing bonds", after "7-34-2411" deleted "through 7-34-2418", and substituted "extend until" for "terminate at"; in (2)(b) substituted "health care facility or designated portion of a health care facility, including equipment if applicable" for "buildings and equipment" and substituted "health care" for "hospital"; and made minor changes in style. Amendment effective April 25, 1995.

Attorney General's Opinions

Lease of Hospital Facilities and Contract for Services for Indigent Aged: A county that has leased hospital facilities to a lessee may lease space in the facilities from the lessee and contract with the lessee to provide services for the indigent aged who cannot be accommodated in the county nursing home. 37 A.G. Op. 173 (1978).

Limitations on the Term of Leases: A county may not lease its hospital facilities for a term exceeding 5 years. 36 A.G. Op. 101 (1976).

Collateral References

Counties *key* 110.

20 C.J.S. Counties §170.

Part 23
County Boarding Homes for the Aged

Part Attorney General's Opinions

Lease of Hospital Facilities and Contract for Services for Indigent Aged: A county that has leased hospital facilities to a lessee may lease space in the facilities from the lessee and contract with the lessee to provide services for the indigent aged who cannot be accommodated in the county nursing home. 37 A.G. Op. 173 (1978).

Indigent Residency Requirement for Nursing Home: A county (under 7-34-2302, now repealed) may restrict entry into the county boarding or nursing home to only those indigent

aged who are bona fide residents of the county, as the obligation of the counties to provide institutional care to indigent aged appears to be limited to indigent county residents according to the language of 53-3-104. 35 A.G. Op. 63 (1974).

Part Law Review Articles

The Nursing Home and Community Residence Facility Resident's Protections Act of 1985—Boon or Bane?, Hyman, 32 How. L.J. 39 (1989).

Don't Make Them Leave Their Rights at the Door: A Recommended Model State Statute to Protect the Rights of the Elderly in Nursing Homes, 4 J. Contemp. Health L. & Pol'y 321 (1988).

Part Collateral References

Licensing and regulation of nursing or rest homes. 53 ALR 4th 689.

Validity and construction of zoning regulations expressly referring to hospitals, sanitariums, nursing homes. 27 ALR 3d 1022.

7-34-2301. Construction and operation of county boarding home authorized.

Compiler's Comments

1995 Amendments: Chapter 418 at end of first sentence substituted "department of public health" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Chapter 520 in first sentence, after "erect", inserted "furnish", after "equip" inserted "expand, improve", after "home" deleted "or nursing home", and after "for the aged" inserted "that does not constitute a health care facility"; inserted second sentence providing that a boarding home may be located near or in a building containing a health care facility and operated in conjunction with it; and made minor changes in style. Amendment effective April 25, 1995.

Chapter 546 at end of first sentence substituted "department of public health and human services" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Attorney General's Opinions

No County Authority to Provide Housing to Low-Income Elderly: A county with general government powers does not have the authority under Art. XI, sec. 4, Mont. Const., or 7-8-2102 to construct or maintain an apartment complex for elderly low-income citizens that does not otherwise constitute a boarding or nursing home under this section and that does not constitute a public building under 7-8-2102. Instead, a county or municipal housing authority should be created under Title 7, ch. 15, parts 21 or 44, to provide such housing. 42 A.G. Op. 20 (1987).

Lease of Hospital Facilities and Contract for Services for Indigent Aged: A county that has leased hospital facilities to a lessee may lease space in the facilities from the lessee and contract with the lessee to provide services for the indigent aged who cannot be accommodated in the county nursing home. 37 A.G. Op. 173 (1978).

County's Inherent Power to Prevent Destruction of Its Property: If a county-operated nursing home and a district hospital will close as a result of the failure of the county to construct a doctors' facility, the county has the inherent power to construct the facility using federal revenue sharing funds and payments in lieu of taxes to preserve its property. 37 A.G. Op. 61 (1977).

Collateral References

False imprisonment in connection with confinement in nursing home or hospital. 4 ALR 4th 449.

7-34-2303. Lease of county property for boarding home.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 571 in (2) near beginning after "must be paid into the" substituted "general fund" for "poor fund"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 in (2) near beginning substituted "general fund" for "poor fund"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 520 in (1) and (4), after "boarding home", deleted "or nursing home"; in (2) inserted "or if bonds have been issued under 7-34-2411 to finance or refinance the costs of a boarding home, the rentals must be applied, as necessary, to the payment of the

principal of or interest on the bonds"; in (3)(b) substituted current text for former text that changed term of lease; and made minor changes in style. Amendment effective April 25, 1995.

1989 Amendment: At beginning of (3)(a) inserted exception clause; inserted (3)(b) regarding financing of capital improvements required by state or federal agencies; and made minor changes in punctuation and phraseology. Amendment effective March 22, 1989.

Part 24
Financing of County-Operated Health Care Facilities

Part Law Review Articles

Ways to Reduce Tax Burdens of Nursing Home Residents, Christopher, 70 J. Tax'n 364 (1989).

7-34-2401. Depletion allowance reserve fund authorized.

Compiler's Comments

1995 Amendment: Chapter 520 substituted "health care facilities" for "hospitals and nursing homes"; deleted reference to 7-34-2301; and made minor changes in style. Amendment effective April 25, 1995.

7-34-2402. Sources of money for depletion allowance reserve fund.

Compiler's Comments

1995 Amendment: Chapter 520 in (2) substituted "health care facility" for "hospital or nursing home" and inserted two references to residents; and made minor changes in style. Amendment effective April 25, 1995.

Attorney General's Opinions

Source of Depletion Allowance Reserve Fund — Not Subject to Budgeting: This section permits poor fund money to be used to fund a depletion allowance reserve fund only to the extent that the money represents actual money received in excess of expenses incurred from or for the care of indigent patients in the county facility. Because depletion allowance reserve fund money is not derived from tax revenues and the sources and uses of the fund are limited statutorily, the transfer of money to a depletion allowance reserve fund is not subject to the requirements of 7-6-2326 (now repealed). 40 A.G. Op. 29 (1983).

7-34-2411. County health care facility bonds authorized.

Compiler's Comments

1995 Amendment: Chapter 520 in (1), in introductory clause, substituted "acquiring, erecting, furnishing, equipping, expanding, improving, or maintaining a health care facility" for "constructing a hospital or nursing home", after "7-34-2201" inserted "or a boarding home under 7-34-2301", and near end, after "facility", inserted "or boarding home, respectively"; in (1)(a) substituted "health care or boarding" for "hospital or nursing"; in (1)(b) inserted references to 7-6-2512 and to health care facility; in (2), at end of first sentence, inserted "including those authorized in 7-6-2512 and this part" and substituted "revenue of the health care facility or boarding home" for "revenues referred to in 7-34-2411 through 7-34-2418"; and made minor changes in style. Amendment effective April 25, 1995.

Case Notes

Bonds for Health Care Facility Not Subject to Voter Approval: When Toole County proposed to borrow $1.7 million to construct a county hospital and nursing home, plaintiff sued, alleging that the county could not borrow money without first submitting the bond proposal to the voters for approval. Affirming the District Court decision, the Supreme Court ruled that the indebtedness for the repayment of bonds for the proposed health care facility is not indebtedness of the county for which an election is required under 7-7-2402. State ex rel. Lovins v. Toole County, 278 M 253, 924 P2d 693, 53 St. Rep. 887 (1996).

7-34-2414. Election required on question of issuance of bonds.

Compiler's Comments

1995 Amendments — Composite Section: Chapter 387 in (1) inserted second sentence that read: "A special election must be conducted in conjunction with a regular or primary election"; and made minor changes in style.

Chapter 520 in (1), near beginning, inserted "to which all or a portion of the taxes levied under 7-6-2512 are pledged or to which the general tax authorized under 7-34-2418 is pledged";

in (2), at end, deleted "through 7-34-2418"; and made minor changes in style. Amendment effective April 25, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

1981 Amendment: In (1), substituted "the laws governing the election on county general obligation bonds in chapter 7, part 22" for "[7-7-2229 through 7-7-2231, 7-7-2233, and 7-7-2234]".

7-34-2415. Details of bonds.

Compiler's Comments

1995 Amendment: Chapter 520 in (2) inserted two references to 7-34-2413; and made minor changes in style. Amendment effective April 25, 1995.

1987 Amendment: In (1), at end of first sentence, substituted "as provided in 17-5-102" for "not exceeding the limitation of 17-5-102".

1983 Amendment: Made 1981 amendment permanent. (Amendment was to terminate July 1, 1983—sec. 21, Ch. 500, L. 1981.)

1981 Amendment: Substituted "the limitation of 17-5-102" for "10% a year" in (1).

7-34-2416. Tax-exempt status of bonds.

Compiler's Comments

1995 Amendment: Chapter 520 inserted reference to 7-34-2413. Amendment effective April 25, 1995.

7-34-2417. Health care facility tax levy authorized.

Compiler's Comments

2001 Amendment: Chapter 574 near middle after "levy taxes on" inserted "the taxable value of" and at end deleted "7-34-2134, 7-34-2135(1), and 7-34-2136, up to a maximum of 3 mills not submitted to a vote of the people and 3 additional mills approved by a vote of the people". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 inserted reference to 15-10-420. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1995 Amendment: Chapter 520 near beginning substituted "are not paid or are not expected to be paid" for "become delinquent or cannot be paid" and after "7-34-2411" inserted "for a health care facility"; and made minor changes in style. Amendment effective April 25, 1995.

1983 Amendment: Near end, after "7-34-2136" substituted "up to a maximum of" for "namely".

Attorney General's Opinions

County Debt Limitations Determined by Legislature: The Montana Legislature may constitutionally authorize County Commissioners to issue, by resolution, revenue bonds in excess of $40,000 without an election. The Commissioners of a county having a population of less than 10,000 have authority to levy, without an election, 3 mills in addition to its present funding in the event the bonds issued under 7-34-2411 become delinquent or cannot be paid from ordinary revenues of the facility. (See 1999 and 2001 amendments.) 36 A.G. Op. 20 (1975).

7-34-2418. General tax to support bonds authorized.

Compiler's Comments

1995 Amendment: Chapter 520 in introductory clause to (1)(a) substituted "for a health care facility and if approved by the voters as provided in 7-34-2414" for "through 7-34-2418"; in (3) substituted "that the health care facility for which bonds are issued pursuant to 7-34-2411 is a joint institution, as provided in part 25, and the deficiency tax levy is authorized under 7-34-2417" for "more than one county is included in an authority issuing bonds pursuant to 7-34-2411 through 7-34-2418"; and made minor changes in style. Amendment effective April 25, 1995.

Part 25
Multicounty Operation of Health Care Facilities and Nursing Homes

7-34-2501. Definitions.

Compiler's Comments

1995 Amendment: Chapter 520 in definition of joint institution substituted "health care facility or boarding home" for "hospital or nursing home". Amendment effective April 25, 1995.

Part 41
Municipal Hospital Services

Part Collateral References

40 Am. Jur. 2d Hospitals and Asylums §22.

7-34-4101. Detention hospitals.

Collateral References

Hospitals *key* 2.

41 C.J.S. Hospitals §6.

False imprisonment in connection with confinement in nursing home or hospital. 4 ALR 4th 449.

Power of municipal corporation to provide hospital. 25 ALR 612.

CHAPTER 35
CEMETERY SERVICES

Chapter Collateral References

Validity, construction, and application of statutes or ordinances regulating perpetual-care trust funds of cemeteries and mausoleums. 54 ALR 5th 681.

Zoning regulations in relation to cemeteries. 96 ALR 3d 921.

Part 1
General Provisions Applicable to Local Governments

Part Collateral References

14 Am. Jur. 2d Cemeteries §§2, 6.

Measure of damages for condemnation of cemetery lands. 42 ALR 3d 1314.

7-35-101. Joint conduct of cemeteries.

Collateral References

Cemeteries *key* 4.

14 C.J.S. Cemeteries §4.

7-35-102. Use of county lands for cemeteries.

Collateral References

Counties *key* 108.

20 C.J.S. Counties §172.

Part 21
Cemetery Districts

Part Collateral References

14 Am. Jur. 2d Cemeteries §§2, 6.

7-35-2101. Petition to create cemetery district.

Collateral References

Cemeteries *key* 1, 3, 4.

14 C.J.S. Cemeteries §3.

14 Am. Jur. 2d Cemeteries §3.

7-35-2102. Notice of hearing on creation of district.

Compiler's Comments

1985 Amendment: In (1) substituted "as provided in 7-1-2121" for "prescribed by law for not less than 2 weeks prior to the time of said hearing".

7-35-2104. Establishment of boundaries and call for election.

Collateral References

14 C.J.S. Cemeteries §§13 through 16.

7-35-2105. Territory of cemetery district.

Collateral References

14 C.J.S. Cemeteries §§13 through 16.

Validity of public prohibition or regulation of location of cemetery. 50 ALR 2d 905.

7-35-2106. Election details.

Compiler's Comments

1995 Amendment: Chapter 387 in (1) inserted third sentence that read: "A special election must be held in conjunction with a regular or primary election"; and made minor changes in style.

7-35-2108. Government of district by trustees.

Compiler's Comments

1995 Amendment: Chapter 543 near middle, after "managed by", deleted "three", at end inserted "pursuant to the provisions of 7-1-201 through 7-1-203", and deleted remainder of former section that read: "The trustees at their first meeting shall adopt bylaws for the government and management of the district.

(2) The trustees may be appointed from the residents of the district for terms of 1, 2, and 3 years, respectively, and until their successors are appointed and qualified. Annually thereafter the board of county commissioners shall appoint one trustee for a term of 3 years or until his successor is appointed and qualified.

(3) Per diem and mileage of the cemetery trustees may be set by resolution of the board of county commissioners"; and made minor changes in style.

Collateral References

Municipal Corporations *key* 196.

14 C.J.S. Cemeteries §8; 62 C.J.S. Municipal Corporations §597.

Gift for maintenance or care of private cemetery or burial lot, or of tomb or of monument, including the erection thereof, as valid trust. 47 ALR 2d 596.

7-35-2109. Powers of district.

Compiler's Comments

1995 Amendment: Chapter 543 at beginning of introductory clause inserted "In addition to the powers and duties established in the resolution creating a cemetery district"; and made minor changes in style.

Attorney General's Opinions

Rulemaking Authority of Board to Clear Title to Burial Lots: It is within the statutory authority of a board of trustees of a cemetery district to establish rules for the purpose of clearing title to burial lots. 44 A.G. Op. 9 (1991).

Power of Cemetery District Trustees to Sell Headstones and Grave Markers: Consistent with the liberal construction of powers granted to local government units, the board of trustees of a cemetery district may sell headstones and grave markers at the cemetery for use in the cemetery as long as the profits are used in furtherance of the purposes of the cemetery district. 43 A.G. Op. 31 (1989).

Collateral References

14 C.J.S. Cemeteries §9.

7-35-2112. Notice of hearing on withdrawal.

Compiler's Comments

2001 Amendment: Chapter 354 substituted "publish a notice of the hearing as provided in 7-1-2121" for "at least 30 days prior to the time so fixed, publish a notice of such hearing for two issues as provided by law". Amendment effective October 1, 2001.

7-35-2114. Petition for alteration of district boundaries.

Collateral References

Cemeteries *key* 7 through 9.
14 C.J.S. Cemeteries §13.

7-35-2115. Notice and hearing on alteration of boundaries.

Compiler's Comments

1985 Amendment: In (1) substituted "as provided in 7-1-2121" for "according to law for 2 weeks prior to the date to be fixed by said board for the hearing of said petition".

7-35-2121. District budget — report.

Compiler's Comments

1989 Amendment: Inserted (2) requiring a written report to accompany the budget. Amendment effective March 18, 1989, and terminates June 30, 1991.

Termination Date: Section 6, Ch. 14, L. 1989, provided: "[This act] terminates June 30, 1991."

Collateral References

Cemeteries *key* 1, 3, 4; Counties *key* 192.
14 C.J.S. Cemeteries §3; 20 C.J.S. Counties §281.

7-35-2122. County cemetery tax levy.

Compiler's Comments

2001 Amendment: Chapter 574 near middle substituted "levy a tax on the taxable value of all taxable property within the cemetery district, taking into account" for "levy upon all property within the cemetery district an amount sufficient to raise" and deleted former second sentence that read: "The tax may not exceed 4 mills on each dollar of taxable valuation on the property of the district." Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

7-35-2131. Establishment and maintenance of permanent care and improvement fund.

Collateral References

Cemeteries *key* 5.
14 C.J.S. Cemeteries §16.

7-35-2145. Vesting of powers and duties in new trustees.

Collateral References

14 C.J.S. Cemeteries §8.

7-35-2146. Administration of permanent care and improvement fund.

Collateral References

14 C.J.S. Cemeteries §10.

Validity of statutes regulating pre-need contracts for the sale or furnishing of burial services and merchandise. 68 ALR 2d 1251.

7-35-2147. Financial management of fund.

Collateral References

14 C.J.S. Cemeteries §§10, 11.

7-35-2148. Disposition of fund income.

Collateral References

14 C.J.S. Cemeteries §11.

Part 22
Cemeteries in Counties

7-35-2201. Power of county commissioners to conduct cemeteries.

Compiler's Comments

2001 Amendment: Chapter 125 in introductory clause of (2) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Collateral References

Cemeteries *key* 4.

14 Am. Jur. 2d Cemeteries §9.

Part 41
Cemeteries in Municipalities

7-35-4101. Power of municipalities to establish and maintain cemeteries.

Collateral References

Cemeteries *key* 1.

14 C.J.S. Cemeteries §§3, 4.

Validity, construction, and application of statutes or ordinances regulating perpetual-care trust funds of cemeteries and mausoleums. 54 ALR 5th 681.

Zoning regulations in relation to cemeteries. 96 ALR 3d 921.

Municipal power to condemn land for cemetery. 54 ALR 2d 1322.

Validity of public regulation or prohibition of location of cemetery. 50 ALR 2d 905.

7-35-4102. Vesting of title to cemetery grounds — restrictions on use.

Collateral References

Cemeteries *key* 12.

14 C.J.S. Cemeteries §§18, 19.

14 Am. Jur. 2d Cemeteries §3.

7-35-4103. What constitutes a cemetery.

Collateral References

Cemeteries *key* 2.

14 C.J.S. Cemeteries §2.

14 Am. Jur. 2d Cemeteries §1.

7-35-4105. Layout of cemeteries.

Collateral References

14 Am. Jur. 2d Cemeteries §9.

7-35-4106. Inhabitants of municipality to own cemetery.

Collateral References

Cemeteries *key* 11, 12.

14 C.J.S. Cemeteries §§17 through 19.

TITLES 8 AND 9
RESERVED

TITLE 10
MILITARY AFFAIRS AND DISASTER AND EMERGENCY SERVICES

CHAPTER 1
MILITIA

Chapter Administrative Rules

Most Rules Not Published: The Department of Military Affairs and its component organizations adopt regulations, orders, and operating procedures that are not published in the Administrative Rules of Montana. Due to the exemptions contained in 2-3-102 and 2-4-102, such publication is not required except for the purposes of 10-1-121. Unpublished records and documents are available in accordance with Department policy and state and federal law and regulations.

Chapter Law Review Articles

James R. Browning Symposium for 1996: The Militia: Constitutional and Criminal Law Perspectives, 58 Mont. L. Rev. 7 (1997).

Private Organizations and the Militia Status: They Don't Make Militias Like They Used To (Second Amendment Symposium), Driessen, 1998 B.Y.U. L. Rev. 1 (1998).

"Don't Ask, Don't Tell" and the National Guard: Federal Policies on Homosexuality in the Military vs. the Militia Clauses of the Constitution, Ruby, 85 Calif. L. Rev. 955 (1997).

The Minutemen, the National Guard and the Private Militia Movement: Will the Real Militia Please Stand Up?, Daugherty, 28 J. Marshall L. Rev. 959 (1995).

Guard and Reserve Issues in Deployment (The Master Operations Lawyer's Edition), James, 37 A.F. L. Rev. 95 (1994).

The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service", Rich, 1994 Army Law. 35 (1994).

Benefits for Reserve and National Guard Members Under the Soldiers' and Sailors' Civil Relief Act of 1940, Switzer, 110 Banking L.J. 517 (1993).

The Militia and the Constitution: A Legal History, Fields & Hardy, 136 Mil. L. Rev. 1 (1992).

State Governors and the Federal National Guard, Kester, 11 Harv. J.L. & Pub. Pol'y 177 (1988).

The Constitution and the Training of National Guardsmen: Can State Governors Prevent Uncle Sam From Sending the Guard to Central America?, 4 J.L. & Pol. 597 (1988).

The Militia Clauses of the Constitution and the National Guard, Hirsch, 56 U. Cin. L. Rev. 919 (1988).

The Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War, 57 Geo. Wash. L. Rev. 328 (1988).

Chapter Collateral References

6 C.J.S. Armed Services §§15, 18, 288 through 298.

53 Am. Jur. 2d Military and Civil Defense; 53A Am. Jur. 2d Military and Civil Defense.

32 U.S.C. §101, et seq.

Part 1
General Provisions

Part Law Review Articles

Perpich v. Department of Defense [496 U.S. 334]: Federalism Values and the Militia Clause, 62 U. Colo. L. Rev. 637 (1991).

Perpich v. United States Department of Defense: Who's in Charge of the National Guard?, Bovarnick, 26 New Eng. L. Rev. 453 (1991).

Part Collateral References

Militia *key* 1 through 3, 17.

53 Am. Jur. 2d Military and Civil Defense §§25 through 41.

Official immunity of state national guard members. 52 ALR 4th 1095.

10-1-102. Powers and duties of department of military affairs.

Case Notes

Exhaustion of Administrative Remedies Doctrine Not Applicable if Constitutional Violation Alleged: Since declaratory judgment petitioner argued that the state requirement that firefighters working for it at an airport and protecting civilian and military aircraft be members of the Montana Air National Guard was unconstitutional, the doctrine requiring exhaustion of administrative remedies before seeking a declaratory judgment did not apply. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Possibility of Being Fired as Controversy With Employer: The state required firefighters working for it at an airport and protecting civilian and military aircraft to be members of the Montana Air National Guard. Since another firefighter was terminated because of noncompliance with this requirement, after retiring from the National Guard, petitioner firefighter's employment would be threatened if he resigned or retired from the National Guard. In addition, the existence of a case or controversy was amply demonstrated by multiple lawsuits concerning the pay and employment status of the firefighters. Therefore, the declaratory judgment requirement of a threatened injury and a case or controversy was met. It was proper to refuse to dismiss the petition for a judgment declaring the National Guard membership requirement unconstitutional. It was not necessary for petitioner to have already suffered an injury. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Requiring National Guard Membership of State Firefighters Protecting National Guard Aircraft: The state's requirement that its firefighters protecting civilian and National Guard aircraft belong to the National Guard did not meet the rational basis test and was an unconstitutional violation of equal protection. Other states do not have the requirement, the federal National Guard Bureau does not recommend it, the state fire chief said that there is no rational basis for it, and the state offered no persuasive argument for it. The state's argument that firefighters need security clearances and thus have to be in the National Guard was without merit because a security clearance can be given to nonmilitary personnel. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994). See also Peters v. St., 285 M 345, 948 P2d 250 (1997).

Retaliatory Employment Requirement — Not Relevant to Requirement's Constitutionality: The date on which the state began to require that its firefighters protecting civilian and National Guard aircraft be members of the National Guard was not a material issue of fact precluding a summary judgment that the requirement was unconstitutional. The date was relevant to the petitioner firefighter's claim that the requirement was in retaliation for a firefighters' wage and hours suit against the state, but whether the requirement was in retaliation for the suit was not relevant to the issue of whether the requirement was constitutional. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Right to Declaratory Judgment on Discretionary Military Policy Threatening Public Sector Harm: The general rule of no subject matter court jurisdiction over a discretionary military policy (in this case, a state government military policy) did not apply to a state requirement that its firefighters protecting civilian and National Guard aircraft belong to the Montana Air National Guard. Loss of the job for failure to belong was a threatened injury resulting from military intrusion into the civilian sector by the state. The state did not show that the requirement was related to military employment. Therefore, the rule could not be used to dismiss a firefighter's petition for declaratory judgment. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

State Job Requirement — Many Years' Worth of Witnesses' Records With State and Others Not Relevant: In an action for judgment declaring that the state requirement that firefighters working for it at an airport and protecting civilian and military aircraft be members of the Montana Air National Guard was unconstitutional, the state asked three firefighter witnesses for the petitioner to produce 20 years' worth of any correspondence with the state, 25 years' worth of any correspondence with the National Guard, numerous types of records of the firefighters' union, and the last 4 years' worth of records of the union's payments to its law firm. The request was overbroad, none of the material may have been relevant to the proceeding, and it was proper to grant the petitioner's motion to quash and for a protective order. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Unsuccessful Defense to State's Requirement That Firefighters at Airport Belong to National Guard — Costs and Attorney Fees Denied: Because the state's defense to a firefighter's petition for judgment declaring it unconstitutional for the state to require Air National Guard membership of its firefighters protecting National Guard aircraft was not frivolous or in bad faith, it was not an abuse of discretion to refuse costs and attorney fees to the prevailing firefighter. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Collateral References

Militia *key* 1.
6 C.J.S. Armed Services §§288, 289.
53 Am. Jur. 2d Military and Civil Defense §§34, 36.

10-1-103. Classes of militia.

Collateral References

Militia *key* 3.
6 C.J.S. Armed Services §§13, 288, 289.
53 Am. Jur. 2d Military and Civil Defense §26.

10-1-104. Federal regulations to govern.

Compiler's Comments

2003 Amendment: Chapter 17 near middle of (1) and near beginning of (2) substituted "October 1, 2003" for "October 1, 2001"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 4 in (1) near middle and in (2) near beginning substituted "October 1, 2001" for "October 1, 1999". Amendment effective October 1, 2001.

1999 Amendment: Chapter 33 in (1) in two places and in (2) in two places substituted "national guard" for "militia" or "military forces"; in (1) near middle and in (2) near beginning substituted reference to October 1, 1999 for reference to October 1, 1997; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 10 in (1), near middle, and in (2), near beginning, substituted "October 1, 1997" for "October 1, 1995".

Saving Clause: Section 2, Ch. 10, L. 1997, was a saving clause.

1995 Amendment: Chapter 120 near middle of (1), after "militia", substituted reference to October 1, 1995, for "including The Uniform Code of Military Justice, shall"; inserted (2) relating to adoption of The Uniform Code of Military Justice; and made minor changes in style.

1983 Amendment: At end inserted the "including" clause referring to active duty guard/reserve personnel.

Case Notes

Liability of State to Suit — Active Duty U.S. Army Worker Injured While Assigned to National Guard — Tort Claim Not Barred: While in full-time service to the U.S. Army, Trankel was assigned to a Montana Army National Guard unit rebuilding armored vehicles and was injured by toxic chemicals during the rebuilding project. Trankel sued the state, asserting violations of the Occupational Health Act of Montana, the Montana Safety Act, and the Employee and Community Hazardous Chemical Information Act. The state contended that Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950), and Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986), barred a claim that was incident to military service regardless of the substantive law upon which the claim was based, the status of the plaintiff at the time of injury, or the status of the party against whom the claim was made and that the alleged violations of the state Acts did not provide a private cause of action and could be enforced only through the administrative remedies provided for in the Acts. The District Court agreed with the state and dismissed Trankel's complaint with prejudice. On appeal, the Supreme Court distinguished Feres and related federal cases because they were based on federal rather than state tort claims, with little bearing on rights under state law and the Montana Constitution. The Supreme Court overruled the holding in Evans that the National Guard was not a political subdivision subject to suit, finding instead that the National Guard and the Department of Military Affairs were clearly governmental entities within the meaning of 2-9-101 and that the constitutional premise on which Evans was based did not apply. Consistent with other applications of Art. II, sec. 16, Mont. Const., any statute or court decision that deprives an employee of the right to full legal redress, as defined by general Montana tort law against third parties, is absolutely prohibited. Because Trankel was not employed by the Montana Army National Guard or the Department of Military Affairs at the time of injury, Trankel's claim against the state pursuant to the tort claims statutes was not barred. Further, applying the rationale in Pollard v. Todd, 148 M 171, 418 P2d 869 (1966), the Supreme Court held that the statutory state Acts did not give rise to causes of action independent from a claim of negligence subject only to the administrative remedies contained in the Acts, but rather established duties, the violation of which is negligence per se. Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997), distinguishing Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950), U.S. v. Johnson, 481 US 681, 95 L Ed 2d 648, 107 S Ct

2063 (1987), and Stauber v. Cline, 837 F2d 395 (9th Cir. 1988); following Webb v. Mont. Masonry Constr. Co., 233 M 198, 761 P2d 343 (1988), Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488 (1989), and Francetich v. St. Comp. Mut. Ins. Fund, 252 M 215, 827 P2d 1279 (1992); and overruling Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986). Trankel was followed in Lake v. St., 282 M 484, 938 P2d 698, 54 St. Rep. 442 (1997).

Collateral References

Militia *key* 3.

6 C.J.S. Armed Services §289.

53 Am. Jur. 2d Military and Civil Defense §§8, 27, 28; 53A Am. Jur. 2d Military and Civil Defense §290.

32 C.F.R. §564.1, et seq.

10-1-105. Rules by governor and adjutant general.

Compiler's Comments

1995 Amendment: Chapter 91 inserted (2) authorizing Adjutant General to adopt rules that conform to applicable federal laws and regulations governing the armed forces of the state and to carry out the duties. Amendment effective March 9, 1995.

Retroactive Applicability: Section 3, Ch. 91, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to regulations adopted by the department of military affairs after July 1, 1974."

Administrative Rules

Most Rules Not Published: The Department of Military Affairs and its component organizations adopt regulations, orders, and operating procedures that are not published in the Administrative Rules of Montana. Due to the exemptions contained in 2-3-102 and 2-4-102, such publication is not required except for the purposes of 10-1-121. Unpublished records and documents are available in accordance with Department policy and state and federal law and regulations.

Collateral References

Militia *key* 3, 14.

6 C.J.S. Armed Services §289.

53 Am. Jur. 2d Military and Civil Defense §§31 through 34, 36.

10-1-106. Proclamation of martial rule.

Collateral References

53 Am. Jur. 2d Military and Civil Defense §§28, 31, 33; 53A Am. Jur. 2d Military and Civil Defense §§437 through 443.

Power to declare martial law apart from military occupation or operations. 24 ALR 1183.

For a general discussion of the authority of the Governor to proclaim martial law and the authority of the militia under such a proclamation, see Ex parte McDonald, 49 M 454, 143 P 947 (1914) and Herlihy v. Donohue, 52 M 601, 161 P 164 (1916).

10-1-107. Property remains public property.

Collateral References

Militia *key* 13.

53 Am. Jur. 2d Military and Civil Defense §§37, 38.

32 U.S.C. §§706, 710.

10-1-108. Armories.

Collateral References

Militia *key* 17.

6 C.J.S. Armed Services §296.

53 Am. Jur. 2d Military and Civil Defense §§37, 38.

10-1-109. Lease of real property for military facilities.

Collateral References

Militia *key* 17.

53 Am. Jur. 2d Military and Civil Defense §§29, 30.

10-1-111. Immunity from liability.

Compiler's Comments

Preamble: The preamble attached to Ch. 87, L. 1997, provided: "WHEREAS, Article VI, section 13, of the Montana Constitution provides that the "governor is commander-in-chief of the militia forces of the state, except when they are in the actual service of the United States"; and

WHEREAS, section 10-1-101, MCA, defines "militia" as "all the military forces of this state, whether organized or active or inactive"; and

WHEREAS, section 10-1-101, MCA, defines "national guard" as "the army national guard and the air national guard"; and

WHEREAS, section 10-1-102, MCA, recognizes that the Department of Military Affairs performs duties and functions required by federal laws and regulations; and

WHEREAS, section 10-1-104, MCA, recognizes the application of federal laws, regulations, forms, precedents, and usages relating to and governing the armed forces of the United States to the military forces of this state; and

WHEREAS, the Army National Guard and the Air National Guard perform a uniquely federal mission and role except when ordered by the Governor into state active duty as provided for in Article VI, section 13, of the Montana Constitution; and

WHEREAS, the federal government has established comprehensive administrative programs to compensate military forces for injuries that they may incur while performing training for the nation's defense; and

WHEREAS, the federal government has established comprehensive administrative programs to compensate those who make claims for death, personal injury, or damage to real or personal property under the Federal Tort Claims Act, 28 U.S.C. 2671, et seq.

NOW, THEREFORE, the Legislature finds it appropriate to enact [section 1] [10-1-111] for the purpose of limiting liability of this state, its officers, employees, and agents, and members of the militia for the performance of the uniquely federal functions of the Army National Guard and the Air National Guard."

Saving Clause: Section 3, Ch. 87, L. 1997, was a saving clause.

Law Review Articles

Recurring Issues Arising Under the Federal Tort Claims Act, Axelrad, 22 Trial Law. 136 (1999).

The FTCA Discretionary Function Exception Nullifies $25 Million Malpractice Judgment Against the DCAA: A Sigh of Relief Concludes the DIVAD Contract Saga (Federal Torts Claims Act, Defense Contract Audit Agency, Divisional Air Defense), Schooner, 1999 Army Law. 17 (1999).

Government Tort Liability, 111 Harv. L. Rev. 2009 (1998).

Causation and the Discretionary Function Exception to the Federal Tort Claims Act, Seamon, 30 U.C. Davis L. Rev. 691 (1997).

The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?, Hackman, 19 Campbell L. Rev. 411 (1997).

Eroding the Feres Doctrine—A Critical Analysis of Three Decisions, Darpino, 1996 Army Law. 26 (1996).

Exploring Military Medical Malpractice Actions: The Federal Tort Claims Act, Weiss, 25 Colo. Law. 77 (1996).

Federal Tort Claims Act (The D.C. Circuit Review: September 1994-August 1995), Lunday, 64 Geo. Wash. L. Rev. 1254 (1996).

Collateral References

Official immunity of state national guard members. 52 ALR 4th 1095.

Serviceman's right to recover under Federal Tort Claims Act. 31 ALR Fed. 146.

10-1-121. Montana national guard education benefit program — rulemaking.

Compiler's Comments

Preamble: The preamble attached to Ch. 418, L. 1997, provided: "WHEREAS, the Montana National Guard is recognized by the highest command levels as an outstanding military organization; and

WHEREAS, the Montana National Guard has been assigned a force structure that provides exceptional opportunity as it moves into the 21st century; and

WHEREAS, the Montana National Guard cannot and should not depend solely upon federal programs to entice Montana citizenry to join or stay in the Guard; and

WHEREAS, the state's investment in the Montana National Guard education benefit program could provide to Montana communities an economic benefit that is currently not being realized in wages and tax revenue."

1997 Statement of Intent: The statement of intent attached to Ch. 418, L. 1997, provided: "A statement of intent is necessary for this bill because [section 1] [10-1-121] authorizes the department of military affairs to adopt rules necessary to implement and administer a national guard education benefit program and provides the department with specific guidelines for the proposed rules."

Effective Date: Section 4, Ch. 418, L. 1997, provided that 10-1-121(4) was effective on passage and approval. Approved April 29, 1997. The other subsections were effective July 1, 1997.

Part 2
Officers of Militia

Part Collateral References

Militia *key* 7.
6 C.J.S. Armed Services §§25, 291.
53 Am. Jur. 2d Military and Civil Defense §§27, 42 through 53.
32 U.S.C. §§305 through 312, 324.
32 C.F.R. §§564.1 through 564.5.

10-1-201. Officers.

Collateral References

Militia *key* 7.
6 C.J.S. Armed Services §§25, 291.
53 Am. Jur. 2d Military and Civil Defense §§27, 28, 31, 43, 47.
32 U.S.C. §§305 through 310.

10-1-202. Oath of office.

Collateral References

Militia *key* 7.
6 C.J.S. Armed Services §291.
53 Am. Jur. 2d Military and Civil Defense §56.
Validity of governmental requirement of oath of allegiance as applied to militiamen. 18 ALR 2d 328.
32 U.S.C. §312.

10-1-203. Retirement of officers.

Compiler's Comments

1997 Amendment: Chapter 9 in (1)(a), after "upon", substituted "loss of federal recognition" for "reaching his 60th birthday"; in (2), after "retired", inserted "from the militia"; and made minor changes in style. Amendment effective February 7, 1997.

Retroactive Applicability: Section 3, Ch. 9, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to officers appointed by commission or warrant and all other members enlisted prior to [the effective date of this act]." Effective February 7, 1997.

Collateral References

Militia *key* 11.
6 C.J.S. Armed Services §§80, 114, 115, 291.
53 Am. Jur. 2d Military and Civil Defense §§27, 29, 40, 181 through 224.

10-1-204. Resignation of officers.

Collateral References

Militia *key* 10, 11.
6 C.J.S. Armed Services §§79, 291.
53 Am. Jur. 2d Military and Civil Defense §§40, 51.

10-1-205. Vacating commissions or warrants.

Collateral References

Militia *key* 7, 10.
6 C.J.S. Armed Services §§81, 86, 291.

53 Am. Jur. 2d Military and Civil Defense §§28, 31, 40, 43; 53A Am. Jur. 2d Military and Civil Defense §331.
32 U.S.C. §§324, 331.

10-1-206. Examination as to fitness — board of examination.

Collateral References
Militia *key* 10, 11.
53 Am. Jur. 2d Military and Civil Defense §§42, 43.
32 U.S.C. §307.

10-1-207. Uniform allowance for officers.

Compiler's Comments
1995 Amendment: Chapter 20 deleted (1) that read: "(1) Every officer of the organized militia shall, within 60 days from the date of the order whereby he is appointed, provide himself, at his own expense, with the uniforms and equipment prescribed by the department for his rank and assignment"; and at beginning, after "There", substituted "may" for "shall".

Collateral References
Militia *key* 11, 13.
6 C.J.S. Armed Services §§291, 293.
53 Am. Jur. 2d Military and Civil Defense §6.
32 U.S.C. §§701 through 703, 705.

10-1-208. Officer need not vacate civil office.

Collateral References
Militia *key* 2, 7.
6 C.J.S. Armed Services §291.
53 Am. Jur. 2d Military and Civil Defense §§46, 47.
Constitutionality, construction, and application of statutes concerning status and rights of public officers or employees in civil service while performing military duties. 134 ALR 919.
Incompatibility of military office with public office. 132 ALR 254, supplemented by 147 ALR 1419, 148 ALR 1399, and 150 ALR 1444.

Part 3
Enlisted Members

Part Law Review Articles
The Justiciability of Claims Brought by National Guardsmen Under the Civil Rights Statutes for Injuries Suffered in the Course of Military Service, Hawkens, 125 Mil. L. Rev. 99 (1989).

Part Collateral References
6 C.J.S. Armed Services §290.
53 Am. Jur. 2d Military and Civil Defense §§40, 42 through 53, 64, 70, 71.
32 U.S.C. §§301 through 304.
32 C.F.R. §§564.14 through 564.19.

10-1-301. Terms of enlistment.

Collateral References
Militia *key* 8, 9.
6 C.J.S. Armed Services §§45, 290.
53 Am. Jur. 2d Military and Civil Defense §§42, 48, 58 through 60, 66, 71.
32 U.S.C. §§301 through 304, 313, 322.
32 C.F.R. §564.15.

10-1-302. Oath of enlistment.

Compiler's Comments
1983 Amendment: Twice in (2), substituted "officer" for "commissioned officer".

Collateral References
Militia *key* 8.
6 C.J.S. Armed Services §290.
53 Am. Jur. 2d Military and Civil Defense §56.
Validity of governmental requirement of oath of allegiance as applied to militiamen. 18 ALR 2d 328.
32 U.S.C. §304.

10-1-303. Extension of terms of service.

Collateral References

Militia *key* 9.
6 C.J.S. Armed Services §290.
53 Am. Jur. 2d Military and Civil Defense §69.
32 U.S.C. §302.

10-1-304. Retirement of enlisted members.

Compiler's Comments

1997 Amendment: Chapter 9 in (1), after "upon", substituted "loss of active reserve status" for "reaching his 60th birthday"; and made minor changes in style. Amendment effective February 7, 1997.

Retroactive Applicability: Section 3, Ch. 9, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to officers appointed by commission or warrant and all other members enlisted prior to [the effective date of this act]." Effective February 7, 1997.

Collateral References

Militia *key* 11.
6 C.J.S. Armed Services §§114, 115.
53 Am. Jur. 2d Military and Civil Defense §40.

Part 4
Military Courts

Part Law Review Articles

Going on Fifty: Evolution and Devolution in Military Justice, Fidell, 32 Wake Forest L. Rev. 1213 (1997).

Military Justice: From Oxymoron to Aspiration, Walker, 32 Osgoode Hall L.J. 1 (1994).

Article II Courts, Bederman, 44 Mercer L. Rev. 825 (1993).

The Military Justice System and the Right to Trial by Jury: Size and Voting Requirements of the General Courts-Martial for Service Connected Civilian Offenses, Chmelik, 8 Hastings Const. L.Q. 617 (1981).

Part Collateral References

6 C.J.S. Armed Services §§158 through 183, 295, 298; 57 C.J.S. Military Justice §§138 through 158.
53A Am. Jur. 2d Military and Civil Defense §§250 through 354.
32 U.S.C. §§326 through 333.

10-1-401. Courts — composition, jurisdiction, powers, and procedures.

Collateral References

Militia *key* 21.
6 C.J.S. Armed Services §§158 through 183, 298; 57 C.J.S. Military Justice §§12 through 23, 139, 156.
53A Am. Jur. 2d Military and Civil Defense §§256, 261, 264, 289, 290, 331.
Jurisdiction of court-martial as to conviction and sentence of National Guardsmen. 15 ALR 2d 392.
32 U.S.C. §§326 through 329.

10-1-402. Persons subject.

Collateral References

Militia *key* 21.
6 C.J.S. Armed Services §§171, 298; 57 C.J.S. Military Justice §§14 through 23, 156.
53A Am. Jur. 2d Military and Civil Defense §§256, 289 through 291.
10 U.S.C. §§802, 803.

10-1-403. Territorial applicability.

Law Review Articles

Protecting National Interests: The Legal Status of Extraterritorial Law Enforcement by the Military, Donesa, 41 Duke L.J. 867 (1992).

Collateral References

Militia *key* 21.

57 C.J.S. Military Justice §12.
53A Am. Jur. 2d Military and Civil Defense §§280, 283.
32 U.S.C. §§326 through 329.

10-1-404. Persons authorized to execute process.

Collateral References
53A Am. Jur. 2d Military and Civil Defense §§261, 313, 331.
32 U.S.C. §333.

10-1-405. Confinement of persons committed by military court.

Collateral References
Militia *key* 2.
6 C.J.S. Armed Services §161; 57 C.J.S. Military Justice §§172 through 179.
53A Am. Jur. 2d Military and Civil Defense §290.

10-1-406. Reporter and witness fees.

Collateral References
Militia *key* 2.

10-1-407. Fees of civil officers — records.

Collateral References
Militia *key* 2.

10-1-408. Trial by civil authority — when authorized.

Collateral References
Militia *key* 20.
6 C.J.S. Armed Services §298.
53A Am. Jur. 2d Military and Civil Defense §§355, 362 through 436.
Acquittal or conviction in a military tribunal as bar to prosecution in the state courts based on the same acts, or vice versa. 16 ALR 1247, superseded by 18 ALR Fed. 393, 6 ALR 4th 802.

Part 5
Compensation for Militia

Part Case Notes
Liability of State to Suit — Active Duty U.S. Army Worker Injured While Assigned to National Guard — Tort Claim Not Barred: While in full-time service to the U.S. Army, Trankel was assigned to a Montana Army National Guard unit rebuilding armored vehicles and was injured by toxic chemicals during the rebuilding project. Trankel sued the state, asserting violations of the Occupational Health Act of Montana, the Montana Safety Act, and the Employee and Community Hazardous Chemical Information Act. The state contended that Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950), and Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986), barred a claim that was incident to military service regardless of the substantive law upon which the claim was based, the status of the plaintiff at the time of injury, or the status of the party against whom the claim was made and that the alleged violations of the state Acts did not provide a private cause of action and could be enforced only through the administrative remedies provided for in the Acts. The District Court agreed with the state and dismissed Trankel's complaint with prejudice. On appeal, the Supreme Court distinguished Feres and related federal cases because they were based on federal rather than state tort claims, with little bearing on rights under state law and the Montana Constitution. The Supreme Court overruled the holding in Evans that the National Guard was not a political subdivision subject to suit, finding instead that the National Guard and the Department of Military Affairs were clearly governmental entities within the meaning of 2-9-101 and that the constitutional premise on which Evans was based did not apply. Consistent with other applications of Art. II, sec. 16, Mont. Const., any statute or court decision that deprives an employee of the right to full legal redress, as defined by general Montana tort law against third parties, is absolutely prohibited. Because Trankel was not employed by the Montana Army National Guard or the Department of Military Affairs at the time of injury, Trankel's claim against the state pursuant to the tort claims statutes was not barred. Further, applying the rationale in Pollard v. Todd, 148 M 171, 418 P2d 869 (1966), the Supreme Court held that the statutory state Acts did not give rise to causes of action independent from a claim of negligence subject only to the administrative remedies contained in the Acts, but rather established duties, the violation of which is negligence per se.

Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997), distinguishing Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950), U.S. v. Johnson, 481 US 681, 95 L Ed 2d 648, 107 S Ct 2063 (1987), and Stauber v. Cline, 837 F2d 395 (9th Cir. 1988); following Webb v. Mont. Masonry Constr. Co., 233 M 198, 761 P2d 343 (1988), Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488 (1989), and Francetich v. St. Comp. Mut. Ins. Fund, 252 M 215, 827 P2d 1279 (1992); and overruling Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986). Trankel was followed in Lake v. St., 282 M 484, 938 P2d 698, 54 St. Rep. 442 (1997).

Nature of National Guard Service — State Court Jurisdiction: Members of the National Guard serve a dual responsibility, both to the State of Montana and to the United States of America. While Guard units consist of members enlisted in the United States Army, they are also a Montana military unit consisting of Montana citizens. The District Court improperly dismissed a suit brought by members of the Montana Army National Guard on grounds that the court did not have jurisdiction, absent proof that the members were on federal active duty as opposed to state active duty. The case was remanded for further findings. Grove v. Mont. Army Nat'l Guard, 264 M 498, 872 P2d 791, 51 St. Rep. 366 (1994), distinguishing Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986).

National Guardsman Injured on Weekend Drill, Not During State of Emergency — No Remedy: A National Guardsman alleged that 10-1-504 (repealed 1983) provided a remedy for an injury he received while on routine weekend drill since the section allowed the same benefits to a member of the organized militia "who is wounded, disabled, or dies while on duty in the service of this state" that would have been received if the member had been in federal service. The Supreme Court held that within the context of Title 10, ch. 1, part 5, the words "in the service of this state" clearly referred to active duty during times of state emergency declared by the Governor pursuant to Art. VI, sec. 13, Mont. Const. Since the Guard was not called to emergency service in this case, summary judgment against the guardsman was proper. Evans v. Mont. Nat'l Guard, 223 M 483, 726 P2d 1160, 43 St. Rep. 1930 (1986), distinguished in Grove v. Mont. Army Nat'l Guard, 264 M 498, 872 P2d 791, 51 St. Rep. 366 (1994). Evans was overruled in Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997).

Military Pension Vested Property Subject to Distribution in Property Division: The military pension of a party to a divorce resembles an ordinary private pension, and just as a private pension, it should be treated as a vested property right that can be distributed as a part of a court's property division. A military pension is distinguishable from a pension under the Railroad Retirement Act, which is subject to limitations on its distribution. Further, the heirs of the former spouse of the divorced party receiving the pension could inherit the spouse's share freely. In re Marriage of Miller, 187 M 286, 609 P2d 1185, 37 St. Rep. 556 (1980), vacated 453 US 918 (1981).

Part Collateral References

Militia *key* 11.

6 C.J.S. Armed Services §293.

53 Am. Jur. 2d Military and Civil Defense §37; 53A Am. Jur. 2d Military and Civil Defense §§169 through 180.

32 U.S.C. §§303, 318, 319, 503.

10-1-501. Pay for activated militia from general fund.

Attorney General's Opinions

Funding When National Guard Called to Active Duty in Emergency: Expenses incurred in the mobilization of the Montana National Guard when the Guard is mobilized pursuant to a declaration of emergency under 10-3-311 are funded through 10-3-312. 39 A.G. Op. 33 (1981).

Collateral References

Militia *key* 11.

53 Am. Jur. 2d Military and Civil Defense §37.

10-1-503. Allowances for incidental expenses.

Collateral References

Militia *key* 7, 11.

6 C.J.S. Armed Services §293.

Part 6
Rights of and Duties Owed Militia

Part Collateral References

6 C.J.S. Armed Services §§293, 297.

Official immunity of state national guard members. 52 ALR 4th 1095.

10-1-601. Actions against militia members — attorney's fees.

Collateral References

Militia *key* 19, 20.

6 C.J.S. Armed Services §297.

Official immunity of state national guard members. 52 ALR 4th 1095.

For a discussion of the civil liability of military officers generally, see Herlihy v. Donohue, 52 M 601, 161 P 164 (1916).

10-1-603. Prohibition to deprive members of organized militia of employment — entitlement to unpaid leave of absence during state emergency.

Compiler's Comments

1995 Amendment: Chapter 77 inserted (2) concerning leave of absence for active state service in the organized militia in time of a disaster or an emergency, providing that the person may or may not accrue vacation leave or other benefits offered by the employer, at the option of the employer, and prohibiting leave of absence from being deducted from any sick leave, vacation leave, or other leave; and made minor changes in style. Amendment effective March 6, 1995.

Law Review Articles

Reservists' Reemployment Rights, 25 Clearinghouse Rev. 244 (1991).

Collateral References

Militia *key* 19.

6 C.J.S. Armed Services §§268 through 287, 293.

53A Am. Jur. 2d Military and Civil Defense §174.

38 U.S.C. §§4301 through 4333.

10-1-604. Leave of absence of public employees attending training camp or similar training program.

Compiler's Comments

1991 Amendment: Near beginning, after "city", inserted "town".

Administrative Rules

Title 2, chapter 21, subchapter 4, ARM Military leave.

Attorney General's Opinions

Town Employee Not Entitled to Military Leave With Pay: An employee of a town is not entitled to a leave of absence with pay while attending regular encampments, training cruises, or similar training programs of the organized militia or of the military forces of the United States. (See 1991 amendment.) 42 A.G. Op. 26 (1987).

No Differentiation Between Persons Serving Out Mandatory Military Requirements or Continuing Service Under a Contract of Service: This section requires that state, city, or county employees be allowed leave of absence with pay for annual military training sessions, regardless of whether the employee has fulfilled all mandatory military service and reserve obligations and has extended his service by a contract of reenlistment or continuation of service. The leave taken may not be charged against annual vacation time. 36 A.G. Op. 22 (1975).

Public School Teacher Entitled to Regular Pay When Called on Active National Guard Duty: This section entitles a public school teacher to regular pay for a period not exceeding 15 working days during the school term when he is called on active duty for training with the Montana National Guard. 36 A.G. Op. 35 (1975).

Law Review Articles

"When Johnny Comes Marching Home Again": The Veterans' Reemployment Rights Act and Employers Obligations to Military Reservists, Bradshaw & Fay, 15 Am. J. Trial Advoc. 79 (1991).

Collateral References

Militia *key* 2, 14, 16.

6 C.J.S. Armed Services §§268 through 287, 293.

Validity and construction of state statutes requiring employers to compensate employees for absences occasioned by military service. 8 ALR 4th 704.

38 U.S.C. §§4301 through 4333.

10-1-606. Suspension of property taxes for persons in military service.

Collateral References

Militia *key* 2; Taxation *key* 219, 251.

84 C.J.S. Taxation §§240, 304.

10-1-611. Authority of commanding officer to arrest.

Collateral References

Militia *key* 21.

6 C.J.S. Armed Services §161; 57 C.J.S. Military Justice §§172 through 179.

53A Am. Jur. 2d Military and Civil Defense §307.

10-1-612. Arrest of trespassers and disturbers.

Collateral References

Militia *key* 7, 14.

53A Am. Jur. 2d Military and Civil Defense §§246, 445.

10-1-613. Unlawful sale or detention of military property.

Collateral References

Militia *key* 13.

57 C.J.S. Military Justice §§70 through 73, 112.

53 Am. Jur. 2d Military and Civil Defense §§8, 9.

10-1-614. Unlawful wearing of uniform.

Collateral References

Militia *key* 2.

6 C.J.S. Armed Services §30.

53 Am. Jur. 2d Military and Civil Defense §6.

Part 7
Home Guard

Part Collateral References

53 Am. Jur. 2d Military and Civil Defense §41.

10-1-701. Home guard — organization and composition.

Collateral References

Militia *key* 2, 3.

10-1-702. Gubernatorial rules for guard.

Administrative Rules

Most Rules Not Published: The Department of Military Affairs and its component organizations adopt regulations, orders, and operating procedures which are not published in the Administrative Rules of Montana. Due to the exemptions contained in 2-3-102 and 2-4-102, such publication is not required except for the purposes of 10-1-121. Unpublished records and documents are available in accordance with Department policy and state and federal law and regulations.

Collateral References

Militia *key* 2.

6 C.J.S. Armed Services §§288, 289.

53 Am. Jur. 2d Military and Civil Defense §§31, 32.

10-1-703. Use of armories and equipment.

Collateral References

Militia *key* 13, 17.

6 C.J.S. Armed Services §296.

53 Am. Jur. 2d Military and Civil Defense §§37, 38.

10-1-704. Pay and allowances.

Compiler's Comments

1983 Amendment: Deleted former (2), which provided: "A member of the home guard who is wounded, disabled, or dies while on active duty in the service of this state shall receive the same pensions and benefits as prescribed for members of the organized militia under 10-1-504."

Collateral References

Militia *key* 11.
6 C.J.S. Armed Services §§104 through 127, 293.
53 Am. Jur. 2d Military and Civil Defense §37.

Part 8
National Guard Reenlistment or Extension Incentive

10-1-806. Administration.

Compiler's Comments

Statement of Intent: The statement of intent attached to HB 620 (Ch. 506, L. 1981) provided: "A statement of intent is required for this bill because it grants rulemaking authority to the department of military affairs relating to the administration of the reenlistment or extension incentive bonus.

The person designated by the director of the department of military affairs shall adopt rules that determine the amount of the bonus that will be paid upon completion of a year of service. The amount shall be based on the appropriation. The rules shall provide a method of meshing the need to have an incentive in advance of the reenlistment or extension and the fact that such incentive is dependent on an amount of money which is dependent on a future appropriation. Thus, a person who reenlists in 1982 may be guaranteed by rule a fixed amount based on the 1982-83 appropriation which amount would be paid at the end of a successfully completed year in 1982 and 1983, but the amount that such a member would be paid at the end of 1984 or 1985 would be contingent upon an appropriation for 1984-85 by the 48th Legislature. The rules shall provide a means of identifying unit vacancies that are eligible."

Part 9
Montana National Guard Civil Relief

Part Compiler's Comments

Saving Clause: Section 6, Ch. 222, L. 2003, was a saving clause.

Effective Date: Section 7, Ch. 222, L. 2003, provided that this part is effective on passage and approval. Approved April 3, 2003.

CHAPTER 2
VETERANS

Chapter Compiler's Comments

Preamble: The preamble attached to Ch. 776, L. 1991, provided: "WHEREAS, Montana's women in military service have always responded to the needs of their country and have fought for liberty throughout our nation's history; and

WHEREAS, the United States Congress has unanimously passed legislation authorizing construction of a living memorial to honor the 1.2 million women veterans and the 400,000 women in active military service, the reserves, and the National Guard; and

WHEREAS, the memorial will house a register, making it possible for all servicewomen to have a permanent, visible place in America's history, and will serve to illustrate women's partnership with men in the defense of our nation; and

WHEREAS, March 29, 1991, has already been proclaimed by Lieutenant Governor Kolstad, the Boards of County Commissioners, and the Indian tribes of the State of Montana as the date during National Women's History Month to recognize and honor Montana's women veterans and women active in military service for their contribution to Montana and America.

THEREFORE, the Legislature of the State of Montana finds it appropriate to allocate funds toward the construction of a national women veterans' and servicewomen's memorial in Arlington National Cemetery."

Chapter Law Review Articles

The Federal Circuit's Approach to Statutory and Regulatory Construction, With Emphasis on Veteran's Law, Ratner, 6 Fed. Circuit B.J. 243 (1996).

Veterans' Law Developments (15th Annual Review of Poverty Law), 28 Clearinghouse Rev. 1102 (1995).

Veterans Reemployment Rights Out, Uniformed Service Reemployment Rights Act In, Tobin, 68 Wis. Law. 9 (1995).

Other Social Insurance and Veterans' Programs (unemployment insurance, workers' compensation, temporary disability insurance, Black Lung benefits and veterans' benefits), 57 Soc. Sec. Bull. 103 (1994).

Veterans Law Symposium, 46 Me. L. Rev. 1 (1994).

The Effect of Veterans Benefits on Education and Earnings, Angrist, 46 Indus. & Lab. Rel. Rev. 637 (1993).

Veterans Benefits Manual: An Advocate's Guide to Representing Veterans and Their Dependents, Barry, 40 Fed. B. News & J. 116 (1993).

Rose v. Rose [107 S. Ct. 2029]: Child Support as a Sacred Area, 34 Loy. L. Rev. 248 (1998).

Chapter Collateral References

6 C.J.S. Armed Services §§251 through 287.

77 Am. Jur. 2d Veterans and Veterans' Laws.

Staff Analysis of Statutes Governing Montana Veterans Affairs, Interim Report for the Subcommittee on Veterans' Affairs, Mont. Leg. Serv. Div. (2001).

Part 1
Board of Veterans' Affairs

10-2-101. Definitions.

Compiler's Comments

1991 Amendment: In first sentence of definition of veteran, after "armed forces", inserted "including an individual who served with the United States coast guard".

1989 Amendment: At beginning substituted "chapter, the following definitions apply" for "part"; and inserted definition of veteran.

1983 Amendment: Substituted 2-15-1205 for 2-15-2202.

10-2-102. Duties of board — employee qualifications.

Compiler's Comments

2003 Amendment: Chapter 491 in (1) in introductory clause before "veterans" deleted "discharged" and at end inserted "as provided in this section. The board shall"; in (1)(a) inserted "local"; inserted (1)(c) through (1)(j) relating to assistance to resident veterans and their families in filing benefit claims, advocating for fair treatment of veterans and their families by the U.S. department of veterans affairs, development of an information and communication program for veterans and their families and what the program must include, the seeking of grants, development of an understanding with the federal veterans' employment and training service and other entities for facilitating interagency cooperation, establishment of management tools, a biennial report, and requesting legislation; in (2) inserted "or other period of conflict involving the United States military overseas"; inserted (3) relating to board hiring of an administrator; and made minor changes in style. Amendment effective January 1, 2004.

Preamble: The preamble attached to Ch. 491, L. 2003, provided: "WHEREAS, the 57th Legislature requested a study of veterans' issues, and the State Administration and Veterans' Affairs Interim Committee conducted numerous hearings, received expert testimony, and examined research during a 14-month period; and

WHEREAS, the Interim Committee found that, using 2000 data, Montana's population of nearly 107,000 veterans and an estimated 170,000 family members of veterans not only ranks Montana second in the nation in the number of veterans per capita (11.9%) but also means that veterans and their family members constitute more than 25% of Montana's total population; and

WHEREAS, the Interim Committee found that more than 80,000 Montana veterans are combat-era veterans (more than 36,000 are Vietnam-era, more than 16,000 are Persian Gulf-era, more than 16,000 are World War II-era, and about 14,000 are Korean-era veterans) and that the largest group of veterans is now between 50 and 65 years of age; and

WHEREAS, the U.S. Department of Veterans Affairs estimates that more than 50% of combat theater veterans suffer from clinically serious and disabling posttraumatic stress

disorder, that twice as many veterans as nonveterans experience homelessness, that many veterans have overlapping and complex needs encompassing medical and nursing home care, mental health and chemical dependency counseling, housing, transportation, education and training, job services, and family support services, and that the children and families of veterans who do not get the help that they need are themselves at risk; and

WHEREAS, these complex needs and a maze of federal, state, local, public, and private services demand a high level of interagency coordination and cooperation for effective service delivery to ensure that veterans and their families do not fall through the cracks and to avoid unnecessary cost-shifting from federal to state and local public assistance programs; and

WHEREAS, the Interim Committee found that current statutory language establishing the Board of Veterans' Affairs as the lead agency for veterans' affairs dates back to 1919 and that although the Board's duties and responsibilities have consistently evolved, statutory language has not kept pace; and

WHEREAS, the Board hires and supervises its own classified employees, who make up the Montana Veterans' Affairs Division, but the Board does not have rulemaking authority to implement programs; and

WHEREAS, the Board is administratively attached to the Department of Military Affairs, which has greatly assisted veterans and supported the Board but has no statutory authority over veterans' affairs; and

WHEREAS, a legislative performance audit requested by the Interim Committee revealed that although the Montana Veterans' Affairs Division is to be commended for doing a great job with limited resources and limited statutory guidance, it also revealed that new management tools and updated information management systems are needed to provide more consistency and to track and manage staff workload; and

WHEREAS, the U.S. Department of Veterans Affairs spent about $175 million in Montana during fiscal year 2000, which ranked Montana 37th nationwide in per capita expenditures by the U.S. Department of Veterans Affairs on veterans; and

WHEREAS, the Interim Committee found that a statutory restructuring of powers, duties, and responsibilities for state veterans' affairs programs is essential, not only to address inadvertent statutory shortfalls and elevate the profile of state veterans' affairs, but also to better integrate benefit claims with human services programs so that eligible veterans and family members receive the federal compensation, benefits, and care that they have earned in self-sacrificing service in the armed forces of the United States of America."

2001 Amendment: Chapter 7 in (2) substituted "the Korean war, or the Vietnam conflict" for "the Korean or the Vietnam conflicts"; and made minor changes in style. Amendment effective October 1, 2001.

Case Notes

Funds to Private Veterans' Organizations Unconstitutional: Appropriation made to Veterans' Welfare Commission to pay for secretarial services of V.F.W. and D.A.V. was held unconstitutional, even though private organizations were to perform public services identical with those of Commission. Veterans' Welfare Comm'n v. V.F.W., 141 M 500, 379 P2d 107 (1963).

10-2-106. Acceptance of federal funds or other funds.

Compiler's Comments

2003 Amendment: Chapter 491 in (1) in first sentence at end substituted "as identified in 10-2-102" for "and accept such funds as the board directs" and inserted second sentence relating to deposit of funds; inserted (2) and (3) allowing the board to accept and use gifts and grants, which the board must deposit in the veterans' services account unless specifically assigned by the donor to the special revenue account for state veterans' cemeteries; and made minor changes in style. Amendment effective January 1, 2004.

Preamble: The preamble attached to Ch. 491, L. 2003, provided: "WHEREAS, the 57th Legislature requested a study of veterans' issues, and the State Administration and Veterans' Affairs Interim Committee conducted numerous hearings, received expert testimony, and examined research during a 14-month period; and

WHEREAS, the Interim Committee found that, using 2000 data, Montana's population of nearly 107,000 veterans and an estimated 170,000 family members of veterans not only ranks Montana second in the nation in the number of veterans per capita (11.9%) but also means that veterans and their family members constitute more than 25% of Montana's total population; and

WHEREAS, the Interim Committee found that more than 80,000 Montana veterans are combat-era veterans (more than 36,000 are Vietnam-era, more than 16,000 are Persian Gulf-era,

more than 16,000 are World War II-era, and about 14,000 are Korean-era veterans) and that the largest group of veterans is now between 50 and 65 years of age; and

WHEREAS, the U.S. Department of Veterans Affairs estimates that more than 50% of combat theater veterans suffer from clinically serious and disabling posttraumatic stress disorder, that twice as many veterans as nonveterans experience homelessness, that many veterans have overlapping and complex needs encompassing medical and nursing home care, mental health and chemical dependency counseling, housing, transportation, education and training, job services, and family support services, and that the children and families of veterans who do not get the help that they need are themselves at risk; and

WHEREAS, these complex needs and a maze of federal, state, local, public, and private services demand a high level of interagency coordination and cooperation for effective service delivery to ensure that veterans and their families do not fall through the cracks and to avoid unnecessary cost-shifting from federal to state and local public assistance programs; and

WHEREAS, the Interim Committee found that current statutory language establishing the Board of Veterans' Affairs as the lead agency for veterans' affairs dates back to 1919 and that although the Board's duties and responsibilities have consistently evolved, statutory language has not kept pace; and

WHEREAS, the Board hires and supervises its own classified employees, who make up the Montana Veterans' Affairs Division, but the Board does not have rulemaking authority to implement programs; and

WHEREAS, the Board is administratively attached to the Department of Military Affairs, which has greatly assisted veterans and supported the Board but has no statutory authority over veterans' affairs; and

WHEREAS, a legislative performance audit requested by the Interim Committee revealed that although the Montana Veterans' Affairs Division is to be commended for doing a great job with limited resources and limited statutory guidance, it also revealed that new management tools and updated information management systems are needed to provide more consistency and to track and manage staff workload; and

WHEREAS, the U.S. Department of Veterans Affairs spent about $175 million in Montana during fiscal year 2000, which ranked Montana 37th nationwide in per capita expenditures by the U.S. Department of Veterans Affairs on veterans; and

WHEREAS, the Interim Committee found that a statutory restructuring of powers, duties, and responsibilities for state veterans' affairs programs is essential, not only to address inadvertent statutory shortfalls and elevate the profile of state veterans' affairs, but also to better integrate benefit claims with human services programs so that eligible veterans and family members receive the federal compensation, benefits, and care that they have earned in self-sacrificing service in the armed forces of the United States of America."

10-2-111. Disposal of unclaimed veterans' remains — limits on liability of mortuaries and veterans' service organizations — notice — definitions.

Compiler's Comments

Preamble: The preamble attached to Ch. 202, L. 2001, provided: "WHEREAS, there are remains of military service veterans lying unclaimed in Montana mortuaries, funeral homes, or other establishments authorized to dispose of those remains; and

WHEREAS, the remains of those veterans are entitled to a decent and honorable final disposition in a manner that conforms with law; and

WHEREAS, there are state veterans' service organizations that are willing to dispose of those remains in a manner that honors the military service of those deceased veterans; and

WHEREAS, concerns regarding liability of the mortuaries or veterans' service organizations, or both, may impede the lawful and honorable final disposition of those remains; and

WHEREAS, it is appropriate that the Legislature act to relieve mortuaries and veterans' service organizations of liability for simple negligence in the final disposition of those remains."

Effective Date: This section is effective October 1, 2001.

10-2-112. Veterans' services special revenue account — sources of funds — designated uses.

Compiler's Comments

Preamble: The preamble attached to Ch. 491, L. 2003, provided: "WHEREAS, the 57th Legislature requested a study of veterans' issues, and the State Administration and Veterans' Affairs Interim Committee conducted numerous hearings, received expert testimony, and examined research during a 14-month period; and

WHEREAS, the Interim Committee found that, using 2000 data, Montana's population of nearly 107,000 veterans and an estimated 170,000 family members of veterans not only ranks Montana second in the nation in the number of veterans per capita (11.9%) but also means that veterans and their family members constitute more than 25% of Montana's total population; and

WHEREAS, the Interim Committee found that more than 80,000 Montana veterans are combat-era veterans (more than 36,000 are Vietnam-era, more than 16,000 are Persian Gulf-era, more than 16,000 are World War II-era, and about 14,000 are Korean-era veterans) and that the largest group of veterans is now between 50 and 65 years of age; and

WHEREAS, the U.S. Department of Veterans Affairs estimates that more than 50% of combat theater veterans suffer from clinically serious and disabling posttraumatic stress disorder, that twice as many veterans as nonveterans experience homelessness, that many veterans have overlapping and complex needs encompassing medical and nursing home care, mental health and chemical dependency counseling, housing, transportation, education and training, job services, and family support services, and that the children and families of veterans who do not get the help that they need are themselves at risk; and

WHEREAS, these complex needs and a maze of federal, state, local, public, and private services demand a high level of interagency coordination and cooperation for effective service delivery to ensure that veterans and their families do not fall through the cracks and to avoid unnecessary cost-shifting from federal to state and local public assistance programs; and

WHEREAS, the Interim Committee found that current statutory language establishing the Board of Veterans' Affairs as the lead agency for veterans' affairs dates back to 1919 and that although the Board's duties and responsibilities have consistently evolved, statutory language has not kept pace; and

WHEREAS, the Board hires and supervises its own classified employees, who make up the Montana Veterans' Affairs Division, but the Board does not have rulemaking authority to implement programs; and

WHEREAS, the Board is administratively attached to the Department of Military Affairs, which has greatly assisted veterans and supported the Board but has no statutory authority over veterans' affairs; and

WHEREAS, a legislative performance audit requested by the Interim Committee revealed that although the Montana Veterans' Affairs Division is to be commended for doing a great job with limited resources and limited statutory guidance, it also revealed that new management tools and updated information management systems are needed to provide more consistency and to track and manage staff workload; and

WHEREAS, the U.S. Department of Veterans Affairs spent about $175 million in Montana during fiscal year 2000, which ranked Montana 37th nationwide in per capita expenditures by the U.S. Department of Veterans Affairs on veterans; and

WHEREAS, the Interim Committee found that a statutory restructuring of powers, duties, and responsibilities for state veterans' affairs programs is essential, not only to address inadvertent statutory shortfalls and elevate the profile of state veterans' affairs, but also to better integrate benefit claims with human services programs so that eligible veterans and family members receive the federal compensation, benefits, and care that they have earned in self-sacrificing service in the armed forces of the United States of America."

Effective Date: Section 17, Ch. 491, L. 2003, provided that this section is effective January 1, 2004.

10-2-113. Rulemaking authority.

Compiler's Comments

Effective Date: Section 17, Ch. 491, L. 2003, provided that this section is effective January 1, 2004.

10-2-114. Patriotic license plates — surcharge — disposition.

Compiler's Comments

Preamble: The preamble attached to Ch. 491, L. 2003, provided: "WHEREAS, the 57th Legislature requested a study of veterans' issues, and the State Administration and Veterans' Affairs Interim Committee conducted numerous hearings, received expert testimony, and examined research during a 14-month period; and

WHEREAS, the Interim Committee found that, using 2000 data, Montana's population of nearly 107,000 veterans and an estimated 170,000 family members of veterans not only ranks Montana second in the nation in the number of veterans per capita (11.9%) but also means that veterans and their family members constitute more than 25% of Montana's total population; and

WHEREAS, the Interim Committee found that more than 80,000 Montana veterans are combat-era veterans (more than 36,000 are Vietnam-era, more than 16,000 are Persian Gulf-era, more than 16,000 are World War II-era, and about 14,000 are Korean-era veterans) and that the largest group of veterans is now between 50 and 65 years of age; and

WHEREAS, the U.S. Department of Veterans Affairs estimates that more than 50% of combat theater veterans suffer from clinically serious and disabling posttraumatic stress disorder, that twice as many veterans as nonveterans experience homelessness, that many veterans have overlapping and complex needs encompassing medical and nursing home care, mental health and chemical dependency counseling, housing, transportation, education and training, job services, and family support services, and that the children and families of veterans who do not get the help that they need are themselves at risk; and

WHEREAS, these complex needs and a maze of federal, state, local, public, and private services demand a high level of interagency coordination and cooperation for effective service delivery to ensure that veterans and their families do not fall through the cracks and to avoid unnecessary cost-shifting from federal to state and local public assistance programs; and

WHEREAS, the Interim Committee found that current statutory language establishing the Board of Veterans' Affairs as the lead agency for veterans' affairs dates back to 1919 and that although the Board's duties and responsibilities have consistently evolved, statutory language has not kept pace; and

WHEREAS, the Board hires and supervises its own classified employees, who make up the Montana Veterans' Affairs Division, but the Board does not have rulemaking authority to implement programs; and

WHEREAS, the Board is administratively attached to the Department of Military Affairs, which has greatly assisted veterans and supported the Board but has no statutory authority over veterans' affairs; and

WHEREAS, a legislative performance audit requested by the Interim Committee revealed that although the Montana Veterans' Affairs Division is to be commended for doing a great job with limited resources and limited statutory guidance, it also revealed that new management tools and updated information management systems are needed to provide more consistency and to track and manage staff workload; and

WHEREAS, the U.S. Department of Veterans Affairs spent about $175 million in Montana during fiscal year 2000, which ranked Montana 37th nationwide in per capita expenditures by the U.S. Department of Veterans Affairs on veterans; and

WHEREAS, the Interim Committee found that a statutory restructuring of powers, duties, and responsibilities for state veterans' affairs programs is essential, not only to address inadvertent statutory shortfalls and elevate the profile of state veterans' affairs, but also to better integrate benefit claims with human services programs so that eligible veterans and family members receive the federal compensation, benefits, and care that they have earned in self-sacrificing service in the armed forces of the United States of America."

Effective Date: Section 17, Ch. 491, L. 2003, provided that this section is effective January 1, 2004.

10-2-115. County veterans' service officers.

Compiler's Comments

Preamble: The preamble attached to Ch. 491, L. 2003, provided: "WHEREAS, the 57th Legislature requested a study of veterans' issues, and the State Administration and Veterans' Affairs Interim Committee conducted numerous hearings, received expert testimony, and examined research during a 14-month period; and

WHEREAS, the Interim Committee found that, using 2000 data, Montana's population of nearly 107,000 veterans and an estimated 170,000 family members of veterans not only ranks Montana second in the nation in the number of veterans per capita (11.9%) but also means that veterans and their family members constitute more than 25% of Montana's total population; and

WHEREAS, the Interim Committee found that more than 80,000 Montana veterans are combat-era veterans (more than 36,000 are Vietnam-era, more than 16,000 are Persian Gulf-era, more than 16,000 are World War II-era, and about 14,000 are Korean-era veterans) and that the largest group of veterans is now between 50 and 65 years of age; and

WHEREAS, the U.S. Department of Veterans Affairs estimates that more than 50% of combat theater veterans suffer from clinically serious and disabling posttraumatic stress disorder, that twice as many veterans as nonveterans experience homelessness, that many veterans have overlapping and complex needs encompassing medical and nursing home care, mental health and chemical dependency counseling, housing, transportation, education and

training, job services, and family support services, and that the children and families of veterans who do not get the help that they need are themselves at risk; and

WHEREAS, these complex needs and a maze of federal, state, local, public, and private services demand a high level of interagency coordination and cooperation for effective service delivery to ensure that veterans and their families do not fall through the cracks and to avoid unnecessary cost-shifting from federal to state and local public assistance programs; and

WHEREAS, the Interim Committee found that current statutory language establishing the Board of Veterans' Affairs as the lead agency for veterans' affairs dates back to 1919 and that although the Board's duties and responsibilities have consistently evolved, statutory language has not kept pace; and

WHEREAS, the Board hires and supervises its own classified employees, who make up the Montana Veterans' Affairs Division, but the Board does not have rulemaking authority to implement programs; and

WHEREAS, the Board is administratively attached to the Department of Military Affairs, which has greatly assisted veterans and supported the Board but has no statutory authority over veterans' affairs; and

WHEREAS, a legislative performance audit requested by the Interim Committee revealed that although the Montana Veterans' Affairs Division is to be commended for doing a great job with limited resources and limited statutory guidance, it also revealed that new management tools and updated information management systems are needed to provide more consistency and to track and manage staff workload; and

WHEREAS, the U.S. Department of Veterans Affairs spent about $175 million in Montana during fiscal year 2000, which ranked Montana 37th nationwide in per capita expenditures by the U.S. Department of Veterans Affairs on veterans; and

WHEREAS, the Interim Committee found that a statutory restructuring of powers, duties, and responsibilities for state veterans' affairs programs is essential, not only to address inadvertent statutory shortfalls and elevate the profile of state veterans' affairs, but also to better integrate benefit claims with human services programs so that eligible veterans and family members receive the federal compensation, benefits, and care that they have earned in self-sacrificing service in the armed forces of the United States of America."

Effective Date: Section 17, Ch. 491, L. 2003, provided that this section is effective January 1, 2004.

Part 2
Reemployment on Completion of Service

Part Compiler's Comments

Effective Date — Applicability — Retroactive Repealer of Former Veterans' and Disabled Civilians' Employment Preference Law: Section 16, Ch. 1, Sp. L. 1983, read: "(1) This act is effective on passage and approval. [Approved December 20, 1983.]

(2) Except as provided in section 14, this act applies only to positions that are filled after the effective date of this act."

Section 14, Ch. 1, Sp. L. 1983, read: "Sections 10-2-201 through 10-2-206, MCA, are repealed. This repeal applies retroactively to bar any claim of violation or application of 10-2-201 through 10-2-206 that has not been reduced to judgment, whether or not the judgment is final, on the effective date of this act [December 20, 1983]. Claims under 10-2-201 through 10-2-206 that have been reduced to judgment, whether or not the judgment is final, on the effective date of this act are enforceable. No claim for a violation of 10-2-201 through 10-2-206 may be made under section 8 of this act [39-30-206 and 39-30-207]."

Part Case Notes

DECISIONS UNDER CURRENT LAW

Repeal of Veterans' Preference: Retroactive repeal of the absolute veterans' preference, 10-2-201 through 10-2-206, revoked a government gratuity. The repealer did not provide for sovereign immunity from accrued causes of action without a two-thirds vote of the members of each house as required by Art. II, sec. 18, Mont. Const. As previously decided in Nick v. Dept. of Highways, 219 M 168, 711 P2d 795, 42 St. Rep. 1926 (1985), the Legislature could repeal the veterans' preference by a majority vote at any time. Femling v. Mont. St. Univ., 220 M 133, 713 P2d 996, 43 St. Rep. 235 (1986).

Repeal of Veterans' Preference — Due Process: Plaintiff applied for a position with the Montana University System, claiming entitlement to the then statutory veterans' preference in

employment. He was not interviewed for the job; a nonveteran was hired. Plaintiff petitioned the District Court for an order to show cause why he should not have been employed. Before a hearing was held, the veterans' preference was repealed. Plaintiff's cause of action did not become a vested property right upon the filing of his complaint. The filing of a claim to what was a government gratuity does not change that gratuity into a vested right. Repeal of the preference gratuity did not violate the Due Process Clause of the state or federal constitution. Femling v. Mont. St. Univ., 220 M 133, 713 P2d 996, 43 St. Rep. 235 (1986).

DECISIONS UNDER FORMER PREFERENCE LAW
(See Title 39, Chapter 30, for Current
Employment Preference Provisions.)

Veterans' Preference Claim Based on Gratuity — No Express Reservation Through Stipulation: Plaintiff Jensen filed an amended petition to enforce employment preference that contained three counts. Thereafter, the parties filed a stipulated set of facts and agreement that the court would hear only Count I. The stipulation reserved all claims and defenses arising from Counts II and III. The District Court ruled on Count I, finding Jensen had been denied his veterans' preference, and the ruling was then appealed to the Supreme Court. While the appeal was pending, the Legislature met in special session and enacted a new Veterans' and Handicapped Persons' Employment Preference Act that retroactively repealed the old Veterans' Preference Act under which Jensen had filed his amended petition. The state then filed a motion to dismiss Counts II and III, and the motion was granted by the District Court. On appeal, Jensen questioned whether Count II, which has been expressly reserved by the stipulation, survived the Legislature's retroactive repealer. He argued that the stipulation created an obligation on behalf of the state to reserve the claim for an indefinite period and regardless of legislative action. The Supreme Court held that the stipulation must be viewed as an agreement to reserve a claim based not on a vested right but on a gratuity that the Legislature was empowered to repeal at any time, and that the stipulation reserved only what existed at the time it was entered into. Jensen v. St. 221 M 42, 718 P2d 1335, 43 St. Rep. 621 (1986).

Appointment of Manager From Internal Applicants — Preference Applied: The former veterans' preference law (10-2-201 through 10-2-206, repealed in 1983) gave veterans a preference in "appointment and employment". The Department of Labor issued a vacancy announcement for the position of manager of the Great Falls Job Service Office, viewed the filling of the position as an internal promotion, took only internal applications, and did not consider the former veterans' preference law then in effect, because the Department viewed that law as applying only to initial hirings. To give the former law any effect, the hiring of the Job Service Manager must be construed as employment, and the law covered the hiring. Therefore, a Department employee who was a veteran and who had applied for and did not receive the position was wrongly denied the position in favor of a nonveteran. Jensen v. St., 213 M 84, 689 P2d 1231, 41 St. Rep. 1971 (1984).

Court Order to Hire Bypassed Veteran — Improper Remedy: Although under the former veterans' preference law (10-2-201 through 10-2-206, repealed in 1983) the lower court had authority to order an appointing authority to comply with the law, the court did not have authority to order an appointing authority to grant to a veteran a job it had improperly denied him and granted to a nonveteran. The judiciary does not have and cannot be granted the executive power of appointment. The lower court was directed to order the employer to reopen the position to the original applicants, grant preference to the petitioner-veteran in this case and the other preferred applicants, and otherwise fill the position in accordance with Crabtree. Jensen v. St., 213 M 84, 689 P2d 1231, 41 St. Rep. 1971 (1984).

Crabtree Retroactively Applied: On June 16, 1982, the Department of Labor hired Waltermire to fill a position. Another Department employee filed a petition on June 21, 1983, claiming he was a veteran while Waltermire was not, and therefore he should have been hired instead. On June 16, 1983, the Supreme Court issued its Crabtree decision holding that the then current veterans' preference law (10-2-201 through 10-2-206, repealed in 1983) granted an absolute preference that existed from its enactment in 1921 through its 1983 repeal. That decision applies retroactively to Jensen's claim, and the potential impact upon one person, Waltermire, who may lose his job, was insufficient to rule that Crabtree did not apply retroactively. Jensen v. St., 213 M 84, 689 P2d 1231, 41 St. Rep. 1971 (1984).

Absolute Preference Required for Minimally Qualified Veterans — No Conflict With Other Laws: Where the plaintiff, who had been blind from birth, brought an action against the defendant state library for failing to hire her under 10-2-203 (repealed in 1983) over other more qualified applicants, the District Court did not err in holding that 10-2-203 (repealed in 1983)

required an absolute preference for minimally qualified veterans and disabled civilians over other more qualified persons. Neither the language of the statute nor its history contains any qualifications limiting it to a relative preference over only those equally qualified. Nor does the statute conflict with the duties of governmental agencies to offer employment in a nondiscriminatory manner on the basis of merit. The statute is in the nature of an affirmative action program that agencies must implement and maintain in any event and simply requires the preference of veterans and disabled persons of any sex or race. Crabtree v. Mont. St. Library, 204 M 398, 665 P2d 231, 40 St. Rep. 963 (1983).

Remedy for Failure to Recognize Preference — Order to Redefine and Readvertise Position Upheld: Where the plaintiff had been denied employment for a library staff position and sued to enforce the preference required by 10-2-203 (repealed in 1983), the District Court did not err in ordering the library to redefine and readvertise the position. The court found that the minimum requirements set out in the library's Notice of Position Open bore little correlation to the rating scale used in the selection process. Because the minimal qualifications were never clearly determined or clearly stated, they could not have been used in evaluating the plaintiff's application. It was therefore only fair that all applicants be given an opportunity to reapply. Crabtree v. Mont. St. Library, 204 M 398, 665 P2d 231, 40 St. Rep. 963 (1983).

Constitutionality: The 1943 amendment insofar as it attempted to confer authority upon the Court to make an appointment and insofar as it undertook to confer judicial power without notice and hearing was declared unconstitutional and void. State ex rel. O'Sullivan v. District Court, 119 M 189, 172 P2d 816 (1946); Application of O'Sullivan, 117 M 295, 158 P2d 306, 161 ALR 487 (1945).

City Attorney: Veterans' preference law applies to office of City Attorney. Application of O'Sullivan, 117 M 295, 158 P2d 306 (1945).

Veteran Appointee to Possess Requisite Qualifications: This act merely provides that veterans be preferred, and though a veteran's application must be transmitted to the Police Commission by the Mayor when a vacancy exists unless he is convinced the veteran is not qualified, he may not be coerced by Writ of Mandate after his investigation reveals that the veteran is not qualified physically due to a back injury. The duty to appoint carries with it the duty to determine the requisite qualifications. Horvath v. Mayor, 112 M 266, 116 P2d 874 (1941), explained in State ex rel. O'Sullivan v. District Court, 119 M 189, 172 P2d 816 (1946).

Veteran to Qualify Physically: Although veteran's application must be transmitted to Police Commission by Mayor when a vacancy exists, he may not be coerced by Writ of Mandate to forward application after his investigation reveals veteran is not qualified physically due to a back injury. Court will not substitute its discretion for that of Mayor unless it is shown Mayor abused his discretion by making his decision unfairly or in bad faith. Horvath v. Mayor, 112 M 266, 116 P2d 874 (1941).

No Duty Where No Vacancy Exists: Mandamus was improper to compel the Mayor of a city to transmit the application of an honorably discharged World War veteran for the position of patrolman on the police force to the city Police Commission, since neither under 10-2-211 (formerly section 77-601, R.C.M. 1947), nor under 7-32-4108 (formerly section 11-1803, R.C.M. 1947 (part)), relating generally to appointments to the force, was the Mayor required to transmit such applications when no vacancy on the police force existed. State ex rel. Montgomery v. Mayor, 112 M 275, 114 P2d 1046 (1941).

Part Law Review Articles

Feeney v. Massachusetts (451 F. Supp. 143) — Constitutional Law — Sex Discrimination: Statute providing veterans absolute preference in civil service employment violates the equal protection clause of the 14th amendment. 7 Hofstra L. Rev. 215 (1978).

Veterans' Public Employment Preference as Sex Discrimination — Anthony v. Massachusetts (415 F. Supp. 485) and Branch v. DuBois (418 F. Supp. 1128), 90 Harv. L. Rev. 805 (1977).

Part Collateral References

6 C.J.S. Armed Services §§268 through 287.

77 Am. Jur. 2d Veterans and Veterans' Laws §§88 through 118.

Sufficiency of veteran's application for re-employment under 38 USCS §§2021 et seq. 103 ALR Fed. 575.

When does sale or reorganization exempt business from re-employment requirements of military veterans' re-employment laws (38 USCS §§2021 et seq.). 63 ALR Fed. 132.

Applicability of doctrine of laches to bar veterans' re-employment claims where there is delay by government officials and agencies in rendering veterans' re-employment aid pursuant to 38 USCS §2025. 53 ALR Fed. 451.

38 U.S.C. §§4301 through 4333.

10-2-211. Reemployment of veterans upon completion of service.

Collateral References

Armed Services *key* 113 through 123.

6 C.J.S. Armed Services §§268 through 287.

77 Am. Jur. 2d Veterans and Veterans' Laws §§91 through 94.

Reemployment of discharged serviceman. 29 ALR 2d 1279; §§25 through 28, 29.5 superseded by 83 ALR Fed. 908; §§30, 31 superseded by 9 ALR Fed. 225.

10-2-212. Private employer's duty.

Collateral References

Armed Services *key* 115.

77 Am. Jur. 2d Veterans and Veterans' Laws §§91 through 94.

10-2-213. Restoration of benefits.

Collateral References

Armed Services *key* 118.

6 C.J.S. Armed Services §§276 through 282.

77 Am. Jur. 2d Veterans and Veterans' Laws §93.

10-2-214. Enforcement procedure.

Collateral References

Armed Services *key* 122.

6 C.J.S. Armed Services §§283 through 287; 55 C.J.S. Mandamus §198.

77 Am. Jur. 2d Veterans and Veterans' Laws §§99, 115 through 118.

10-2-221. Reemployment of public employee upon completion of service.

Case Notes

Appointee Entitled to Continue in Office During Term of Incumbent: Relator's claim that 124 write-in votes cast for him at general election held on November 3, 1942, entitled him to office of Attorney General was without merit because appointee was entitled to continue in office during term of incumbent where incumbent was elected to serve from January 1, 1940, until December 31, 1944. Entry by incumbent into military service did not create a vacancy in office requiring an election for office of Attorney General as purpose of this title is to make provision for full functioning of office without an election during absence of regular incumbent while in military service, and so that his right to office will be preserved and that he may resume it upon his return. State ex rel. Niewoehner v. Bottomly, 116 M 96, 148 P2d 545 (1944), following Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Purpose: Legislative intent was not to establish a new class of officers for the state from top to bottom under the title of "acting officers" appointed under this section but merely to provide for the naming of officers to replace elected officers for a period not to exceed unexpired term of those replaced. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Induction to Result in Leave of Absence: When regularly elected incumbent Attorney General was ordered to report for active military service before expiration of his term, his temporary relinquishment of office did not result in a permanent vacancy but in a leave of absence or suspension from duty. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Constitutionality: Although 10-2-221, 10-2-225, and 10-2-227 may not lawfully apply to certain officers such as judicial officers absenting themselves from the State of Montana more than 60 consecutive days owing to the provisions of Art. VIII, sec. 37, 1889 Mont. Const. (now Art. VII, sec. 10, 1972 Mont. Const.), it is not objectionable as class legislation. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Sections Not to Apply to Elected Members of Legislature: Sections 10-2-221 and 10-2-227 were inapplicable to legislative officers and therefore did not warrant appointment of an "acting" Senator to serve during absence of elected one while serving in country's armed forces. State ex rel. Grant v. Eaton, 114 M 199, 133 P2d 588 (1942).

Collateral References

Armed Services *key* 113 through 123.

6 C.J.S. Armed Services §§268 through 287; 67 C.J.S. Officers and Public Employees §§99, 114, 218.

77 Am. Jur. 2d Veterans and Veterans' Laws §§91 through 94.

Reemployment of discharged serviceman. 29 ALR 2d 1279; §§25 through 28, 29.5 superseded by 83 ALR Fed. 908; §§30, 31 superseded by 9 ALR Fed. 225.

10-2-223. Application for reinstatement of officer.

Collateral References

Armed Services *key* 118; Officers *key* 9, 10.

6 C.J.S. Armed Services §275.

77 Am. Jur. 2d Veterans and Veterans' Laws §§88, 91.

10-2-224. Reinstatement for remainder of term.

Collateral References

Officers *key* 9, 10.

67 C.J.S. Officers and Public Employees §§114, 218.

77 Am. Jur. 2d Veterans and Veterans' Laws §124.

10-2-225. No loss of seniority or benefits.

Case Notes

Constitutionality: Although 10-2-221, 10-2-225, and 10-2-227 may not lawfully apply to certain officers such as judicial officers absenting themselves from the State of Montana more than 60 consecutive days owing to the provisions of Art. VIII, sec. 37, 1889 Mont. Const. (now Art. VII, sec. 10, 1972 Mont. Const.), it is not objectionable as class legislation. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Collateral References

Armed Services *key* 118.

6 C.J.S. Armed Services §§276, 277.

77 Am. Jur. 2d Veterans and Veterans' Laws §92.

10-2-226. Enforcement.

Collateral References

Armed Services *key* 122.

6 C.J.S. Armed Services §§283 through 287.

77 Am. Jur. 2d Veterans and Veterans' Laws §§115 through 118.

10-2-227. Acting officer — how appointed.

Case Notes

Purpose: Legislative intent was not to establish a new class of officers for the state from top to bottom under the title of "acting officers" appointed under this section but merely to provide for the naming of officers to replace elected officers for a period not to exceed unexpired term of those replaced. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Sections Not to Apply to Elected Members of Legislature: Sections 10-2-221 and 10-2-227 were inapplicable to legislative officers and therefore did not warrant appointment of an "acting" Senator to serve during absence of elected one while serving in country's armed forces. State ex rel. Grant v. Eaton, 114 M 199, 133 P2d 588 (1942).

Induction to Result in Leave of Absence: When regularly elected incumbent Attorney General was ordered to report for active military service before expiration of his term, his temporary relinquishment of office under 10-2-201 and 10-2-227 did not result in a permanent vacancy but in a leave of absence or suspension from duty. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Collateral References

Officers *key* 57, 58.

10-2-228. Absence for military service creates no vacancy in office.

Case Notes

Induction to Result in Leave of Absence: When regularly elected incumbent Attorney General was ordered to report for active military service before expiration of his term, his temporary relinquishment of office under this chapter did not result in a permanent vacancy but in a leave of absence or suspension from duty. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Attorney General's Opinions

Absence of Public Service Commissioner From State on Military Duty — Vacancy in Office Not Created — No Additional Compensation:

When asked to clarify his opinion in 43 A.G. Op. 32 (1989), the Attorney General looked to the nature of service and the source of payment as affecting the right of a state officer to receive additional compensation, noting that a National Guard member engaged in federal service and thus compensated by the federal government is subject to the duties and may receive the benefits of federal law, while a member engaged in purely state-oriented service and thus compensated by the state is subject to state regulation. Therefore, Art. VI, sec. 5, Mont. Const., prohibits an elected member of the Executive Branch from accepting compensation from the state for service in the Montana Army National Guard, beginning with the first instance of dual compensation. Further, a public officer has a duty to repay unauthorized compensation and the state, through the State Auditor, has a corresponding right to compel repayment of the unauthorized compensation. 43 A.G. Op. 43 (1989).

Absence from the state attributable to active military duty does not result in a vacancy in the office of Public Service Commissioner. However, an elected member of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard. 43 A.G. Op. 32 (1989).

Collateral References

Armed Services *key* 115, 118; Officers *key* 55.

Part 4
Montana Veterans' Homes

Part Collateral References

Armed Services *key* 124.
6 C.J.S. Armed Forces §259.
77 Am. Jur. 2d Veterans and Veterans' Laws §65.
38 U.S.C. §§5031 through 5037.

10-2-401. Location and function of homes — persons admitted.

Compiler's Comments

1995 Amendment: Chapter 546 in second sentence substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

1989 Amendments: Chapter 609 in two places, before "veterans", deleted "honorably discharged".

Chapter 683 inserted reference to the veterans' home in Eastern Montana; and made minor changes in phraseology. Amendment effective May 16, 1989.

10-2-402. Superintendent to be given veterans' preference.

Compiler's Comments

1995 Amendment: Chapter 546 substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated the Ch. 646, L. 1989, amendments to this section July 1, 1991. Repealer effective February 7, 1991.

1989 Amendments: Chapter 646 in two places inserted "under 39-29-102". Amendment terminates July 1, 1991.

Chapter 683 near beginning, after "superintendent of", inserted "each of"; and made minor change in phraseology. Amendment effective May 16, 1989.

Severability: Section 18, Ch. 646, L. 1989, was a severability clause.

1983 Special Session Amendment: Substituted "shall apply the preference granted to veterans and disabled veterans, but not the preference granted to other persons, by Title 39, chapter 30" for "shall give preference to veterans as defined in 10-2-202".

1981 Amendment: Changed requirement that superintendent be a veteran to requirement that veteran's preference be given in selecting superintendent.

10-2-403. Eligibility for residence in home.

Compiler's Comments

1995 Amendment: Chapter 546 in introductory clause substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

1989 Amendments: Chapter 609 near beginning substituted "rules" for "the regulations"; before first "veteran" substituted "a" for "an honorably discharged"; after second "veteran" deleted "who served in the armed forces of the United States"; and made minor changes in style.

Chapter 683 in introductory clause substituted "a Montana veterans' home" for "the Montana veterans' home"; and made minor change in phraseology. Amendment effective May 16, 1989.

1983 Amendment: At end of first sentence inserted "Consideration must also be given to"; and substituted (1) referring to age, (2) referring to physical and mental status, (3) referring to alternative accommodations, (4) referring to term of residence in Montana, (5) referring to gender, and (6) referring to ability of veterans' home to meet the person's needs for: "(2) be an invalid and have become unable to earn a livelihood as a result of the disability;

(3) have resided in Montana for a period of 2 years immediately prior to making application for admittance;

(4) not have been convicted of a felony or of a crime involving moral turpitude;

(5) not be an alcoholic or have a record of habitual inebriation."

Statement of Intent: The statement of intent attached to HB 266 (Ch. 469, L. 1983) provided: "House Bill 266 requires a statement of intent because it authorizes the Department of Institutions [now Department of Public Health and Human Services] to establish admission requirements to the Montana Veterans' Home. The Legislature contemplates that the rules should address the following subjects:

1. Establishment of a minimum age for admission.
2. Written criteria for describing the severity of mental disturbance for which the Home is able to provide treatment.
3. Written criteria establishing the degree of physical disability or acute illness the Home can appropriately accommodate.
4. Procedures that will consider the Home's ability to meet the overall needs of the Veteran.
5. Procedures that will consider the Veteran's gender as it relates to availability of appropriate living space.
6. Procedures that will allow for consideration of the Veteran's ability or inability to locate suitable alternative living accommodations relative to his status on a prioritized waiting list.
7. Procedures that will allow for consideration of the applicant's residence in Montana relative to his status on a prioritized waiting list."

Administrative Rules

Title 20, chapter 14, subchapter 2, ARM Admission policy for Montana Veterans' Home.

10-2-404. Acceptance and deposit of federal money.

Compiler's Comments

1995 Amendment: Chapter 546 in two places substituted "department of public health and human services" for "department of corrections and human services"; in second sentence, after "institution", deleted "as defined in 53-1-101"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec.

1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

1989 Amendment: Made references to veterans' home plural; and made minor changes in phraseology. Amendment effective May 16, 1989.

Collateral References

Armed Services *key* 124.
6 C.J.S. Armed Services §259.
77 Am. Jur. 2d Veterans and Veterans' Laws §65.
38 U.S.C. §§5033, 5035.

10-2-416. Pledge to continue operation and maintenance.

Compiler's Comments

1997 Amendment: Chapter 42 in first sentence substituted "38 U.S.C. 8134 and 8135(a)(6)" for "38 U.S.C. 641 and 5035(a)(6)"; and made minor changes in style. Amendment effective March 12, 1997.

1995 Amendment: Chapter 546 in two places substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendments: Chapter 10 at end of first sentence substituted "state home for veterans in eastern Montana" for "project upon completion".

Chapter 579 in first sentence, before "from the general fund", inserted "funds either" and after "from the general fund" inserted "or from funds generated under 16-11-111"; and inserted second sentence relating to private vendor contracts for operation of the Eastern Montana Veterans' Home. Amendment effective April 28, 1993.

1991 Amendment — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Effective Date: Section 22, Ch. 683, L. 1989, provided that this section is effective May 16, 1989.

10-2-417. Use of funds generated by taxation on cigarettes.

Compiler's Comments

1995 Amendment: Chapter 546 in (1) substituted "department of public health and human services" for "department of corrections and human services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Effective Date: Section 5, Ch. 548, L. 1993, provided: "[This act] is effective July 1, 1993."

Part 5
Veterans' Interment

Part Collateral References

Armed Services *key* 125.
77 Am. Jur. 2d Veterans and Veterans' Laws §148.
38 U.S.C. §§901 through 908.

10-2-501. Interment allowance for veterans — payment by county of residence — veterans' interment supervisor — definitions.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 257 in (11) substituted reference to department of revenue for reference to state treasurer. Amendment effective July 1, 2001. The amendment by Ch. 574 rendered the amendment by Ch. 257 void.

Chapter 574 in (10) in second sentence after "exceed" inserted "an amount equal to the actual cost paid, up to"; deleted former (11) that read: "(11) After payment of the first $30 from county funds, the county treasurer may withhold an amount of the county total monthly remittance to the state treasurer equal to the actual cost paid, up to $40, for the shipping and raising of each headstone"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1999 Amendment: Chapter 210 throughout section substituted "interment" for "burial"; in (2) in first sentence inserted "or cremated remains" and at end inserted sentence prohibiting

veterans' interment supervisor from receiving compensation for duties performed under this part; in (4) substituted "veteran's county of residence" for "county commissioners of the county in which the veteran was a bona fide resident at the time of death"; in (6) substituted "veteran's county of residence" for "county commissioners of the county in which the veteran resided prior to admittance to a Montana veterans' home"; in (8) in first sentence substituted "an institution of the state of Montana" for "any public institution of the state of Montana", inserted "at a federal institution, or at a private facility", and substituted "veteran's county of residence" for "the county of the former residence of the veteran" and in last sentence substituted "veteran's county of residence" for "county in which the veteran resided at the time of entry into the institution"; in (10) in first sentence substituted "personal representative or heirs" for "next of kin or guardian" and in second sentence substituted "veteran's county of residence" for "county commissioners of the county in which the veteran was a resident"; in (11) inserted "After payment of the first $30 from county funds"; inserted (12) defining interment and residence; and made minor changes in style. Amendment effective March 30, 1999.

Applicability: Section 4, Ch. 210, L. 1999, provided that this section applies to claims filed on or after March 30, 1999.

1995 Amendment: Chapter 45 in (10), in second sentence, increased amount payable for shipping and raising of a veteran's headstone from $30 to $70; inserted (11) allowing a County Treasurer to withhold up to $40 for the shipping and raising of each headstone; and made minor changes in style. Amendment effective July 1, 1995.

1991 Amendment: In (2), at end of first sentence, inserted "at the time of death" and inserted second sentence ensuring that the desires of the veteran's personal representative or heirs are not violated; in (5) substituted "personal representative" for "executor, administrator"; inserted (10) establishing certain duties of veterans' burial supervisor and providing for payment and audit of certain burial expenses; and made minor change in style.

1989 Amendment: In five places substituted "veteran" for reference to deceased person; in (1) substituted "a veteran" for "an honorably discharged serviceman or servicewoman"; in (2) substituted "veteran" for "serviceman or servicewoman"; deleted (2)(a) establishing honorable discharge as criteria for military burial; deleted (2)(b) establishing death while in service as criteria for military burial; deleted (2)(c) establishing death while in service during war as criteria for military burial; deleted (2)(d) establishing residency in state veterans' home as criteria for military burial; in (4) substituted "a" for "an actual"; near beginning of (7) and (8) substituted "veteran" for "person qualified under subsection (2)(a)"; and made minor changes in style and grammar.

Collateral References

Armed Services *key* 125.
6 C.J.S. Armed Services §253.
77 Am. Jur. 2d Veterans and Veterans' Laws §148.
38 U.S.C. §§902, 904, 906.

10-2-503. Report of actions and expenses by veterans' interment supervisor.

Compiler's Comments

1999 Amendment: Chapter 210 throughout section substituted "interment" for "burial"; in first sentence substituted "interred" for "buried"; and made minor changes in style. Amendment effective March 30, 1999.

Applicability: Section 4, Ch. 210, L. 1999, provided that this section applies to claims filed on or after March 30, 1999.

1991 Amendment: In first sentence, before "command", inserted "the last", before "place" inserted "the exact", and deleted requirement for reporting of veteran's occupation while living and inserted second sentence allowing keeping of additional information by clerk of Board of County Commissioners; and made minor changes in style.

1989 Amendment: Pursuant to sec. 7, Ch. 609, L. 1989, after "cause" substituted "the veteran" for "such deceased person"; after "with the" substituted "veteran's" for "deceased's"; and after "which the" substituted "veteran" for "deceased".

10-2-504. Duty of clerk.

Compiler's Comments

1991 Amendment: Deleted former second and third sentences that read: "It shall also be the duty of the clerk, upon receiving the report of the burial of the veteran, to make application to the proper authorities under the government of the United States for a suitable headstone as

provided by act of congress and to cause the same to be placed at the head of the grave of the veteran, the expense of which shall not exceed the sum of $30 for cartage of and properly setting up each stone. The expense thus incurred shall be audited and paid as provided in 10-2-502 for the burial expenses"; and made minor changes in style.

1989 Amendment: Pursuant to sec. 7, Ch. 609, L. 1989, in two places substituted "the veteran" for "such serviceman or servicewoman"; and in second sentence, after "burial of", substituted "the veteran" for "such deceased person".

10-2-506. Not to apply to nonresidents.

Compiler's Comments

1989 Amendment: Pursuant to sec. 7, Ch. 609, L. 1989, substituted "veterans" for "servicemen and servicewomen".

Part 6
State Veterans' Cemeteries

10-2-601. State veterans' cemeteries.

Compiler's Comments

Negotiations for Missoula Veterans' Cemetery: Section 2, Ch. 451, L. 2003, provided: "(1) On [the effective date of this act] [effective April 21, 2003], the department of military affairs [board of veterans' affairs] shall initiate activities at or in the vicinity of Fort Missoula, Missoula County, Montana, in the city of Missoula, or in Missoula County, as appropriate, to complete all preapplication requirements provided in the federal department of veterans affairs national cemetery administration's state cemetery grants program grant requirements, including but not limited to:

(a) completion of an environmental assessment and an environmental impact statement if necessary;

(b) designation of the area to be served by the preferred location of the cemetery;

(c) a design concept that describes the primary features to be included in the project and the number of grave sites to be provided; and

(d) a needs assessment that explains the need for the project to establish, expand, or improve the veterans' cemetery.

(2) If the review provided for in subsection (1) shows that the selected property meets all the federal requirements for a veterans' cemetery, the board shall enter into negotiations with the appropriate entities for the acquisition of property for the purpose of a veterans' cemetery."

Appropriation: Section 5, Ch. 451, L. 2003, provided: "There is appropriated $150,000 from the special revenue account provided for in 10-2-603 to the department of military affairs [board of veterans' affairs] for the purpose of completing the preapplication inspection and requirements as provided in [section 2(1)] [not codified]."

1999 Amendment: Chapter 51 at end substituted "Miles City" for "the location chosen pursuant to sections 1 through 6, Chapter 109, Laws of 1997". Amendment effective March 15, 1999.

1997 Amendment: Chapter 109 at end of first sentence substituted "cemeteries" for "cemetery"; at end of second sentence inserted clause concerning Ch. 109, L. 1997; and made minor changes in style. Amendment effective March 20, 1997.

Siting of Eastern Montana Veterans' Cemetery: Sections 1 through 6, Ch. 109, L. 1997, which were not codified, provided: **"Section 1. Legislative findings.** The legislature finds that Article II, section 35, of the Montana constitution states that the legislature may give Montana veterans special consideration. Accordingly, there are geographical requirements for veterans' cemeteries for proper interment. Therefore, it is necessary to provide guidelines for the siting and construction of an eastern Montana state veterans' cemetery." Section 1 effective July 1, 1997, and terminates June 30, 1999.

"Section 2. Request for proposals. (1) The board of veterans' affairs shall request that proposals for the siting of a new state veterans' cemetery be submitted to the board from town, city, county, and tribal governments in the counties enumerated in [section 4]. The request must:

(a) be made in the form of a request for proposals;

(b) specify 90 days from the date on which the requests for proposals are mailed as the date on which all proposals are to be received by the board; and

(c) contain the information required under subsection (2) and other information determined necessary by the board.

(2) The request for proposal must:

(a) require that information be submitted by a town, city, county, or tribal government as part of any proposal according to the requirements in 38 U.S.C. 2408, 38 CFR, part 39, and the most recent department of veterans affairs National Cemetery System Program Guide 40-1, state cemetery grants program;

(b) include the extent to which land is donated to the state for an eastern Montana state veterans' cemetery; and

(c) state the proximity to the veterans' affairs field offices and department of military affairs support facilities.

Section 3. Board to select site. (1) Proposals submitted in response to the request for proposals required by [section 2] must be evaluated by the board of veterans' affairs.

(2) Except as provided in subsection (3), the board must be compensated, reimbursed, and otherwise governed by the provisions of 2-15-122 regarding advisory councils.

(3) The board members must receive an honorarium of $50 for each day spent performing the duties required in [sections 2 through 6] that does not constitute a regular board meeting.

(4) The board shall meet as often as necessary to perform the duties assigned by [sections 2 through 6]. The board shall consider, evaluate, and select the location for the eastern Montana state veterans' cemetery according to the procedure and criteria provided for in [sections 2 through 6].

(5) The department of military affairs shall provide staff and budgetary, administrative, and clerical services to the board as the board or its presiding officer requests.

(6) The board must receive assistance and information, as requested, from the department of administration, architecture and engineering division, and other executive agencies that may have information relevant to siting and supporting a state veterans' cemetery.

(7) The board's site selection function terminates on the date of the announcement by the governor of the winning proposal, in accordance with [section 6].

Section 4. Site selection procedure and criteria. (1) The board of veterans' affairs may not consider a proposal unless the proposal:

(a) is submitted within the time required by the request for proposal;

(b) contains the criteria and additional information required by [section 2]; and

(c) is submitted by a town, city, county, or tribal government located in Big Horn, Carter, Custer, Daniels, Dawson, Fallon, Garfield, McCone, Musselshell, Petroleum, Phillips, Powder River, Prairie, Richland, Roosevelt, Rosebud, Sheridan, Treasure, Valley, Wibaux, or Yellowstone County.

(2) The board shall determine a maximum numeric value for each of the criteria required in [section 2] and the tie-breaker criteria described in [section 6(2)]. Criteria that the board determines to be of more relative importance must be awarded a greater maximum value. The board shall rate each proposal considered by it by using a weighted-scale process that assigns a numeric score for each criterion and then totals the score for each proposal. The score for each criterion and proposal must be determined by the extent to which each criterion is satisfied, based upon a documented demonstration.

Section 5. Site visitations and hearings required. The board of veterans' affairs shall determine the three proposals with the highest numeric scores. The board shall eliminate the other proposals from further consideration. As soon as possible after elimination of the other sites, the board shall conduct onsite reviews of the remaining candidate sites by both conducting an onsite tour of each of the candidate sites and holding a public hearing on the subject of the cemetery in the community where each proposed site is located. The purpose of the tour and hearing is to receive information concerning the extent to which each candidate site satisfies the criteria provided in [section 2]. The hearings must be conducted under procedures determined by the board, and the board shall give notice of each hearing by advertisement in a newspaper of general circulation in the county of each candidate site.

Section 6. Site selection. (1) After completing the onsite reviews required by [section 5], the board shall again score each of the candidate sites by applying the criteria and scoring method provided in [section 4].

(2) If two or more proposals receive the same total score, the board shall determine the leading proposal by scoring those proposals on the following criteria for the community in which the cemetery would be located:

(a) the extent to which land is donated to the state for an eastern Montana veterans' cemetery; and

(b) the proximity to the veterans' affairs division field offices and department of military affairs support facilities.

(3) The cemetery must be located at the proposed site that receives the highest numeric score using the procedure provided in this section. Upon selection of the winning proposal by the board, the board shall inform the governor of its selection. The board shall submit its selection to the governor no later than 250 days after [the effective date of this section]. The governor shall review the selection process to ensure that the board has not made an error in process or in fact. If the governor determines that an error has been made, the governor shall remand the recommendation to the board for further evaluation. The governor shall make a public announcement of the board's selection upon determining that no errors have been made." Sections 2 through 6 effective March 20, 1997, and terminate June 30, 1999.

10-2-602. Rulemaking authority.

Compiler's Comments

2003 Amendment: Chapter 491 in first sentence at beginning substituted "board" for "department of military affairs", inserted "to administer the state veterans' cemetery program and to", and substituted "who may be buried" for "which veterans may be buried"; inserted third sentence requiring rules to be adopted in accordance with Title 2, chapter 4; and made minor changes in style. Amendment effective January 1, 2004.

1997 Amendment: Chapter 109 near end of first sentence substituted "a veterans' cemetery" for "the veterans' cemetery". Amendment effective March 20, 1997.

Statement of Intent: The statement of intent attached to Ch. 734, L. 1985, provided: "This bill requires a statement of intent because section 2 [10-2-602] requires the department of military affairs to adopt rules establishing criteria for determining which veterans may be buried in the state veterans' cemetery.

The legislature contemplates that the rules should, at a minimum, address the following subjects:

(1) discharge status, i.e., dishonorable discharge, medical discharge, killed in line of duty, etc.;

(2) length of service; and

(3) such other factors as may be used as reasonable, objective criteria if burial space is severely limited in the state veterans' cemetery."

Administrative Rules

Title 34, chapter 5, subchapter 1, ARM Montana State Veterans' Cemetery.

Most Rules Not Published: The Department of Military Affairs and its component organizations adopt regulations, orders, and operating procedures that are not published in the Administrative Rules of Montana. Due to the exemptions contained in 2-3-102 and 2-4-102, such publication is not required except for the purposes of 10-1-121. Unpublished records and documents are available in accordance with Department policy and state and federal law and regulations.

10-2-603. Special revenue account — use of funds — solicitation.

Compiler's Comments

2003 Amendment: Chapter 491 in (1) substituted "board" for "department of military affairs"; in (2) inserted "to the cemetery program, and fund transfers pursuant to 15-1-122(3)(d)"; in (4) substituted "board shall" for "department of military affairs may"; and made minor changes in style. Amendment effective January 1, 2004.

2001 Amendment: Chapter 574 in (2) after "donations" deleted "and, as provided in 61-3-332, revenue from veterans' license plate sales"; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendment: Chapter 109 at end of (1), (3), and (4) substituted "cemeteries" for "cemetery". Amendment effective March 20, 1997.

Effective Date: Section 4, Ch. 159, L. 1993, provided: "[This act] is effective July 1, 1993."

10-2-604. Authority to exercise eminent domain for purposes of establishing veterans' cemetery.

Compiler's Comments

Coordination: Pursuant to sec. 7, Ch. 451, L. 2003, a coordination section, the code commissioner in the first sentence substituted "board of veterans' affairs" for "department of military affairs".

Effective Date: Section 8, Ch. 451, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 21, 2003.

CHAPTER 3
DISASTER AND EMERGENCY SERVICES

Chapter Attorney General's Opinions

Grasshopper Spraying Program — MEPA Exception: While an emergency situation is a legitimate exception to the requirements of the Montana Environmental Policy Act (MEPA), the Montana Department of Agriculture should in the future, comply with MEPA before participating in a grasshopper spraying program if the need for such a program is reasonably foreseeable. 42 A.G. Op. 62 (1988).

Indian Reservations: In an opinion issued before the 1977 amendment to 10-3-103, the Attorney General ruled that an Indian reservation, represented by a tribal council, is not a political subdivision of the state of Montana for purposes of receiving aid and assistance pursuant to the state civil defense law. 36 A.G. Op. 53 (1976).

Chapter Law Review Articles

Section 1033 Ruled Applicable on Destruction of Principal Residence and Subsequent Sale of Land; Mortgage Interest Remains Deductible During a Reasonable Period Until Reconstruction Complete, Friedrich, 24 J. Real. Est. Tax'n 326 (1997).

Helping Hands: Aid for Natural Disaster Homeless vs. Aid for 'Ordinary Homeless', Sar, 7 Stan. L. & Pol'y Rev. 129 (1995).

Lawyering Your Municipality Through a Natural Disaster or Emergency, Nowadzky, 27 Urb. Law. 9 (1995).

Federal and State Coordination of Disaster Relief: A Survey of Administrative Law Schemes, 46 Admin. L. Rev. 539 (1994).

Governmental Negligence Liability Exposure in Disaster Management, Lerner, 23 Urb. Law. 333 (1991).

Dealing With the Tax Consequences of a Natural Disaster, Baldwin, Plunkett, & Herring, 170 J. Acct. 50 (1990).

FEMA: Its Mission, Its Partners, Giuffrida, 45 Pub. Admin. Rev. 2 (1985).

Chapter Collateral References

53A Am. Jur. 2d Military and Civil Defense §§447 through 453.

Part 1
General Provisions and Administration

Part Compiler's Comments

Severability: Section 20, Ch. 335, L. 1977, was a severability section.

Part Collateral References

53A Am. Jur. 2d Military and Civil Defense §§14, 447 through 453.

10-3-101. Declaration of policy.

Compiler's Comments

1989 Amendment: Inserted (10) relating to payment of costs and hiring of personnel to provide assistance in cases of declared disasters; and made minor changes in phraseology.

1987 Amendment: Deleted former (3) that read: "(3) prepare for prompt and efficient search, rescue, recovery, care, and treatment of persons lost, entrapped, victimized, or threatened by emergencies or disasters".

Language From Model Act: The initial paragraph of this section parallels sec. 2, 1949 Model State Civil Defense Act, contained in the program for 1949 of Suggested State Legislation, Council of State Governments.

Collateral References

53A Am. Jur. 2d Military and Civil Defense §§14, 447.

10-3-102. Limitations.

Compiler's Comments

Section Not Codified: Section 77-2301.1, R.C.M. 1947, designating Ch. 335, L. 1977, as the "Montana Disaster Act of 1977" has not been codified. However, it has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 335, L. 1977.

10-3-103. Definitions.

Compiler's Comments

2003 Amendment: Chapter 391 in definition of disaster at end inserted "bioterrorism, or incidents involving weapons of mass destruction"; and made minor changes in style. Amendment effective April 17, 2003.

1995 Amendment: Chapter 176 inserted definition of incident; and made minor changes in style.

1987 Amendment: In definition of disaster and emergency services, after "means the", deleted "prevention of, the" and before "prepare for" substituted "mitigate" for "prevent"; and deleted former (9) that read: "(9) "Search and rescue" means the employment, coordination, and utilization of available resources and personnel in locating, relieving distress of, preserving life of, or removing survivors from the site of a hazard, emergency, or disaster to a place of safety in case of lost, stranded, entrapped, or injured persons."

1983 Amendment: In definition of disaster added "disruption of state services".

Attorney General's Opinions

"Political Subdivision" to Exclude Indian Reservation: An Indian reservation, represented by a tribal council, is not a political subdivision of the State of Montana for purposes of receiving aid and assistance pursuant to state civil defense law. 36 A.G. Op. 53 (1976).

10-3-104. General authority of governor.

Compiler's Comments

1995 Amendment: Chapter 176 in (2)(c) inserted "incident or"; and made minor changes in style.

Attorney General's Opinions

School Transportation Not Reimbursable During Emergency: The authority of the Governor under this section to suspend the provisions of a regulatory statute during an emergency is discretionary. Therefore, when nothing in the Governor's executive order declaring a state of emergency specifically mentioned reimbursement for school transportation under 20-10-145, the state was not required to reimburse the costs for school bus transportation for districts closed in accordance with the declaration of emergency. 43 A.G. Op. 29 (1989).

Collateral References

53A Am. Jur. 2d Military and Civil Defense §§31, 450.

10-3-105. Division of disaster and emergency services — duties.

Compiler's Comments

1995 Amendment: Chapter 176 in (4)(i), in two places, and in (4)(l) inserted references to an incident or incidents; and made minor changes in style.

1983 Amendment: In (4), deleted: "(h) determine the requirements of the state and its political subdivisions for food, clothing, and other necessities in the event of an emergency or disaster;

(i) plan for the procurement of food, clothing, other necessities, supplies, medicines, materials, and equipment that may be necessary in the event of an emergency or disaster and, as funding is authorized, procure and pre-position the same;".

Attorney General's Opinions

Designation of Fire Service Organization as First Responder to Hazardous Materials Incident: The designation of a fire service organization as first responder to a hazardous materials incident is a matter to be included in the state and local disaster and emergency plans. 42 A.G. Op. 104 (1988).

"Political Subdivision" to Exclude Indian Reservation: An Indian reservation, represented by a tribal council, is not a political subdivision of the State of Montana for purposes of receiving aid and assistance pursuant to state civil defense law. 36 A.G. Op. 53 (1976).

10-3-106. Communications.

Compiler's Comments

2001 Amendment: Chapter 313 in (2) deleted reference to the division of communications; in (3) substituted "department of administration" for "division of communications"; in (4) at end substituted "statewide telecommunications network" for "state telecommunications system or network"; and made minor changes in style. Amendment effective July 1, 2001.

10-3-107. National defense highway plans.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1983 Amendment: Renumbered former (a), referring to cooperation to make and execute plans for troop, vehicle, and materials movement over highways, as (1) and (b), referring to coordination of activities of Departments of Highways and Justice, as (2); at end deleted: "as referred to in subsection (1) of this section;

(c) solicit the cooperation of officials of the various political subdivisions of the state in the proper execution of these plans;

(d) have the authority to take an inventory, by counties, of the trucks and buses in the state, publicly and privately owned, which would be available in case of emergency affecting the national defense.

(2) The department of military affairs may, in conjunction with any interested public or private agencies, conduct a highway safety and driver training program as an aid to the national defense."; and inserted (3) referring to cooperation of officials of political subdivisions.

10-3-111. Personnel immune from liability.

Compiler's Comments

1999 Amendment: Chapter 520 at end of (2) in two places inserted reference to part 12; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 176 in first sentence of (1) and in (2) inserted "incident" and substituted "emergency" for "catastrophe"; and made minor changes in style.

Section Purportedly Repealed: Section 15, Ch. 49, L. 1977, purported to repeal section 77-2308, R.C.M. 1947. However, the Code Commissioner has determined that the section, as reenacted and amended by Ch. 73, L. 1977, should appear in the MCA.

Language From Model Act: The language of this section parallels that of sec. 10, 1949 Model State Civil Defense Act, contained in the program for 1949 of Suggested State Legislation, Council of State Governments.

Law Review Articles

Governmental Negligence Liability Exposure in Disaster Management, Lerner, 23 Urb. Law. 333 (1991).

Tortfeasor Liability for Disaster Response Costs: Accounting for the True Cost of Accidents, McIntyre, 55 Fordham L. Rev. (1987).

Collateral References

53A Am. Jur. 2d Military and Civil Defense §451.

Official immunity of state national guard members. 52 ALR 4th 1095.

10-3-112. Employment requirements for personnel — political involvement of organizations prohibited.

Compiler's Comments

Language From Model Act: The language of this section parallels that of sec. 14, 1949 Model State Civil Defense Act, contained in the program for 1949 of Suggested State Legislation, Council of State Governments.

Collateral References

53A Am. Jur. 2d Military and Civil Defense §452.

Part 2
Intergovernmental Cooperation

Part Compiler's Comments

Text From Model Act: The text of the Interstate Civil Defense and Disaster Compact (repealed in 1985) was developed by the Northeastern Interstate Committee on Civil Defense of the Council of State Governments, with the assistance and cooperation of the Civil Defense Office of the National Security Resources Board, and appears in the program for 1953 of Suggested State Legislation, pp. 25 through 27, Council of State Governments, with amendments appearing in Vol. XXXIII, Suggested State Legislation, pp. 237 and 238 (1974).

Severability: Section 20, Ch. 335, L. 1977, was a severability section.

Part Law Review Articles

Lawyering Your Municipality Through a Natural Disaster or Emergency. (Symposium: Coping With Chaos—Disaster Planning), Nowadzky, 27 Urb. Law. 9 (1995).

10-3-201. Local and interjurisdictional emergency and disaster agencies and services.

Attorney General's Opinions

County Commissioner and County Coordinator of Disaster and Emergency Services Incompatible — Positions Not to Be Held Simultaneously: The Board of County Commissioners has the power of supervision, revision, and removal over the position of county coordinator of disaster and emergency services. Therefore, under the common-law doctrine of incompatible public offices, the office of County Commissioner and the position of county coordinator of disaster and emergency services are incompatible and one person may not hold both jobs simultaneously. 46 A.G. Op. 26 (1996).

10-3-202. Mutual aid — cooperation.

Compiler's Comments

1997 Amendment: Chapter 46 in (1), at beginning after "subdivisions", inserted "fire districts, fire service areas, and fire companies in unincorporated places" and near end, before "emergencies", inserted "incidents"; and made minor changes in style.

10-3-203. Acceptance of services, gifts, grants, and loans.

Compiler's Comments

2003 Amendment: Chapter 426 in (1) near middle of first sentence after "grant" inserted "reimbursement of mutual aid"; in (2) at end after "subsection (1)" inserted "or to the department of natural resources and conservation for fire suppression purposes or costs"; and made minor changes in style. Amendment effective July 1, 2003.

1999 Amendment: Chapter 389 in (1) near beginning after "officer of the federal government" deleted "or any person, firm, or corporation"; and made minor changes in style. Amendment effective July 1, 1999.

1985 Amendment: Inserted (2) creating statutory appropriation.

Language From Model Act: The language of this section (prior to 1985 amendment) parallels that of sec. 11(b), 1949 Model State Civil Defense Act, contained in the program for 1949 of Suggested State Legislation, Council of State Governments.

Collateral References

53A Am. Jur. 2d Military and Civil Defense §447.

10-3-204. Intergovernmental arrangements.

Compiler's Comments

1985 Amendment: In (1), (3), and (4) substituted reference to interstate mutual aid compact for interstate civil defense and disaster compact; at end of (1) substituted reference to 10-3-207 for 10-3-206; and near beginning of (2) after "with any state", deleted "that does not border this state".

Collateral References

81A C.J.S. States §31.

72 Am. Jur. 2d States §5.

10-3-205. Authority to join interstate mutual aid compact — supplemental agreements.

Compiler's Comments

1985 Amendment: In (1) and (2) substituted reference to interstate mutual aid compact for interstate civil defense and disaster compact; at end of (1) deleted "as developed by the civil defense office of the national security and resources board and the council of state governments"; and at end of (2) substituted reference to 10-3-207 for 10-3-206.

Collateral References

81A C.J.S. States §31.

72 Am. Jur. 2d States §5.

10-3-207. Text of compact.

Compiler's Comments

1997 Amendment: Chapter 42 in Article II, in second sentence after "50 U.S.C. 2281(g) and 2283", inserted "(now repealed)". Amendment effective March 12, 1997.

10-3-208. Rulemaking authority.

Compiler's Comments

Statement of Intent: The statement of intent attached to Ch. 228, L. 1985, provided: "It is the intent of this bill to allow the governor to enter into interstate mutual aid agreements with other states for the purposes of:

(1) providing state resources such as manpower, equipment, and material; and

(2) coordinating the provision of volunteer resources to assist other states in response and recovery activities relating to earthquakes, floods, and other disasters.

The governor shall enter these agreements and shall provide for their implementation, including the appointment of contact persons within this state and establishment of a contact procedure with participating states.

Although the governor is charged with implementation of this bill, he may delegate authority to the department of military affairs or other appropriate agency for day-to-day administration of the compact."

Administrative Rules

Most Rules Not Published: The Department of Military Affairs and its component organizations adopt regulations, orders, and operating procedures that are not published in the Administrative Rules of Montana. Due to the exemptions contained in 2-3-102 and 2-4-102, such publication is not required except for the purposes of 10-1-121. Unpublished records and documents are available in accordance with Department policy and state and federal law and regulations.

Part 3
State Planning and Execution

Part Compiler's Comments

Severability: Section 20, Ch. 335, L. 1977, was a severability section.

Part Law Review Articles

Symposium: Coping With Chaos—Disaster Planning, Fleming, 27 Urb. Law. 3 (1995).

10-3-301. State disaster and emergency plan.

Compiler's Comments

1995 Amendment: Chapter 176 in (1)(b) inserted "incident"; and made minor changes in style.

1983 Amendment: In (2), substituted "the division may seek the advice" for "the division shall seek the advice"; and substituted "the division may encourage" for "the division shall encourage".

10-3-302. Declaration of emergency — effect and termination.

Collateral References

53A Am. Jur. 2d Military and Civil Defense §§449, 450.

10-3-305. Governor commander-in-chief — duties.

Compiler's Comments

1995 Amendment: Chapter 176 in (1) inserted two references to an incident; and made minor changes in style.

Collateral References

57 C.J.S. Militia §21.

53A Am. Jur. 2d Military and Civil Defense §450.

10-3-311. Emergency or disaster expenditures — restrictions.

Compiler's Comments

1987 Amendment: Inserted (2) prohibiting payments for flood-related damages to political subdivisions that have been sanctioned under national flood insurance programs.

1985 Amendment: At end of (3) after "department", deleted "of administration".

Statement of Intent: The statement of intent attached to Ch. 111, L. 1985, provided: "A statement of intent is required for this bill because it transfers rulemaking authority from the department of administration to the department of military affairs. It is the intent of the legislature that in developing rules under this act, the department of military affairs look to the rules of the department of administration under 10-3-311, MCA, so that affected political

jurisdictions are assured of some continuity in the administration of disaster and emergency relief."

1983 Amendment: In middle of first paragraph of (1), substituted "to meet contingencies and needs arising from an emergency or disaster, as defined in 10-3-103, which results in damage to the works, buildings" for "to meet contingencies and emergencies arising from hostile attacks, riots or insurrections, epidemics of disease, plagues of insects, fires, floods, or other acts of God resulting in damage or disaster to the works, buildings".

1981 Amendment: Inserted "in the affected fund" in (1)(b).

Severability: Section 20, Ch. 577, L. 1977, was a severability section.

Temporary Law: The term "energy emergencies" was added to this section by sec. 19, Ch. 577, L. 1977, and was terminated by sec. 21, Ch. 577, L. 1977, on March 1, 1979. Similar language was inserted into sec. 18, Ch. 473, L. 1979, now codified as 90-4-318.

Administrative Rules

Title 34, chapter 3, ARM Emergency and disaster relief.

Title 34, chapter 3, subchapter 1, ARM Emergency and disaster relief.

Title 34, chapter 3, subchapter 2, ARM State participation in federal assistance programs.

Most Rules Not Published: The Department of Military Affairs and its component organizations adopt regulations, orders, and operating procedures that are not published in the Administrative Rules of Montana. Due to the exemptions contained in 2-3-102 and 2-4-102, such publication is not required except for the purposes of 10-1-121. Unpublished records and documents are available in accordance with Department policy and state and federal law and regulations.

Attorney General's Opinions

Budget Amendment Process Inapplicable — Obligation to Pay Firefighting Expenses: Authority of the Governor to "incur" expenses under this section is distinct from the statutory appropriation found in 10-3-312. Although the budget amendment process is inapplicable to a request by the Department of State Lands (now Department of Natural Resources) to pay the costs associated with the suppression of forest fires, the Legislature may be bound by this section to appropriate money from the general fund to cover valid firefighting expenses. 42 A.G. Op. 123 (1988).

Funding When National Guard Called to Active Duty in Emergency: Expenses incurred in the mobilization of the Montana National Guard when the Guard is mobilized pursuant to a declaration of emergency under 10-3-311 are funded through 10-3-312. 39 A.G. Op. 33 (1981).

Collateral References

81A C.J.S. States §§204 through 207.

53A Am. Jur. 2d Military and Civil Defense §449.

10-3-312. Maximum expenditure by governor — appropriation.

Compiler's Comments

2003 Amendment: Chapter 426 in (1) near middle of first sentence increased maximum emergency appropriation from $12 million to $16 million. Amendment effective July 1, 2003.

2001 Amendment: Chapter 569 in (1) near middle of first sentence after "17-7-502, and" inserted "subject to subsection (2)" and inserted second sentence allowing the statutory appropriation to address a state-declared emergency to be used by any designated state agency; in (3) inserted second sentence allowing the statutory appropriation to address a federally declared emergency to be used by any designated state agency; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 55 near end of (1) substituted "exceed $12 million" for "exceed $2 million"; deleted former (1)(b) that read: "(b) Whenever an emergency or disaster due to fire is declared by the governor, there is statutorily appropriated to the office of the governor, as provided in 17-7-502, and the governor is authorized to expend from the general fund, an amount not to exceed $10 million in any biennium. The amount appropriated in this subsection (b) may be combined with the amount appropriated in subsection (1)(a) for an emergency or disaster due to fire"; and made minor changes in style. Amendment effective March 15, 1999.

1997 Amendment Not Codified: Chapter 422 in (1)(a), near end, increased amount to $4 million from $2 million; and in (1)(b), after "fire" in two places, inserted "or flood". Amendment effective April 29, 1997, and terminated July 1, 1997, pursuant to sec. 68(3), Ch. 422, L. 1997.

1995 Amendments: Chapter 176 in (1)(a), at end, inserted "minus any amount appropriated pursuant to 10-3-310 in the same biennium"; and made minor changes in style.

Chapter 401 in (1)(b) increased amount from $3 million to $10 million; and made minor changes in style. Amendment effective April 13, 1995.

1992 Special Session Amendment: Chapter 12, Sp. L. July 1992, inserted (1)(b) to statutorily appropriate up to $3 million per biennium to the Governor's Office for a declared emergency or disaster due to fire; and made minor changes in style. Amendment effective August 6, 1992.

1991 Amendment: In (1) inserted second sentence regarding reinstatement of spending authority when money is recovered.

1989 Amendment: At end of (1) increased from $1 million to $2 million the amount authorized for expenditure from the general fund; and inserted (2) relating to appropriation of $500,000 if a disaster is declared by the U.S. President.

1985 Amendment: Substituted language referring to statutory appropriation of emergency money to the Governor's office for "Whenever an emergency or disaster is declared by the governor, he is authorized to expend from the general fund not to exceed $1 million in any one biennium".

1983 Amendment: Increased maximum authorized expenditure from $750,000 to $1 million.

Attorney General's Opinions

Governor's Declaration Required — Expenditure of Other Funds: A disaster or emergency must be declared by the Governor before expenses may be incurred under this section. If a disaster is declared by the Governor, the statutory appropriation provided for in this section need not be expended before any other funds may be used for expenses associated with the disaster. 42 A.G. Op. 123 (1988).

Funding When National Guard Called to Active Duty in Emergency: Expenses incurred in the mobilization of the Montana National Guard when the Guard is mobilized pursuant to a declaration of emergency under 10-3-311 are funded through 10-3-312. 39 A.G. Op. 33 (1981).

10-3-313. Temporary housing for disaster victims — site acquisition and preparation.

Compiler's Comments

Language Similar to Model Act: The language of this section is similar to legislation contained in Vol. XXXV, Suggested State Legislation, p. 132, Council of State Governments (1976).

Law Review Articles

Helping Hands: Aid for Natural Disaster Homeless vs. Aid for Ordinary Homeless, Sar, 7 Stan. L. & Pol'y Rev. 129 (1995).

10-3-314. Community disaster loans.

Compiler's Comments

1985 Amendment: Substituted last sentence of (1) referring to statutory appropriation for "and to receive and disburse the proceeds of any approved loan to any applicant political subdivision".

10-3-315. Debris and wreckage removal in emergencies or disasters.

Compiler's Comments

Language Similar to Model Act: The language of this section is similar to legislation contained in Vol XXXV, Suggested State Legislation, p. 136, Council of State Governments (1976).

Collateral References

53A Am. Jur. 2d Military and Civil Defense §451.

Part 4
Local and Interjurisdictional Planning and Execution

Part Compiler's Comments

Severability: Section 20, Ch. 335, L. 1977, was a severability section.

10-3-401. Local and interjurisdictional disaster and emergency plan — distribution.

Compiler's Comments

1987 Amendment: Inserted (2)(c) referring to local evacuation authority and responsibility; and inserted (2)(d) referring to local authority over ingress and egress to emergency or disaster area.

1983 Amendment: At beginning of (1), substituted "Each political subdivision eligible to receive funds under this chapter shall prepare a local" for "Each local and interjurisdictional agency shall prepare and keep current a local"; near end of (1) substituted "political subdivision" for "agency"; at beginning of (2) substituted "The political subdivision" for "The local or interjurisdictional agency"; and in (2)(a) inserted "if any" after "the emergency responsibilities of all local agencies".

Attorney General's Opinions

Designation of Fire Service Organization as First Responder to Hazardous Materials Incident: The designation of a fire service organization as first responder to a hazardous materials incident is a matter to be included in the state and local disaster and emergency plans. 42 A.G. Op. 104 (1988).

10-3-402. Local emergency — declaration and termination.

Compiler's Comments

1989 Amendment: Deleted former (3) that read: "(3) An emergency proclamation may not continue for longer than 10 days except by consent of the governing body of the political subdivision."

10-3-403. Local disaster — declaration and termination.

Compiler's Comments

1989 Amendment: Deleted former (2) that read: "(2) A disaster declaration may not continue for longer than 30 days except by consent of the governing body of the political subdivision."

10-3-404. Contents of order — effect.

Compiler's Comments

1983 Amendment: Near end of (1), deleted ", the local or interjurisdictional agency," after "and shall be filed promptly with the division".

10-3-405. Levying emergency tax — disposition of surplus.

Compiler's Comments

1981 Amendment: Substituted "governing body of the" throughout (1) for specific references to "city council" and "board of county commissioners"; and made minor changes in phraseology.

Collateral References

53A Am. Jur. 2d Military and Civil Defense §449.

10-3-406. Authority of principal executive officer.

Compiler's Comments

1989 Amendment: In Introductory clause, before "principal", inserted "Upon the declaration of an emergency or disaster under 10-3-402 or 10-3-403 and the issuance of an order as required by 10-3-404" and after "officer" substituted "may" for "shall".

Part 5
Emergency Resource Management

Part Compiler's Comments

Language From Model Act: The language of this part parallels that contained in Vol. XXV, Suggested State Legislation, pp. 36 through 41, Council of State Governments (1966).

10-3-501. Policy of state.

Compiler's Comments

1997 Amendment: Chapter 42 in (1), in three places, substituted "enemy attack" for "attack"; and made minor changes in style. Amendment effective March 12, 1997.

Collateral References

53A Am. Jur. 2d Military and Civil Defense §448.

10-3-503. Governor's powers and duties.

Collateral References

53A Am. Jur. 2d Military and Civil Defense §§448, 449.

10-3-504. Emergency resource management plan.

Compiler's Comments

1997 Amendment: Chapter 42 near end of third sentence, before "plan", inserted "emergency resources management"; and made minor changes in style. Amendment effective March 12, 1997.

10-3-505. Proclamation of emergency — effect and termination.

Compiler's Comments

Repealing Clause: Section 15, Ch. 49, L. 1977, read: "Section 77-2308, R.C.M. 1947, is repealed."

10-3-507. Penalty for violation of rules.

Collateral References

53A Am. Jur. 2d Military and Civil Defense §450.

Part 6
Continuity of Government

10-3-601. Citation of part.

Compiler's Comments

1983 Amendment: Deleted "Post-Enemy Attack" before "Continuity in Government Act".

10-3-602. Filling vacancy in governorship.

Collateral References

81A C.J.S. States §§88, 89.

10-3-607. Relocating seat of state government.

Compiler's Comments

1983 Amendment: At beginning, deleted "Following an enemy attack in which" and inserted "If"; near beginning substituted "is rendered unsuitable" for "has been rendered unsuitable".

Section Not Codified: Section 82-1310, R.C.M. 1947, providing that the Governor may move the seat of Montana state government in the event of enemy attack has not been codified, as it is redundant with this section. However, section 82-1310, R.C.M. 1947, has not been repealed and is still valid law. Citation may be made to sec. 2, Ch. 148, L. 1959.

Collateral References

States *key* 22.

81A C.J.S. States §38.

Part 7
Tactical Incident Assistance

10-3-701. Short title.

Compiler's Comments

Severability: Section 7, Ch. 455, L. 1989, was a severability clause.

Effective Date: Section 8, Ch. 455, L. 1989, provided that this section is effective July 1, 1989.

10-3-702. Definitions.

Compiler's Comments

Severability: Section 7, Ch. 455, L. 1989, was a severability clause.

Effective Date: Section 8, Ch. 455, L. 1989, provided that this section is effective July 1, 1989.

10-3-703. Tactical team aiding another jurisdiction.

Compiler's Comments

Severability: Section 7, Ch. 455, L. 1989, was a severability clause.

Effective Date: Section 8, Ch. 455, L. 1989, provided that this section is effective July 1, 1989.

10-3-704. Local agency to contact national guard.

Compiler's Comments

Severability: Section 7, Ch. 455, L. 1989, was a severability clause.

Effective Date: Section 8, Ch. 455, L. 1989, provided that this section is effective July 1, 1989.

10-3-705. Tactical incident — national guard assistance.

Compiler's Comments

Severability: Section 7, Ch. 455, L. 1989, was a severability clause.

Effective Date: Section 8, Ch. 455, L. 1989, provided that this section is effective July 1, 1989.

Part 8
Search and Rescue

10-3-801. Account created for funding search and rescue operations — rules.

Compiler's Comments

Effective Date: Section 10(1), Ch. 534, L. 2003, provided that this section is effective January 1, 2004.

Part 10
Emergency Management Assistance Compact

Part Compiler's Comments

Effective Date: Section 6, Ch. 175, L. 1999, provided: "[This act] is effective on passage and approval." Approved March 25, 1999.

Part 11
Interstate Emergency Services

Part Compiler's Comments

Effective Date: Section 13, Ch. 5, L. 1989, provided that this part is effective February 4, 1989.

Part 12
Response to Hazardous Material Incidents

Part Compiler's Comments

Severability: Section 18, Ch. 270, L. 1995, was a severability clause.

Effective Date: Section 19, Ch. 270, L. 1995, provided that this part is effective on passage and approval. Approved March 28, 1995.

10-3-1203. Definitions.

Compiler's Comments

1999 Amendment: Chapter 520 inserted definition of incident commander; in definition of local emergency response authority substituted "agency" for "person or persons"; and made minor changes in style. Amendment effective October 1, 1999.

10-3-1204. State emergency response commission.

Compiler's Comments

2003 Amendment: Chapter 37 in (1) in second sentence increased the number of commission members from 19 to 27 and in third sentence after "air force" deleted "state and local fire organizations, state and local emergency medical responders, state and local law enforcement agencies, local emergency planning committees, a Montana utility company, and a railroad company doing business in the state", after "department of justice" deleted "department of fish, wildlife, and parks", inserted "the department of natural resources and conservation, the department of public health and human services, a fire service association, the fire training school, the emergency medical services and injury prevention section of the health policy and services division in the department of public health and human services, the department of fish, wildlife, and parks, Montana hospitals, an emergency medical services association, a law enforcement association, an emergency management association, a public health-related association, a trucking association, a utility company doing business in Montana, a railroad company doing business in Montana, the university system, a local emergency planning committee, a tribal emergency response commission, the national weather service, the Montana association of counties, the Montana league of cities and towns", and at end after "governor" deleted "and any other representatives that the governor appoints"; inserted (13) describing the duties of the commission acting as an all-hazard advisory board; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 45 in (1) in second sentence reduced number of appointed members from 20 to 19, in third sentence near middle substituted representative from department of environmental quality for representative from department of public health and human services and deleted representative from department of administration, inserted fourth sentence establishing 4-year terms and allowing reappointment, and in sixth sentence substituted requirement for two copresiding officers for former requirement for one presiding officer; and made minor changes in style. Amendment effective October 1, 1999.

Applicability: Section 2, Ch. 45, L. 1999, provided: "[Section 1] [amending 10-3-1204] applies to members of the state emergency response commission who are members on October 1, 1999."

Code Commissioner Change: Pursuant to sec. 3, Ch. 546, L. 1995, the Code Commissioner substituted Department of Public Health and Human Services for Department of Health and Environmental Sciences.

10-3-1211. Notification of release.

Compiler's Comments

Code Commissioner Change: Pursuant to sec. 568, Ch. 546, L. 1995, the Code Commissioner substituted Department of Environmental Quality for Department of Health and Environmental Sciences.

10-3-1216. Cost recovery and civil remedies.

Compiler's Comments

1999 Amendment: Chapter 520 in (6) after "team" inserted "and the local emergency response authority"; and made minor changes in style. Amendment effective October 1, 1999.

10-3-1217. Liability of persons and response team members rendering assistance.

Compiler's Comments

2003 Amendment: Chapter 517 inserted (1)(e) relating to private emergency response team dispatched by governmental entity for emergency response activities; in (1)(f) after "gross negligence" deleted "bad faith"; and made minor changes in style. Amendment effective April 25, 2003.

1999 Amendment: Chapter 520 in first sentence at beginning inserted "The state or a political subdivision of the state", after "commission" inserted "the local emergency response authority", after "team" inserted "or, except for willful misconduct, gross negligence, or bad faith, an employee, representative, or agent of the state or a political subdivision of the state, the commission, the local emergency response authority, and the state hazardous material incident response team", and near end after "release" inserted "or remedial action resulting from the release or threatened release"; in third sentence after "contacted" inserted "dispatched, or requested"; and made minor changes in style. Amendment effective October 1, 1999.

Part 13
Montana High-Level Radioactive Waste and Transuranic Waste Transportation Act

Part Compiler's Comments

Severability: Section 12, Ch. 560, L. 2003, was a severability clause.

Effective Date: Section 13, Ch. 560, L. 2003, provided that this part is effective January 1, 2004.

CHAPTER 4
STATE EMERGENCY TELEPHONE SYSTEM

Chapter Administrative Rules

Title 2, chapter 13, subchapter 2, ARM Statewide emergency telephone system.

Chapter Law Review Articles

"911" Emergency Assistance Calls Systems: Should Local Governments Be Liable for Negligent Failure to Respond?, Belongia, 8 Geo. Mason U.L. Rev. 103 (1985).

Negligent 911 Goof-Up Proves Costly in New York, Ashman, 69 A.B.A.J. 354(2) (March 1983).

Part 1
Emergency Telephone System Plans

Part Case Notes

Agency Not Required to Provide Free Dispatch Services: This part provides the requirements of an emergency telephone system when set up by a public or private safety agency and includes provisions enabling agencies with common boundaries to make agreements that would provide emergency service. However, nothing in the law requires an agency to provide free dispatch service to another entity that shares a common boundary. Cut Bank v. Glacier County, 270 M 355, 891 P2d 1174, 52 St. Rep. 228 (1995).

Part Collateral References

Admissibility of tape recording or transcript of "911" emergency telephone call. 3 ALR 5th 784.

Liability for failure of police response to emergency call. 39 ALR 4th 691.

10-4-101. Definitions.

Compiler's Comments

1997 Amendments: Chapter 42 substituted direct dispatch, relay, and transfer for the defined terms direct dispatch method, relay method, and transfer method; deleted former definition of local government that read: ""Local government" means any city, county, or political subdivision of the state and its agencies"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 448 substituted definition of basic 9-1-1 account for definition of account that read: ""Account means the 9-1-1 emergency telecommunications account established in 10-4-301"; inserted definitions of basic 9-1-1 service, basic 9-1-1 system, enhanced 9-1-1 account, enhanced 9-1-1 service, and enhanced 9-1-1 system; deleted definition of minimum 9-1-1 service that read: ""Minimum 9-1-1 service" means a telephone service meeting the standards established in 10-4-102 that automatically connects a person dialing the digits 9-1-1 to an established public safety answering point. "Minimum 9-1-1 services" includes equipment for connecting and outswitching 9-1-1 calls within a telephone central office, trunking facilities from the central office to a public safety answering point, and equipment, as appropriate, for transferring the call to another point, when appropriate"; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

1987 Amendment: In (6)(b) changed reference from (7)(a) to (6)(a).

Administrative Rules

ARM 2.13.202 Definitions.

10-4-102. Department of administration duties and powers.

Compiler's Comments

1997 Amendment: Chapter 448 in (1) substituted "development of basic and enhanced 9-1-1 systems" for "development of 9-1-1 systems"; in (1)(a) substituted "from basic or enhanced 9-1-1 service" for "from minimum 9-1-1 service"; in (1)(b) substituted "planning a basic or enhanced 9-1-1 system" for "planning an emergency 9-1-1 telephone system"; in (1)(c) substituted "evaluating basic and enhanced 9-1-1 system plans" for "evaluating plans"; in (1)(d) substituted "approved basic and enhanced 9-1-1 system plans" for "approved plans"; and at end of (1)(e) substituted "statewide basic and enhanced 9-1-1 systems" for "a statewide emergency telephone system". Amendment effective July 1, 1997.

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

1993 Amendment: Chapter 349 at beginning of (1)(e) substituted "as it finds necessary" for "as provided in 5-11-210".

1991 Amendment: At beginning of (1)(e) inserted reference to 5-11-210 and after "report" deleted "biennially". Amendment effective March 20, 1991.

Statement of Intent: The statement of intent attached to Ch. 635, L. 1985, provided: "A statement of intent is required for this act because it delegates rulemaking to the department of administration and the department of revenue. It is the intent of the legislature that the department of administration solicit the advice of emergency service providers and the advisory council created by section 3 [10-4-102] in developing rules for requirements of systems and criteria for approving or disapproving plans.

Rules adopted by the department of revenue must provide for forms for returns and requests for refunds that are not burdensome to providers. The rules must also provide recordkeeping requirements for service providers and dates when returns must be made. The department shall also prescribe standards by which it will determine whether a refund is payable."

Administrative Rules

Title 2, chapter 13, subchapter 1, ARM Regulation of communications facilities.

Title 2, chapter 13, subchapter 2, ARM Statewide emergency telephone system.

10-4-103. Emergency telephone system requirements.

Compiler's Comments

1997 Amendment: Chapter 448 in (1) substituted "a basic or enhanced 9-1-1 system" for "an emergency telephone system"; in (2) substituted "A basic 9-1-1 system" for "An emergency telephone system"; inserted (3) establishing requirements for enhanced 9-1-1 system; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

Administrative Rules

ARM 2.13.203 Department of Administration duties and powers.

Case Notes

Agency Not Required to Provide Free Dispatch Services: Title 10, ch. 4, part 1, provides the requirements of an emergency telephone system when set up by a public or private safety agency and includes provisions enabling agencies with common boundaries to make agreements that would provide emergency service. However, nothing in the law requires an agency to provide free dispatch service to another entity that shares a common boundary. Cut Bank v. Glacier County, 270 M 355, 891 P2d 1174, 52 St. Rep. 228 (1995).

10-4-104. Agreements among safety agencies for rendering emergency services.

Administrative Rules

ARM 2.13.203 Department of Administration duties and powers.

ARM 2.13.204 Participation by public and private safety agencies.

10-4-111. Submission of preliminary plans for 9-1-1 jurisdictions — review — cost estimates.

Compiler's Comments

1997 Amendment: Chapter 448 in (1) substituted "a basic or enhanced 9-1-1 system" for "an emergency telephone system". Amendment effective July 1, 1997.

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

10-4-112. Submission and approval of final plans — exception.

Compiler's Comments

1997 Amendment: Chapter 448 in (1) substituted "establishing a basic or enhanced 9-1-1 system" for "establishing an emergency telephone system"; and in (2) substituted "proposed

basic or enhanced 9-1-1 system" for "proposed emergency 9-1-1 telephone system". Amendment effective July 1, 1997.

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

10-4-113. Requirement for approval of final plan — department to insure compliance.

Compiler's Comments

1997 Amendment: Chapter 448 substituted "final plan for basic or enhanced 9-1-1 service within a 9-1-1 jurisdiction" for "final plan of a 9-1-1 jurisdiction". Amendment effective July 1, 1997.

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

Administrative Rules

ARM 2.13.204 Participation by public and private safety agencies.

10-4-114. Rulemaking authority.

Compiler's Comments

Effective Date: Section 3, Ch. 184, L. 2003, provided: "[This act] is effective on passage and approval." Approved March 31, 2003.

10-4-121. Pay phones to be converted to allow emergency calls without charge.

Administrative Rules

ARM 2.13.205 Distribution of emergency telecommunications account.

10-4-125. Submission of revised plan for conversion from basic 9-1-1 to enhanced 9-1-1.

Compiler's Comments

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

Effective Date: Section 18, Ch. 448, L. 1997, provided: "(1) Except as provided in subsection (2), [this act] is effective July 1, 1997.

(2) [Section 7 [10-4-125] and this section] are effective on passage and approval." Approved April 30, 1997.

10-4-126. Dedicated 9-1-1 telephone facilities to be provided — capabilities.

Compiler's Comments

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

Effective Date: Section 18, Ch. 448, L. 1997, provided that this section is effective July 1, 1997.

Part 2
Funding

Part Administrative Rules

Title 42, chapter 31, subchapter 4, ARM Emergency telephone service.

10-4-201. Fees imposed for telephone exchange access services.

Compiler's Comments

1997 Amendment: Chapter 448 throughout section changed "fee" to "fees"; in (1)(a), at beginning, inserted "for basic 9-1-1 services" and at end inserted "services, wireless telephone service, or other 9-1-1 accessible"; inserted (1)(b) establishing fee for enhanced 9-1-1 services; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

Administrative Rules

ARM 42.31.401 Reporting requirements.

10-4-202. Exemptions from fees imposed.

Compiler's Comments

1997 Amendment: Chapter 448 in introduction changed "fee" to "fees"; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

Administrative Rules

ARM 42.31.401 Reporting requirements.

ARM 42.31.405 Exemptions.

10-4-203. Provider required to maintain record of collections.

Compiler's Comments

Statement of Intent: The statement of intent attached to Ch. 635, L. 1985, provided: "A statement of intent is required for this act because it delegates rulemaking to the department of administration and the department of revenue. It is the intent of the legislature that the department of administration solicit the advice of emergency service providers and the advisory council created by section 3 [10-4-102] in developing rules for requirements of systems and criteria for approving or disapproving plans.

Rules adopted by the department of revenue must provide for forms for returns and requests for refunds that are not burdensome to providers. The rules must also provide recordkeeping requirements for service providers and dates when returns must be made. The department shall also prescribe standards by which it will determine whether a refund is payable."

Administrative Rules

Title 42, chapter 31, subchapter 4, ARM Emergency telephone service.

10-4-204. Deadlines for filing returns.

Administrative Rules

ARM 42.31.401 Reporting requirements.

10-4-205. Refund to provider for excess payment of fee.

Compiler's Comments

1993 Amendment: Chapter 229 in last sentence increased time for claiming refund from 2 years to 5 years; and made minor changes in style.

Administrative Rules

ARM 42.31.401 Reporting requirements.

ARM 42.31.402 Refund procedures.

10-4-206. Credit for overpayment — interest on overpayment.

Compiler's Comments

Applicability: Section 20, Ch. 676, L. 1991, provided: "[This act] applies to all returns or statements due on or after July 1, 1991."

Effective Date: Section 21, Ch. 676, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 27, 1991.

10-4-207. Statute of limitations.

Compiler's Comments

Applicability: Section 20, Ch. 676, L. 1991, provided: "[This act] applies to all returns or statements due on or after July 1, 1991."

Effective Date: Section 21, Ch. 676, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 27, 1991.

10-4-211. Provider required to hold fee in trust for state — penalty and interest.

Compiler's Comments

1991 Amendment: In (2)(a), after "fee", inserted remainder of subsection providing for penalty equal to 10% of delinquent fee plus interest; inserted (2)(b) authorizing waiver of penalty; inserted (3) providing for notice, date of payment, interest, and a penalty for delinquency; inserted (4) authorizing waiver of penalty; and made minor change in style. Amendment effective April 27, 1991.

Coordination: Sec. 19, Ch. 676, L. 1991, was a coordination section that provided that if Senate Bill No. 445 was passed and approved and if it included a section adopting a uniform tax appeal procedure, the bracketed language that constituted subsection (3)(a) of this section was void. Senate Bill No. 445 was passed and approved as Ch. 811, L. 1991.

Applicability: Section 20, Ch. 676, L. 1991, provided: "[This act] applies to all returns or statements due on or after July 1, 1991."

Administrative Rules

ARM 42.31.401 Reporting requirements.

10-4-212. Provider considered a taxpayer under provisions for fee.

Compiler's Comments

1993 Amendment: Chapter 10 near end of first sentence substituted "this part" for "10-4-201 through 10-4-205 and 10-4-211"; and made minor changes in style.

Administrative Rules

ARM 42.31.403 Examination of records.

ARM 42.31.404 Retention of records.

Part 3
Emergency Telephone System Account — Usage

10-4-301. Establishment of emergency telecommunications accounts.

Compiler's Comments

2001 Amendment: Chapter 41 inserted (3) providing for retention of interest earnings in emergency telephone service accounts; and made minor changes in style. Amendment effective March 14, 2001.

Preamble: The preamble attached to Ch. 41, L. 2001, provided: "WHEREAS, the Legislature finds public safety to be of paramount importance; and

WHEREAS, emergency telephone systems are a critical component of facilities and services use by private and public agencies in providing public safety services to Montana citizens; and

WHEREAS, the 49th Legislature enacted legislation providing for emergency telephone systems, and this legislation was amended in subsequent sessions to address changing technology; and

WHEREAS, the Legislature intends that all money collected under section 10-4-201, MCA, be used only for providing emergency telephone system services; and

WHEREAS, sound business practices suggest that 9-1-1 funds be invested until a city or county has sufficient revenue to purchase equipment and other necessary items; and

WHEREAS, sections 10-4-303 and 10-4-312, MCA, require that a city or county use income from investments of 9-1-1 funds only for providing emergency telephone services; and

WHEREAS, sections 10-4-302 and 10-4-311, MCA, require that the state withhold the transfer of 9-1-1 funds to a city or county until a plan is approved; and

WHEREAS, city and county governments have built their emergency public safety answering point budgets on the good faith expectation that interest on investments held in trust by the state until a plan was approved would continue to be distributed to city and county governments; and

WHEREAS, the 55th Legislature, in passing House Bill No. 2, House Bill No. 166, and House Bill No. 210, intended to fund 9-1-1 administrative costs from both the basic and enhanced 9-1-1 accounts using a general fund appropriation pursuant to House Bill No. 2, which was intended to correspond to amounts transferred to the general fund pursuant to House Bill No. 166, in the amount of 3.74% of the total fees imposed for telephone exchange access services; and

WHEREAS, the 56th Legislature, in passing House Bill No. 69, further clarified its intent that general fund appropriations corresponding to transfers of 9-1-1 collections to the general fund were to be the sole funding source of administrative costs."

Retroactive Applicability: Section 3, Ch. 41, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to:

(1) January 1, 1987, for all fees collected and interest earned from the investment of the money collected for basic 9-1-1 services under 10-4-201; and

(2) July 1, 1997, for all fees collected and interest earned from the investment of the money collected for enhanced 9-1-1 services under 10-4-201."

1999 Amendment: Chapter 389 in (2) in second sentence decreased amount from 7.48% to 3.74%; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendments — Composite Section: Chapter 42 in fourth sentence, after "statutorily appropriated", inserted "as provided in 17-7-502". Amendment effective March 12, 1997.

Chapter 422 inserted second sentence relating to deposit in the state general fund; in third sentence, at beginning before "money", inserted "remaining"; at end of fifth sentence inserted "as provided in 17-7-502, to the department of administration"; in last sentence substituted "appropriations made for that purpose" for "temporary appropriations, as described in 17-7-501(1) or (2), made for that purpose"; and made minor changes in style. Amendment effective July 1, 1997. The Code Commissioner did not codify the amendment in the third sentence because of placement of the second sentence in subsection (2).

Chapter 448 in (1) substituted "There are established" for "A 9-1-1 emergency telecommunications account is established"; inserted (1)(a) and (1)(b) establishing accounts for basic and enhanced 9-1-1 services; at end of first sentence of (2) substituted "in the appropriate account" for "in the account"; in (3) substituted "balance of the respective accounts" for "balance of the account"; in (4) substituted "distribution of funds in the 9-1-1 emergency telecommunications accounts described in subsection (1)" for "distribution of the 9-1-1 emergency telecommunications account" and inserted reference to 10-4-311; and made minor changes in style. Amendment effective July 1, 1997.

In preparing the composite of this section, the Code Commissioner has moved the sentence relating to the general fund to subsection (2) for purposes of logical arrangement.

Coordination Instruction: Section 67, Ch. 422, L. 1997, provided: "If [this act] is passed and approved in a form de-earmarking a percentage of the 9-1-1 emergency telecommunications tax to the general fund and if House Bill No. 210 is passed and approved increasing the 9-1-1 emergency telecommunication tax to 55 cents, then the percentage de-earmarked to the general fund in [this act] is 3.76%." House Bill No. 210 was enacted as Ch. 448, L. 1997. Section 10-4-201 was amended by Ch. 448, but because the telecommunication tax was increased to only 50 cents, the 7.48% allocation to the state general fund enacted by sec. 5, Ch. 422, remains unchanged.

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

1989 Amendment: Near middle, after "the balance of the account", deleted "is statutorily appropriated as provided in 17-7-502 to the department to" and inserted "must"; and inserted fourth and fifth sentences stating that the distribution of the account is statutorily appropriated and that expenditures for plan administration must be from temporary appropriations, as described in 17-7-501(1) or (2). Amendment effective July 1, 1989.

Administrative Rules

ARM 2.13.205 Distribution of emergency telecommunications account.

10-4-302. Distribution of basic 9-1-1 account by department.

Compiler's Comments

1997 Amendments: Chapter 422 in (1), after "entire account", deleted "beginning on April 1, 1987"; deleted former (1)(a) and (1)(b) that read: "(a) administrative costs incurred during the preceding calendar quarter by the department of revenue in carrying out this chapter. The amount paid may not exceed 1% of the account on the date of distribution or actual expenses incurred, whichever is less.

(b) administrative costs incurred during the preceding calendar quarter by the department in carrying out its duties under this chapter. The department's annual recovery of costs may not exceed 7% of the amount collected by the account during the fiscal year or actual expenses incurred, whichever is less"; in (2), in three places, substituted "subsection (1)" for "subsection (1)(c)"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 448 in (1), at end of first sentence, substituted "entire basic 9-1-1 account" for "entire account beginning on April 1, 1987"; in (1)(a) reduced the percentage limitation of payments from the account from "1%" to "0.5%"; in (1)(b) reduced percentage limitation on recovery of costs from "7%" to "3.5%"; in (1) changed "fee" to "fees"; inserted (5) requiring distribution of account balance; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

1991 Amendment: Substituted second sentence of (1)(b) regarding Department's annual recovery of costs for former second sentence that read: "The amount paid to the department may not exceed 7% of the account on the date of distribution or actual expenses incurred, whichever is less"; in (3), in first sentence, substituted "allocated" for "distributed", after "cities" substituted "and counties" for "within a 9-1-1 jurisdiction that have an approved final plan and to counties within a 9-1-1 jurisdiction that have an approved final plan", in second sentence substituted "be allocated" for "receive", deleted former third sentence that read: "Cities and counties shall distribute amounts received to 9-1-1 jurisdictions within their jurisdiction", in third sentence, before "each city", inserted "the allocation for", and inserted fourth and fifth sentences describing Department distribution of amounts and requiring a report. Amendment effective July 1, 1991.

Administrative Rules

ARM 2.13.205 Distribution of emergency telecommunications account.

10-4-303. Limitation on use of basic 9-1-1 funds.

Compiler's Comments

1997 Amendment: Chapter 448 at end of first sentence substituted "improving a basic 9-1-1 emergency telephone system" for "improving an emergency telephone system using 9-1-1" and in second sentence substituted "investments may be used" for "investments shall be used". Amendment effective July 1, 1997.

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

10-4-311. Distribution of enhanced 9-1-1 account by department.

Compiler's Comments

1999 Amendment: Chapter 389 deleted former (1)(a) and (1)(b) that read: "(a) administrative costs incurred during the preceding calendar quarter by the department of revenue in carrying out this chapter. The amount paid may not exceed 0.5% of the account on the date of distribution or actual expenses incurred, whichever is less.

(b) administrative costs incurred during the preceding calendar quarter by the department in carrying out its duties under this chapter. The department's annual recovery of costs may not

exceed 3.5% of the amount deposited in the account during the fiscal year or actual expenses incurred, whichever is less"; and made minor changes in style. Amendment effective July 1, 1999.

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

Effective Date: Section 18, Ch. 448, L. 1997, provided that this section is effective July 1, 1997.

10-4-312. Limitation on use of enhanced 9-1-1 funds.

Compiler's Comments

Applicability: Section 17, Ch. 448, L. 1997, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies on July 1, 1997.

(2) [Sections 7, 18, and this section] [10-4-125, effective date section, and this section] apply on passage and approval [approved April 30, 1997].

(3) [Section 14] [10-4-311] applies to calendar quarters beginning on or after October 1, 1997."

Effective Date: Section 18, Ch. 448, L. 1997, provided that this section is effective July 1, 1997.

TITLES 11 AND 12
RESERVED

TITLE 13
ELECTIONS

Title Administrative Rules

Title 44, chapter 3, ARM Elections.

Title 44, chapter 9, ARM mail ballot elections.

Title 44, chapter 10, ARM Commissioner of Political Practices.

Title Collateral References

Award of attorneys' fees under 42 U.S.C.S. §19731(e), providing for award to prevailing party, other than United States, of reasonable attorney's fee as part of costs in any action or proceeding to enforce voting guaranties of fourteenth or fifteenth amendments. 127 ALR Fed. 1, superseding 68 ALR Fed. 206.

Actionability, under 42 U.S.C.S. §1983, of claim arising out of maladministration of election. 66 ALR Fed. 750.

Scheduling election on religious holiday as violation of federal constitutional rights. 44 ALR Fed. 886.

Report of the Montana Districting and Apportionment Commission, Montana Legislative Council (1992).

Election Laws, Montana Legislative Council (1978).

CHAPTER 1
GENERAL PROVISIONS

Chapter Compiler's Comments

Preamble: The preamble attached to Ch. 414, L. 2003, provided: "WHEREAS, the U.S. Supreme Court in Bush v. Gore, 531 U.S. 98 (2000), found that the lack of uniform procedures for determining voter intent in Florida during the 2000 presidential election led to a violation of the U.S. Constitution's Equal Protection Clause of the 14th Amendment; and

WHEREAS, at the request of the 57th Legislature, the State Administration and Veterans' Affairs Interim Committee devoted much of the 2001-2002 interim to a review of Montana election laws with respect to voting systems and counting processes in light of Bush v. Gore; and

WHEREAS, the interim study found that Montana's statutory provisions relating to ballots, voting systems, and vote counting processes needed to be updated, clarified, and in some instances revised to better define uniform standards and procedures to provide equal protection for votes cast by Montana voters; and

WHEREAS, the Subcommittee on Voting Systems of the State Administration and Veterans' Affairs Interim Committee agreed that statutory changes should be made with an eye on future technology but should also standardize current practices to the greatest extent possible.

THEREFORE, this legislation will enable the Secretary of State to adopt a statewide benchmark performance measure that voting systems must meet before they can be approved for use in the state; allow local election administrators to continue to choose which of the approved voting systems should be used locally; require the Secretary of State to adopt uniform statewide rules regarding ballot form, votes and vote counts, and other operational procedures specific to each voting system and to provide training to local election administrators; and require all counting boards to use the uniform counting procedures specified."

Chapter Law Review Articles

"Don't Show Them Where to Click and Vote:" An Assessment of Electioneering Law in the United States as a Consideration in Implementing Internet Voting Regimes, Walker, 91 Ky. L.J. 715 (2003).

Election Law and the Internet: How Should the FEC Manage New Technology?, Blaine, 81 N.C.L. Rev. 697 (2003).

Section 2 of the Voting Rights Act: An Approach to the Results Test, Eades, 39 Vand. L. Rev. 139 (1986).

"And the Winner Is . . ." Election Day Projections and the First Amendment, Kamenetsky, 4 Cardozo Arts & Ent. L.J. 373 (1985).

Annexation and the Voting Rights Act, Waite, 28 How. L.J. 567 (1985).

Exit Polls and the First Amendment, 98 Harv. L. Rev. 1927 (1985).

Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment, Jordan, 64 Neb. L. Rev. 389 (1985).

The Crown Jewel of American Liberty: The Right to Vote; What Does It Mean Under the Amended Section 2 of the Voting Rights Act?, Rubarts, 37 Baylor L. Rev. 1015 (1985).

The First Amendment and Distributional Voting Rights Controversies, Calhoun, 52 Tenn. L. Rev. 549 (1985).

The Future of the Fifteenth Amendment, Jordan, 28 How. L.J. 541 (1985).

Timely Debate on Election Reform, Shepherd, 71 A.B.A. J. 8 (Feb. 1985).

Curtailment of Early Election Predictions: Can We Predict the Outcome?, Garfield, 36 U. Fla. L. Rev. 489 (1984).

Early Election Projections, Restrictions on Exit Polling, and the First Amendment, Spillenger, 3 Yale L. & Pol'y Rev. 210 (1984).

Recent Developments in Election Law, Peck, 16 Urb. Law. 765 (1984).

Part 1
General Provisions

13-1-101. Definitions.

Compiler's Comments

2003 Amendments — Composite Section — Coordination: Chapter 414 inserted definitions of ballot and valid vote; substituted definition of voting system or system for definition of voting machine or device that read: ""Voting machine or device" means any equipment used to record, tabulate, or in any manner process the vote of an elector"; and made minor changes in style. Amendment effective October 1, 2003.

Section 93(1), Ch. 414, L. 2003, a coordination section, deleted the bracketed language in the definition of ballot after "optical scan system" that read: "a punchcard voting system".

Chapter 475 in definition of active elector near beginning after "means" substituted "an elector who voted in the previous federal general election and" for "a qualified elector"; in definition of active list near middle after "maintained" deleted "by an election administrator" and at end substituted "13-2-220" for "13-2-219"; in definition of application for voter registration near beginning after "means" substituted "a voter registration form prescribed by the secretary of state that is completed and signed by an elector" for "a completed voter registration card" and at end after "administrator, and" substituted "contains voter registration information subject to verification as provided by law" for "subject to confirmation, as provided in 13-2-207"; in definition of elector near middle after "qualified" deleted "and registered"; in definition of inactive elector near beginning after "individual" inserted "who failed to vote in the preceding federal general election and" and at end inserted "pursuant to 13-2-220"; in definition of inactive list near middle after "maintained" deleted "by an election administrator" and at end substituted "13-2-220" for "13-2-219"; inserted definitions of legally registered elector, provisional ballot, provisionally registered elector, statewide voter registration list, and transfer form; and made minor changes in style. Amendment effective January 1, 2004.

2001 Amendment: Chapter 401 in definition of contribution in (b)(iii) and in definition of expenditure in (b)(iv) at end after "or stockholders or employees" deleted "as long as the organization is not a primary political committee"; in definition of issue in second sentence near beginning after "For the purposes of chapters" substituted "35 and 37" for "35, 36, or 37"; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 208 in definition of federal election inserted "or primary"; in definition of inactive elector substituted "an individual whose name" for "a qualified elector who"; and made minor changes in style. Amendment effective March 30, 1999.

1997 Amendment: Chapter 246 inserted definitions of active elector, active list, application for voter registration, federal election, inactive elector, and inactive list; and made minor changes in style. Amendment effective April 11, 1997.

1993 Amendment: Chapter 390 in definition of election, after "general", inserted "regular"; in definition of general election inserted "or "regular election"" as defined term and inserted last sentence defining regular election for ballot issues required by Article XIV, section 9, of the Montana Constitution; and made minor changes in style. Amendment effective July 1, 1993.

1989 Amendment: In definition of candidate, near beginning of (b) after "who has", substituted remainder of (b) and (c) (see 1989 Session Law for text) for former language that read: "publicly announced his intention to seek nomination or election to public office by write-in vote and who has received a contribution or made an expenditure or has given an authorization

to another person to receive a contribution or make an expenditure for the purpose of supporting his nomination or election".

1987 Amendment: In (10), near beginning of second sentence, substituted "chapters 35, 36, or 37" for "chapters 35, 36, and 37".

1983 Amendment: In (8) inserted second sentence defining general election for certain ballot issues.

Administrative Rules

ARM 44.10.321 Interpretive rule regarding definition of "contribution" for the purposes of Title 13, ch. 35 and 37.

ARM 44.10.323 Interpretive rule regarding definition of "expenditure" for the purposes of Title 13, ch. 35 and 37.

ARM 44.10.325, 44.10.327, 44.10.329 Interpretive and procedural rules regarding political committees for the purposes of Title 13, ch. 35 and 37.

Case Notes

Vacancy: The word vacancy as applied to a public office has no technical meaning, and it is not to be taken in a strict technical sense in every case. It may be said that an office is vacant when it is empty and without an incumbent who has a right to exercise its functions and take its fees or emoluments even though the vacancy is not a corporal one. "An office without an incumbent is vacant." LaBorde v. McGrath, 116 M 283, 149 P2d 913 (1944).

General Election: Under section 23-101, R.C.M. 1947 (now repealed), a general election was one held for the election of officers throughout the state. State ex rel. Rowe v. Kehoe, 49 M 582, 144 P 162 (1914).

Special Election: Under section 23-101, R.C.M. 1947 (now repealed), a special election was one held to supply a vacancy in a public office or to submit to the electors a proposition to raise money for any public improvement. State ex rel. Rowe v. Kehoe, 49 M 582, 144 P 162 (1914).

Attorney General's Opinions

County Commissioners — Term of Office When Appointed: When there was no primary or general election of county officials in 1976, a County Commissioner appointed to office in 1975 to serve until the next general election was to hold office until the 1977 election. 36 A.G. Op. 66 (1976).

Holidays — State General Election Day: State primary election days, including the day of the primary election for choosing delegates to the constitutional convention, are not state holidays. State general election days, including the day of the general election for choosing delegates to the constitutional convention, are state holidays. 34 A.G. Op. 20 (1971).

13-1-102. Elections by secret ballot.

Case Notes

Evidence: Under former law, when it appeared in an election contest that a voter's ballot had been endorsed by the judges of election, as required by law, it was necessary to show that it could not thereby be identified, in order to let in, as secondary evidence, testimony as to how he voted. Lane v. Bailey, 29 M 548, 75 P 191 (1904).

Collateral References

Elections *key* 28.

29 C.J.S. Elections §201(2).

26 Am. Jur. 2d Elections §328.

13-1-103. Determination of winner.

Compiler's Comments

2003 Amendment: Chapter 414 before "votes" inserted "valid". Amendment effective October 1, 2003.

Case Notes

Voting for Deceased Candidate: The casting of a ballot at an election of public officers is an affirmative, not a negative, act. It is an act done with intention of voting for someone. Hence, if it is the purpose of voters to defeat a certain candidate, that purpose can be accomplished only by voting for some person in opposition to him, and not by voting for a person who died some weeks before election with the expectation that the vote cast for him would be counted as opposed to the person sought to be defeated. One who has died is no longer a person for whom, under Art. IX, sec. 2, 1889 Mont. Const. (now Art. IV, sec. 2, 1972 Mont. Const.), a voter may cast his ballot. State ex rel. Wolff v. Geurkink, 111 M 417, 109 P2d 1094 (1941).

Collateral References

Elections *key* 237.

29 C.J.S. Elections §§241 through 244.

26 Am. Jur. 2d Elections §§405 through 411.

13-1-104. Times for holding general elections.

Compiler's Comments

2003 Amendment: Chapter 475 in (1)(a) at beginning inserted exception clause and near middle after "general election" deleted "unless an earlier date is provided in a law authorizing a special election on an initiative or referendum pursuant to Article III, section 6"; inserted (1)(b) providing that a special election may be held on an initiative or referendum; and made minor changes in style. Amendment effective January 1, 2004.

1999 Amendment: Chapter 514 in (3) substituted "first Tuesday after the first Monday of May" for "first Tuesday of April"; and made minor changes in style. Amendment effective July 1, 1999.

Effective Date — Applicability: Section 11(1), Ch. 514, L. 1999, provided that this section is effective July 1, 1999, and applies to school fiscal years beginning on or after July 1, 2000.

1987 Amendment: Chapter 216 in (3), after "subdivision", inserted "other than a municipality"; and inserted (4) setting general election date for municipalities required to hold annual elections.

Contingent 1987 Amendment: Chapter 644 in (3) substituted "regular school election day" for "school election day, the first Tuesday of April of each year".

Section 14(1), Ch. 644, L. 1987, provided that the amendment to this section was effective on passage and approval of legislation or adoption of party rules establishing the fourth Tuesday of March as the presidential primary election date or caucus date in any two of the states of Idaho, Washington, or Oregon prior to August 1, 1987. Contingency did not occur.

Applicability: Section 4, Ch. 216, L. 1987, provided: "Sections 2 and 3 apply to municipal elections held after the effective date of this act." Effective March 25, 1987.

1983 Amendment: In (1), after "November" inserted language relating to elections on ballot issues through "pursuant to Article III, section 6, and".

1981 Amendment: Inserted "and not required to hold annual elections" in (2); substituted "on school election day, the first Tuesday of April of each year, and is subject to the election procedures provided for in 13-1-401" for "with the general election provided for in subsections (1) and (2). If a primary election is necessary, it shall be held at the same time as the primary provided for the regular general election for that year" in (3).

Attorney General's Opinions

Submission of Constitutional Initiative at Statewide Primary Election Allowable: Citing numerous cases affirming the rationale that a primary election cannot be distinguished from any other regular or general election prescribed by law and distinguishing a primary election from a special election, which is an election called for a special purpose and not one fixed by law to occur at regular intervals, the Attorney General held that a constitutional amendment proposed by initiative pursuant to this section may be submitted to the voters at a regular statewide primary election. 44 A.G. Op. 20 (1991). See also 19 A.G. Op. 412 (1942).

When Judicial Appointee to Run for Election: An individual appointed by the Governor to the office of District Judge need not run in the general election in the year in which Senate confirmation takes place if, at the time of confirmation, the filing date for judicial candidates has passed. 41 A.G. Op. 52 (1986).

Time for Election of Newly Created District Court Judgeships: Subsection (1) of this section sets forth the schedule for general elections to be held in even-numbered years and lists those offices for which such an election is to be held, including the office of District Court Judge. Subsection (2) of this section provides the schedule for holding general elections in odd-numbered years, and its list of officers to be elected does not include District Court Judges but does include "any other officers specified by law for election in odd-numbered years". Chapter 293, L. 1983, increased the number of judgeships in several judicial districts and provided that the new judgeships could be initially filled at either the 1983 or 1984 general election. The provision of Ch. 293, L. 1983, allowing election of judges in an odd-numbered year is not in conflict with this section because, while subsection (1) would appear to require elections in even-numbered years, Ch. 293, L. 1983, contains specific authority for District Court Judges to be elected in odd-numbered years and thus the clause of subsection (2) "any other officers specified by law for election in odd-numbered years" is applicable. Further, 13-1-107(2), which

sets forth the time for holding a primary election in an odd-numbered year, is the law applicable to any odd-numbered year primary election held under Ch. 293, L. 1983. 40 A.G. Op. 13 (1983).

Water or Sewer District Officers: Officers of water or sewer districts whose terms were due to expire in 1980 are entitled to remain in office until their successors are properly qualified following the election to be held in November 1981. 38 A.G. Op. 74 (1980).

Conservation District Officers: Officers of conservation districts shall be elected at the general election held in November of even-numbered years. 38 A.G. Op. 74 (1980).

Hospital, Fire, Irrigation, or Drainage District Officers: Officers of hospital, fire, irrigation, or drainage districts whose terms were due to expire in the spring of 1980 are entitled to remain in office until their successors are properly qualified following an election held in November 1980. 38 A.G. Op. 74 (1980).

Local Government Charter Requirements for General Election: The positions on the Anaconda-Deer Lodge Commission are subject to election at the primary and general elections to be held in 1978 and 1980 even though the charter creating the positions was implemented by the community in April 1977. 37 A.G. Op. 124 (1978).

County Commissioners — Term of Office When Appointed: When there was no primary or general election of county officials in 1976, a County Commissioner appointed to office in 1975 to serve until the next general election was to hold office until the 1977 election. 36 A.G. Op. 66 (1976).

Holidays — State General Election Day: State primary election days, including the day of the primary election for choosing delegates to the constitutional convention, are not state holidays. State general election days, including the day of the general election for choosing delegates to the constitutional convention, are state holidays. 34 A.G. Op. 20 (1971).

Collateral References

Elections *key* 26, 31, 38.

29 C.J.S. Elections §§76, 77.

26 Am. Jur. 2d Elections §318.

Validity of public election as affected by fact that it was held at time other than that fixed by law. 121 ALR 987.

Scheduling election on religious holiday as violation of federal constitutional rights. 44 ALR Fed. 886.

13-1-106. Time of opening and closing of polls for all elections — exceptions.

Compiler's Comments

1985 Amendment: Inserted (2) providing in certain cases for polls to open and close at times set for school election.

1983 Amendment: In (1) changed opening time from 8 a.m. to 7 a.m. and changed excepted polling places from those with less than 100 registered electors to those with less than 200 registered electors.

Collateral References

Elections *key* 26, 205 through 208.

29 C.J.S. Elections §198.

26 Am. Jur. 2d Elections §§319 through 321.

Violation of law as regards time for keeping polls open as affecting election results. 66 ALR 1159.

13-1-107. Times for holding primary elections.

Compiler's Comments

1987 Amendment: Inserted (3) setting date of primary election for municipalities required to hold annual elections.

Applicability: Section 4, Ch. 216, L. 1987, provided: "Sections 2 and 3 apply to municipal elections held after the effective date of this act." Effective March 25, 1987.

Attorney General's Opinions

Time for Election of Newly Created District Court Judgeships: Subsection (1) of 13-1-104 sets forth the schedule for general elections to be held in even-numbered years and lists those offices for which such an election is to be held, including the office of District Court Judge. Subsection (2) of 13-1-104 provides the schedule for holding general elections in odd-numbered years, and its list of officers to be elected does not include District Court Judges but does include "any other officers specified by law for election in odd-numbered years". Chapter 293, L. 1983, increased the number of judgeships in several judicial districts and provided that the new judgeships could be

initially filled at either the 1983 or 1984 general election. The provision of Ch. 293, L. 1983, allowing election of judges in an odd-numbered year is not in conflict with 13-1-104 because, while subsection (1) would appear to require elections in even-numbered years, Ch. 293, L. 1983, contains specific authority for District Court Judges to be elected in odd-numbered years and thus the clause of subsection (2) "any other officers specified by law for election in odd-numbered years" is applicable. Further, subsection (2) of this section, which sets forth the time for holding a primary election in an odd-numbered year, is the law applicable to any odd-numbered year primary election held under Ch. 293, L. 1983. 40 A.G. Op. 13 (1983).

Filling Vacant Office: When the office of County Commissioner has become vacant with no opportunity to nominate candidates in the primary election, the selection of candidates for the general election will be made by each political party according to 13-10-327; and, pursuant to 13-12-208 (now repealed), write-in candidates may also seek the office. The appointee to fill the immediate vacancy will hold that office until the next general election. 37 A.G. Op. 147 (1978).

Collateral References

Elections *key* 26, 126.

29 C.J.S. Elections §117.

26 Am. Jur. 2d Elections §228, et seq.

Validity of public election as affected by fact that it was held at time other than that fixed by law. 121 ALR 987.

Scheduling election on religious holiday as violation of federal constitutional rights. 44 ALR Fed. 886.

13-1-108. Notice of special elections.

Collateral References

Elections *key* 32, 39 through 42.

29 C.J.S. Elections §§66 through 82.

26 Am. Jur. 2d Elections §291.

13-1-109. Election records open to public.

Attorney General's Opinions

Voter Registration Forms and Precinct Registers: The original signed voter registration form is available for public inspection unless the elector's social security number appears on it. Precinct registers are public records available for inspection after election returns are canvassed. 38 A.G. Op. 65 (1980).

Collateral References

Elections *key* 111.

25 Am. Jur. 2d Elections §§94, 95.

13-1-111. Qualifications of voter.

Case Notes

Part of Section Unconstitutional — Voting Rights of Montana Residents of Yellowstone Park Upheld: The Supreme Court specifically adopted the substance of a District Court summary judgment in declaring subsection (1)(c) of this section unconstitutional insofar as it acts to deny residents of the Montana portion of Yellowstone park from voting in state and local elections. Olson v. Dept. of Revenue, 223 M 464, 726 P2d 1162, 43 St. Rep. 1916 (1986).

Incarcerated Felons Excluded From Suffrage: The provisions of Montana's Constitution excluding incarcerated felons from suffrage are constitutionally permissible under the Equal Protection Clause, both in the federal and state constitutional versions. Further, 13-1-111, defining the qualifications of electors, also passes constitutional muster. Emery v. St., 177 M 73, 580 P2d 445 (1978).

Effect of Federal Conviction for Offense Not a Felony Under State Law: A Montana voter cannot be denied the right to vote because of conviction of an offense in Federal Court that would not be a felony by Montana statutory definition. Melton v. Oleson, 165 M 424, 530 P2d 466 (1974), overruling State ex rel. Anderson v. Fousek, 91 M 448, 8 P2d 791 (1932).

Residency Requirements:

Durational residency requirements of 3 months in county and 1 year in state as conditions precedent to voting violate the Equal Protection Clause of the 14th amendment. The unreasonableness of the classification was established by the fact that the registration books in Tennessee were not closed until 30 days before the election, and this was ample time to complete whatever administrative tasks were necessary to ensure the purity of the ballot box. Dunn v. Blumstein, 405 US 330 (1971), distinguished in Marston v. Lewis, 410 US 679 (1973).

As it did in the Voting Rights Act Amendments of 1970, 42 U.S.C. §1973aa-1, Congress can prohibit states from disqualifying voters in elections for presidential and vice-presidential electors because they have not met state residency requirements, and can set residency requirements and provide for absentee balloting in presidential and vice-presidential elections. Oregon v. Mitchell, 400 US 112 (1970).

Racial Discrimination Prohibited: Congress is empowered, as it did in the Voting Rights Act Amendments of 1970, 42 U.S.C. §1973aa-1, to prohibit use of literacy tests or other devices used to discriminate against voters on account of their race in all state and national elections. Oregon v. Mitchell, 400 US 112 (1970).

Attorney General's Opinions

School Trustee Nominations: An elector nominating a candidate for a school trustee position under 20-3-305(2) must be registered to vote at the time the nominating petition is filed. 43 A.G. Op. 24 (1989).

Voter Registration — Proof of Residence Not Required: A County Clerk and Recorder may not request proof of residence of those intending to register to vote. 42 A.G. Op. 67 (1988).

Voter Qualifications — Irrigation District Election: In order to vote in an irrigation district election under Title 85, ch. 7, part 17, an individual must be: (1) a landowner in the irrigation district; (2) a citizen of the United States; (3) 18 years of age or older; and (4) a resident of Montana and the county in which he offers to vote for at least 30 days. 42 A.G. Op. 47 (1987).

City Employees — Eligibility to Hold City Office: Under the state's constitution, any qualified elector is eligible to hold any public office, subject to additional qualifications as provided by the Legislature. A municipality may not enact an ordinance that prohibits city employees from holding office on the City Council. 41 A.G. Op. 81 (1986).

Servicepersons — Registration to Vote — Tax Liability: The fact that a member of the military service has registered to vote in Montana is evidence, though not conclusive proof, that he is a Montana resident and is thus not exempt, under the federal Soldiers' and Sailors' Civil Relief Act of 1940, from property and income taxation by Montana. Montana's election law requires one to be a resident of Montana before voting in the state's elections, so a serviceperson who has registered to vote in Montana (thereby claiming to be a resident) may not claim tax exemption under the federal Act without offering convincing evidence that he is in fact not a Montana resident after all. However, to claim he is not in fact a resident after having registered to vote in Montana would subject him to prosecution for the misdemeanor of fraudulent registration. 41 A.G. Op. 2 (1985).

Residency — Elector Requirement as Qualification for County Office: A practicing attorney who has declared his intention to make a county his permanent home, is actively seeking a permanent residence in that county, and is in the process of terminating his personal business affairs at his former residence has become a resident of the county and is eligible for appointment as a full-time County Attorney once he has resided in the county for 30 days if he becomes a qualified registered elector and meets other qualifications for the office. 38 A.G. Op. 22 (1979).

Prisoner Voting Rights: No person may vote in the state of Montana while serving a sentence in a penal institution resulting from conviction of a felony. 37 A.G. Op. 125 (1978).

Electors — Qualifications: Durational residence requirements for elector qualification contained in Art. IX, sec. 2, 1889 Mont. Const., and this section, prior to 1973 amendment, are unconstitutional. 34 A.G. Op. 40 (1972).

Law Review Articles

Freeholder Requirements in the Montana Code Annotated: Unconstitutional Restrictions on the Right of Political Participation, Hammond, 41 Mont. L. Rev. 97 (1980).

Voter Registration: A Restriction on the Fundamental Right to Vote, 96 Yale L.J. 1615 (1987).

Equal Protection: Analyzing the Dimensions of a Fundamental Right—The Right to Vote, 17 Santa Clara L. Rev. 163 (1977).

Collateral References

Elections *key* 59 through 94.

29 C.J.S. Elections §§14 through 50.

25 Am. Jur. 2d Elections §§103 through 191.

Voting rights of persons mentally incapacitated. 80 ALR 3d 1116.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period. 65 ALR 3d 1048.

Residence of students for voting purposes. 44 ALR 3d 797.

Effect of conviction under federal law or law of another state or county on right to vote or hold public office. 39 ALR 3d 303.

What constitutes "conviction" within constitutional or statutory provision disfranchising one convicted of crime. 36 ALR 2d 1238.

Validity, under federal constitution, of state residency requirements for voting in elections. 31 L. Ed. 2d 861.

13-1-112. Rules for determining residence.

Compiler's Comments

2003 Amendment: Chapter 271 inserted (3)(c) providing that a member of a reserve component of the United States armed forces who is stationed outside of the state but who has no intent of changing residency retains resident status; and made minor changes in style. Amendment effective April 9, 2003.

Retroactive Applicability: Section 63, Ch. 271, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to occurrences after December 31, 2002."

1999 Amendment: Chapter 51 in (2) near middle before "prison" deleted "public"; and made minor changes in style. Amendment effective March 15, 1999.

1993 Amendment: Chapter 74 near beginning of introductory clause, after "voting", inserted "or seeking election to the legislature"; and made minor changes in style.

Case Notes

Interpretation of Residency in City Ordinance: A Virginia City ordinance defined a resident as a person who resided within the town for at least 30 days prior to an election. Plaintiffs sought invalidation of a mail ballot election on the grounds that not all voters had resided within the city in the month prior to the election. The Supreme Court applied this section in holding that plaintiffs' interpretation would be burdensome and would effectively disenfranchise many voters in a town that was largely composed of seasonal residents. The court determined that a sounder interpretation was that the individual must reside within the city for a minimum of 30 days to establish residency. Given the fact that no evidence was offered that any elector had voted elsewhere or did not intend to return to Virginia City and in light of plaintiffs' failure to timely challenge any elector's right to vote or the registration of any elector, plaintiffs' challenge of residency was properly disallowed. Drummond v. Virginia City, 253 M 428, 833 P2d 1067, 49 St. Rep. 510 (1992).

Residence of Prisoner: A felon convicted and imprisoned in Montana who is not a resident of this state at the time of conviction does not gain residency for voting purposes during his jail term, and a Montana resident will not lose his voting residence because of incarceration. Emery v. St., 177 M 73, 580 P2d 445 (1978).

Inapplicable to Licensing of Automobiles: Section prescribing the conditions determining the right to vote with respect to residence of the voter had no bearing upon the situs of one's property (an automobile) or the ownership thereof for purpose of taxation or licensing. Valley County v. Thomas, 109 M 345, 97 P2d 345 (1939).

Acts and Intent of Voter: The residence of a voter is to be determined from his acts and intent; but this fact, like any other fact involved in a civil action or proceeding, may be established by circumstantial evidence, and any declarations of the voter touching the subject, if a part of the res gestae, or any declarations in disparagement of his right to vote, if made at or before the election, may be received in evidence. Sommers v. Gould, 53 M 538, 165 P 599 (1917).

Presumption: Predecessor to subsection (7) was held to be in reality a rule of evidence. Carwile v. Jones, 38 M 590, 101 P 153 (1909).

Attorney General's Opinions

Voter Qualifications — Irrigation District Election: In order to vote in an irrigation district election under Title 85, ch. 7, part 17, an individual must be: (1) a landowner in the irrigation district; (2) a citizen of the United States; (3) 18 years of age or older; and (4) a resident of Montana and the county in which he offers to vote for at least 30 days. 42 A.G. Op. 47 (1987).

Servicepersons — Registration to Vote — Tax Liability: The fact that a member of the military service has registered to vote in Montana is evidence, though not conclusive proof, that he is a Montana resident and is thus not exempt, under the federal Soldiers' and Sailors' Civil Relief Act of 1940, from property and income taxation by Montana. Montana's election law requires one to be a resident of Montana before voting in the state's elections, so a serviceperson who has registered to vote in Montana (thereby claiming to be a resident) may not claim tax exemption under the federal Act without offering convincing evidence that he is in fact not a Montana resident after all. However, to claim he is not in fact a resident after having registered to vote in Montana would subject him to prosecution for the misdemeanor of fraudulent registration. 41 A.G. Op. 2 (1985).

Facts Sufficient to Establish Residency for Purposes of Qualification for County Office: A practicing attorney who has declared his intention to make a county his permanent home, is actively seeking a permanent residence in that county, and is in the process of terminating his personal business affairs at his former residence has become a resident of the county and is eligible for appointment as a full-time County Attorney once he has resided in the county for 30 days if he becomes a qualified registered elector and meets other qualifications for the office. 38 A.G. Op. 22 (1979).

Residency as Grounds for Challenge — Standing: An elector in a school election may be challenged on election day by any registered elector of the district and may be disqualified from voting by the election judges if he is not a resident of the school district in which the election is held. 35 A.G. Op. 56 (1974).

Residence of Minors and Others for Voting Purposes: Emancipated minors and persons 19 years of age or over may register to vote in the community in which they live if they intend to make that community their residence. Mere presence at a college or university is not sufficient to establish residence in a community but must be coupled with an actual intent to make that community one's residence. A person who is attending an institution of learning may retain his original residence for voting purposes if he intends that place to be his residence. Unemancipated minors are residents of the place where their parents reside and may register to vote in that place if they will be 18 years of age at the time of the election. 34 A.G. Op. 13 (1971).

Collateral References

Elections *key* 71 through 78.
29 C.J.S. Elections §§19 through 25.
25 Am. Jur. 2d Elections §§163 through 173.
Residence of students for voting purposes. 44 ALR 3d 797.

13-1-113. Only one residence.

Attorney General's Opinions

Residency as Grounds for Challenge — Standing: An elector in a school election may be challenged on election day by any registered elector of the district and may be disqualified from voting by the election judges if he is not a resident of the school district in which the election is held. 35 A.G. Op. 56 (1974).

Collateral References

Elections *key* 71.
29 C.J.S. Elections §§19 through 25.
25 Am. Jur. 2d Elections §§163 through 173.

13-1-114. Computation of elector's age and term of residence.

Collateral References

Elections *key* 66, 71.
29 C.J.S. Elections §§17, 19 through 25.
25 Am. Jur. 2d Elections §§154, 163 through 173.

13-1-115. Privilege from arrest.

Collateral References

Elections *key* 327.

13-1-122. Ballot form and content.

Collateral References

Elections *key* 160 through 196.
29 C.J.S. Elections §§152 through 189.
26 Am. Jur. 2d Elections §§298 through 316.

Part 2
Role of Secretary of State

13-1-201. Chief election officer.

Administrative Rules

ARM 44.1.101 Organizational rule of Secretary of State.
ARM 44.3.1403 Facsimile requests for absentee ballots.

Collateral References

Elections *key* 46 through 58.
29 C.J.S. Elections §§55 through 65.
25 Am. Jur. 2d Elections §§89 through 95.

13-1-202. Forms and rules prescribed by secretary of state — consultation.

Compiler's Comments

2003 Amendment: Chapter 414 inserted (4) requiring election administrators to give the secretary of state data necessary to evaluate voting system performance against an adopted standard, evaluate the security, accuracy, and accessibility of elections, and assist in making recommendations to improve voter confidence in the integrity of the election process; inserted (5) requiring the secretary of state to regularly consult with and seek the advice of local election administrators in implementing this section; and made minor changes in style. Amendment effective October 1, 2003.

Statement of Intent: The statement of intent that accompanied SB 65 (Ch. 571, L. 1979) provided in part: "In subsection (1)(a) of section 12, the authority given to issue written directions and instructions is intended to give legal standing to the type of directives and instructions the secretary of state has issued in the past in regard to elections and is not intended to significantly increase the number of directives and instructions. The main purpose of a directive or instruction should be to assist election administrators in their duties and assure uniform procedures are used in all counties whenever possible.

In subsection (1)(c) of section 12, the secretary of state is authorized to issue advisory opinions. It is the intent of the Legislature that advisory opinions should be made primarily for administrative problems that do not apply to all counties in the state or to problems that do not regularly occur. An opinion should be issued only when the person requesting the opinion and the secretary of state believe the problem is administrative in nature and does not require a legal opinion from a county attorney or the attorney general."

Administrative Rules

Title 44, chapter 3, subchapter 1, ARM Voting accessibility for the elderly and handicapped.

Collateral References

Elections *key* 46 through 58.
29 C.J.S. Elections §55.
25 Am. Jur. 2d Elections §§96 through 99.

13-1-203. Secretary of state to advise, assist, and train.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) in introductory clause inserted "including administrators of school elections under Title 20, chapter 20"; inserted (1)(c) relating to procedures adopted under 13-17-211; inserted (2) requiring the secretary of state to prepare and distribute training materials for election judges, with enough copies for all judges, and some extra copies, to be sent to election administrators; inserted (3) requiring the secretary of state to hold at least one workshop every 2 years for election administrators and their staffs, stating where they may be held, and providing that costs be paid by the secretary of state and that attendees receive a certificate of instruction; at end of section deleted sentences that read: "The secretary of state shall hold at least one workshop every 2 years to provide training and assistance to election administrators. Election administrators must be reimbursed, from funds appropriated to the secretary of state, for their mileage and expenses for attending the workshops at the rates set for mileage and expenses in 2-18-501 through 2-18-503. At the discretion of the secretary of state and within the budget limits allowed for workshops, the workshops may be held in several sessions at separate locations in the state"; and made minor changes in style. Amendment effective October 1, 2003.

1997 Amendment: Chapter 246 at end of first sentence inserted "and the implementation and operation of the National Voter Registration Act of 1993, Public Law 103-31"; and made minor changes in style. Amendment effective April 11, 1997.

1993 Special Session Amendment: Chapter 4 in second sentence, after "workshop", substituted "every 2 years" for "each year"; and made minor changes in style. Amendment effective January 1, 1994.

1987 Amendment: At end of third sentence, after "expenses", deleted "for county officials as provided for".

Collateral References
Elections *key* 46 through 58.
29 C.J.S. Elections §55.
25 Am. Jur. 2d Elections §§96 through 99.

13-1-204. Election records to be kept by secretary of state.

Compiler's Comments
1997 Amendment: Chapter 246 inserted (1)(f) regarding records submitted and coordinated by Secretary of State pursuant to the National Voter Registration Act; and made minor changes in style. Amendment effective April 11, 1997.
1983 Amendment: In (1)(e), after "by precinct" deleted "; by municipality;".

Collateral References
Elections *key* 54.
29 C.J.S. Elections §55.
25 Am. Jur. 2d Elections §§96 through 99.
Report of the Montana Districting and Apportionment Commission, Montana Legislative Council (1992).

13-1-209. Special account for federal Help America Vote Act.

Compiler's Comments
Effective Date: Section 3, Ch. 218, L. 2003, provided that this section is effective on passage and approval. Approved April 3, 2003.

Part 3
Local Election Administration

13-1-301. Election administrator.

Compiler's Comments
2003 Amendment: Chapter 475 in (2) near middle before "records" inserted "county" and at end after "elections" inserted "and is the primary point of contact for the county with respect to the statewide voter registration list and implementation of other provisions of applicable federal law governing elections"; and made minor changes in style. Amendment effective January 1, 2004.
1981 Amendment: Added subsection (3) referring to appointment of deputy election administrator.

Attorney General's Opinions
Compensation of County Clerk and Recorder for Work as Election Administrator: A County Clerk and Recorder is not entitled to compensation for services as an election administrator. Without a specific grant of authority to allow additional compensation beyond that for the duties as a County Clerk and Recorder, no additional compensation is allowed. An election administrator who is not also the County Clerk and Recorder may be compensated for his election duties. 39 A.G. Op. 7 (1981).
Commissioner Elections — Election Administrator: Commissioner elections in drainage and irrigation districts must be conducted by the county's election administrator. 38 A.G. Op. 105 (1980).

Collateral References
Elections *key* 49 through 58.
29 C.J.S. Elections §§55 through 65.
25 Am. Jur. 2d Elections §§89 through 102.

13-1-302. Election costs.

Compiler's Comments
Contingent 1987 Amendment: Inserted "(4) The costs of a presidential preference primary provided for in 13-10-401 must be paid by the county; however, if the primary is held in conjunction with a regularly scheduled school election, the county and the school district each shall bear a proportionate share of the costs as determined by the county election administrator and the school district election administrator. If a county election administrator specifies polling places or hours that differ from those set for the school election, the county shall bear any additional costs incurred as a result of the different polling places or hours."

Section 14(1), Ch. 644, L. 1987, provided that the amendment to this section was effective on passage and approval of legislation or adoption of party rules establishing the fourth Tuesday of March as the presidential primary election date or caucus date in any two of the states of Idaho, Washington, or Oregon prior to August 1, 1987. Contingency did not occur.

1983 Amendment: In (1) substituted language referring to payment of costs by counties and other subdivisions for "(1) Unless specifically provided otherwise, all costs of the primary and general elections regularly scheduled for even-numbered years shall be paid by the counties.

(2) Costs of the primary and general elections regularly scheduled for odd-numbered years shall be paid by the counties and other political subdivisions for which the elections are held. Each political subdivision shall bear its proportionate share of the costs as determined by the county governing body."; and inserted (7) explaining proportionate costs.

1981 Amendment: In (3) following "regularly scheduled" substituted "school election" for "election" and substituted "election administrator and the school district election administrator" for "governing body".

13-1-303. Disposition of ballots and other election materials.

Compiler's Comments

1997 Amendment: Chapter 97 at end of last sentence of (1) substituted "may dispose of the ballots according to a plan approved by the secretary of state" for "destroy the ballots without opening the packages"; in last sentence of (2) substituted "disposed of" for "destroyed"; and made minor changes in style.

Administrative Rules

ARM 44.3.1747 Central Counting Center — Ballot Tabulation Board.
ARM 44.3.1748 Central Counting Center — Ballot Sealing Board.
ARM 44.3.1749 Central Counting Center — Election Results Board.
ARM 44.3.1750 Central Counting Center — closing of Counting Center.

Attorney General's Opinions

Sealed Ballots and Ballot Stubs: The ballots and ballot stubs sealed pursuant to this section are not available for public inspection as provided in 13-1-109. 38 A.G. Op. 65 (1980).

Collateral References

Elections *key* 255.
29 C.J.S. Elections §234.
26 Am. Jur. 2d Elections §392.

13-1-304. Duties of officials when election not held.

Collateral References

Elections *key* 54.
29 C.J.S. Elections §55.
25 Am. Jur. 2d Elections §§96 through 99.

Part 4
Political Subdivision Elections

13-1-401. Manner of conducting general elections for political subdivisions required to hold annual elections.

Compiler's Comments

1985 Amendment: Inserted (3) allowing mail ballot elections; and in (4) inserted reference to (3).

Code Commissioner Correction: Code Commissioner 1981 inserted the first "administrator" following "election" in (2) for clarity.

CHAPTER 2
REGISTRATION OF ELECTORS

Chapter Law Review Articles

A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993, Green, 22 J. Legis. 45 (1996).

Providing Access to Voter Registration: A Model State Statute, Secoy, 24 Harv. J. on Legis. 479 (1987).

Voter Registration: A Restriction on the Fundamental Right to Vote, 96 Yale L.J. 1615 (1987).

Voter Registration: Context and Results, Stone, 17 Urb. Law. 519 (1985).

Chapter Collateral References

Elections *key* 95 through 119.

29 C.J.S. Elections §§36 through 50.

25 Am. Jur. 2d Elections §§179 through 191.

Constitutionality of statutes in relation to registration before voting at election or primary. 91 ALR 349.

Part 1
Registrars

13-2-107. Statewide voter registration database — information-sharing agreements.

Compiler's Comments

Effective Date: Section 46, Ch. 475, L. 2003, provided that this section is effective January 1, 2004.

13-2-108. Rulemaking for statewide voter registration list.

Compiler's Comments

Effective Date: Section 46, Ch. 475, L. 2003, provided that this section is effective January 1, 2004.

13-2-109. Rulemaking on sufficiency and verification of voter registration information.

Compiler's Comments

Effective Date: Section 46, Ch. 475, L. 2003, provided that this section is effective January 1, 2004.

13-2-110. Application for voter registration — sufficiency and verification of information — identifiers assigned for voting purposes.

Compiler's Comments

Effective Date: Section 46, Ch. 475, L. 2003, provided that this section is effective January 1, 2004.

13-2-112. Register of electors to be kept.

Collateral References

Elections *key* 106, 110.

29 C.J.S. Elections §§47 through 50.

13-2-115. Certification of statewide voter registration list — local lists to be prepared.

Compiler's Comments

2003 Amendment: Chapter 475 in (1) at beginning deleted "Except as provided in subsections (6) and (7)" and at end after "closed" inserted "the secretary of state shall certify the official statewide voter registration list"; in (2) in first sentence near beginning after "shall" deleted "prepare and", near middle after "printed" inserted "from the certified statewide voter registration database", and at end inserted "in the county", in second sentence at beginning inserted exception clause, and deleted former third and fourth sentences that read: "A preliminary list of registered electors may be printed before the close of registration for an election. If a preliminary list is printed, a supplementary list must be printed after the close of registration"; in (3) in first sentence after "registered" substituted "electors in a precinct" for "voters" and before "polling place" inserted "precinct's"; deleted former (3) that read: "(3) The list of registered electors prepared for a primary election may be used for the general election if a supplemental list giving the additions and deletions since the primary list was prepared is printed. The election administrator may prepare lists for a special election, but lists are not required to be printed for special elections"; in (4) after "registered" substituted "electors" for "voters"; deleted former (5) that read: "(5) The election administrator shall forward a list of all registered electors in the county to the secretary of state, as provided in 13-2-123. The secretary of state shall use the lists submitted by election administrators to compile and maintain a list of all registered electors in the state. Upon written request, the secretary of state shall furnish to

any elector, for noncommercial use, a current list of registered electors. Upon delivery of the list to the elector, the secretary of state shall charge and collect a fee, which must be set and deposited in accordance with 2-15-405"; in (5) near middle after "disclosed" substituted "the secretary of state or an election administrator" for "the registrar", before "list" inserted "generally available", after "registered" substituted "electors" for "voters", and at end before "names" inserted "electors'"; in (6)(a) near beginning of introductory clause after "individual" inserted "the secretary of state or", before "list" inserted "generally available", after "registered" substituted "electors" for "voters", and before "name" inserted "elector's"; in (6)(a)(i) after "administrator" inserted "as provided in subsection (6)(b)"; in (6)(a)(ii) after "administrator" inserted "as provided in subsection (6)(c)"; and made minor changes in style. Amendment effective January 1, 2004.

2001 Amendment: Chapter 396 at end of (5) substituted "a fee, which must be set and deposited in accordance with 2-15-405" for "a fee commensurate with the cost of compiling and maintaining the list and of reproducing the list in the format requested by the elector"; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendments: Chapter 233 in (1), near beginning, inserted reference to subsection (7); inserted (7) providing for exclusion of individual from registered voter list if individual fulfills specified conditions; and made minor changes in style.

Chapter 309 inserted (5) requiring the election administrator to forward a list of all registered electors in the county to the Secretary of State, requiring the Secretary of State to use the lists to maintain a list of all registered electors in the state, and requiring the Secretary of State to give an elector the list for noncommercial use upon payment of a fee; and made minor changes in style.

1995 Amendment: Chapter 161 in (1), at beginning, inserted exception clause; inserted (5) allowing nondisclosure of addresses of officers and their spouses on registered voter lists; and made minor changes in style.

Part of Section Not Codified: A portion of section 23-3012, R.C.M. 1947, which is redundant with 13-2-116, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 31, Ch. 368, L. 1969, as amended by sec. 5, Ch. 158, L. 1971, and sec. 12, Ch. 100, L. 1973.

Attorney General's Opinions

Counties — Printing Contract: The reproduction of the list of registered voters required by this section is "printing" as defined by 1-1-203 and must be done by the county printing contractor. 36 A.G. Op. 82 (1976).

Voters — Taxpayer Qualifications: In an opinion written before the adoption of the 1972 Montana Constitution and before the 1973 and subsequent amendments of this section, the Attorney General held that taxpayer qualifications for elections as provided for in Art. IX, sec. 2, 1889 Mont. Const., were invalid, that taxpayer qualifications for petitioning were presumed valid, and that it was no longer mandatory for the county registrar to stamp "taxpayer" beside the name of an elector as required, at the time of the opinion, by this section. 34 A.G. Op. 47 (1972).

Collateral References

Elections *key* 108 through 111.

29 C.J.S. Elections §§47 through 50.

13-2-116. Precinct register.

Compiler's Comments

2003 Amendment: Chapter 475 in (1) in first sentence near middle after "prepare" inserted "from the certified statewide voter registration list" and after "precinct" inserted "in the county" and in second sentence near middle before "registered" inserted "legally registered electors and provisionally"; and made minor changes in style. Amendment effective January 1, 2004.

Part of Section Not Codified: A portion of section 23-3012, R.C.M. 1947, which is redundant with 13-2-116, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 31, Ch. 368, L. 1969, as amended by sec. 5, Ch. 158, L. 1971, and sec. 12, Ch. 100, L. 1973.

Collateral References

Elections *key* 212.

29 C.J.S. Elections §§47 through 50.

13-2-122. Charges for registers, elector lists, and mailing labels made available to public.

Compiler's Comments

2003 Amendment: Chapter 475 in (1) in first sentence near beginning after "provided in" substituted "subsection (2)" for "subsections (2) and (3)", after "request" substituted "the secretary of state or a local election administrator" for "the registrar", and near end before "registered electors" inserted "legally" and in second sentence near beginning after "Upon delivery" substituted "the secretary of state or the local election administrator" for "the registrar"; deleted former (2) that read: "(2) If the registrar receives in writing from a law enforcement officer or reserve officer, as defined in 7-32-201, a request that, for security reasons, the officer's and the officer's spouse's residential address, if the same as the officer's, not be disclosed, the registrar may not include the address on any register, list, or mailing labels disseminated pursuant to subsection (1)"; in (2) at beginning inserted "For an elector whose address information is protected from general distribution under 13-2-115(5) or (6), the secretary of state or a local", after "may not include" substituted "the elector's" for "an individual's", at end before "name" inserted "elector's", and after "name" deleted "or names if the individual requests that the individual's address not be used and the individual proves to the election administrator those matters described in 13-2-115(7)(a)(i) or (7)(a)(ii)"; and made minor changes in style. Amendment effective January 1, 2004.

1999 Amendment: Chapter 51 in (3) at end after "13-2-115" substituted "(7)(a)(i) or (7)(a)(ii)" for "(6)(a)(i) or (6)(a)(ii)". Amendment effective March 15, 1999.

1997 Amendment: Chapter 233 in (1), near beginning, inserted reference to subsection (3); inserted (3) prohibiting election administrator from using individual's residential address if individual fulfills conditions; and made minor changes in style.

1995 Amendment: Chapter 161 in (1), at beginning, inserted exception clause; and inserted (2) allowing nondisclosure of addresses of officers and their spouses on registers, lists, and mailing labels.

1983 Amendment: Near beginning of first sentence, substituted "to any elector for noncommercial use" for "any person"; at end of first sentence, inserted "a current list of registered electors, or mailing labels for registered electors"; near beginning of second sentence, changed "shall" to "may"; and at end of second sentence substituted "not to exceed the actual cost of the register, list, or mailing labels" for "of 5 cents for each name entered in the official register".

Collateral References

Elections *key* 111.

29 C.J.S. Elections §50.

13-2-123. Election administrator to provide list of electors to secretary of state.

Compiler's Comments

2003 Amendment: Chapter 475 in (1) in introductory clause near middle after "secretary of state" deleted "a list by precinct of all registered electors in the county. The list must include"; deleted former (1)(d) that read: "(d) registration number assigned by the county election administrator pursuant to 13-2-114"; inserted (1)(f) requiring a driver's license number or the last four digits of a social security number; inserted (1)(l) requiring information of whether elector is legally or provisionally registered; inserted (2) requiring that information be provided in accordance with adopted rules; deleted former (2) through (5) that read: "(2) (a) Except as provided in subsection (2)(b), the list provided pursuant to subsection (1) must be a paper copy.

(b) If the county election administrator also maintains the information in other media, such as on a computer disk or tape, and the secretary of state requests the information in that media, the county election administrator shall also provide the list in that media.

(3) In odd-numbered years, the list of electors required by subsection (1) must be delivered to the secretary of state by December 15.

(4) In even-numbered years, the list of electors required by subsection (1) must be delivered to the secretary of state:

(a) for a primary election, no later than July 1, and the list must indicate any changes made up to and including the date of the June primary; and

(b) for a general or special election, 30 days prior to the close of registration before the election.

(5) Each election administrator may provide the secretary of state with a supplemental list of electors in even-numbered years, giving the additions, deletions, and changes made between

the time that the previous list was compiled and the close of registration"; and made minor changes in style. Amendment effective January 1, 2004.

1997 Amendment — Coordination: Section 5, Ch. 309, L. 1997, a coordination section, inserted (1)(k) regarding listing whether the elector's name is on the active or inactive list of electors.

Effective Date: Section 6, Ch. 309, L. 1997, provided that this section is effective July 1, 1997.

13-2-124. Registration provisions for United States electors supersede.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

Part 2
Registration Procedures

Part Attorney General's Opinions

Forms to Be Available: Election administrators cannot place arbitrary limits on the availability of voter registration forms either to individuals or political interest groups such as political parties, labor unions, or political action committees. Any restrictions on the availability of forms for voter registration by mail violate the provisions of 13-2-203 (now repealed). 38 A.G. Op. 107 (1980).

13-2-201. Hours of registration.

Collateral References

Elections *key* 105, 106.

29 C.J.S. Elections §39.

25 Am. Jur. 2d Elections §§185 through 187.

Validity of college or university regulation of political or voter registration activity in student housing facilities. 39 ALR 4th 1137.

Validity, construction, and application of 42 U.S.C.S. §1973i(c) making it federal offense with respect to federal elections to give false information in registering or voting or to pay or accept payment for registering or voting. 23 ALR Fed. 463.

13-2-205. Procedure when prospective elector not qualified at time of registration.

Compiler's Comments

2003 Amendment: Chapter 475 at end after "election day may" substituted "apply for voter registration pursuant to 13-2-110 and be registered subject to verification procedures established pursuant to 13-2-109" for "register if it appears that he will become qualified to vote by election day". Amendment effective January 1, 2004.

Collateral References

Elections *key* 106.

29 C.J.S. Elections §40(1).

13-2-206. Citizenship requirements.

Collateral References

Elections *key* 98.

29 C.J.S. Elections §§18, 40(1).

25 Am. Jur. 2d Elections §153.

13-2-207. Confirmation of registration.

Compiler's Comments

1997 Amendment: Chapter 246 in (1) substituted second and third sentences requiring notice to be sent by nonforwardable, first-class mail and prohibiting application for voter registration from being placed on register for former second sentence that read: "Mailed notices must conform to postal regulations to ensure return, not forwarding, of undelivered notices"; in (2), in first sentence after "any mailed notices", substituted "and mail a confirmation notice to the elector" for "and correct the address on the registration form and mail a new notice or cancel the registration of the elector if a diligent effort fails to locate the elector named on the registration form" and inserted second sentence requiring notice to conform to postal regulations to ensure return of undelivered notices; and made minor changes in style. Amendment effective April 11, 1997.

1987 Amendment: At end of (1) substituted "conform to postal regulations to ensure return, not forwarding, of undelivered notices" for "have printed on the address side the words "Do Not Forward, Return Postage Guaranteed"".

Collateral References

Elections *key* 44.
29 C.J.S. Elections §55.
25 Am. Jur. 2d Elections §§96, 97.

13-2-208. Elector to furnish residential address — prohibiting registration for failure to provide address.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

13-2-220. Maintenance of active and inactive voter registration lists for elections — rules by secretary of state.

Compiler's Comments

2003 Amendment: Chapter 475 in (1) in introductory clause at beginning substituted "The rules adopted by the secretary of state under 13-2-108" for "The secretary of state shall adopt rules specifying a list of procedures from which an election administrator shall choose at least one procedure for the maintenance of accurate voter registration rolls for use in elections.

(2) The procedures specified by the secretary of state"; in (1)(c) after "vote" inserted "in the preceding federal general election"; and made minor changes in style. Amendment effective January 1, 2004.

1997 Statement of Intent: The statement of intent attached to Ch. 246, L. 1997, provided: "A statement of intent is required for this bill because the bill gives the secretary of state authority to adopt administrative rules. [Section 12] [13-2-220] requires the secretary of state to adopt rules providing alternative methods to be used by election administrators to ensure the maintenance of accurate voter registration rolls for elections. In adopting the alternatives, the secretary of state shall consider the recommendations of the federal election commission and consult with county election administrators."

Effective Date: Section 18, Ch. 246, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 11, 1997.

13-2-221. Agency-based registration.

Compiler's Comments

1999 Amendment: Chapter 51 in (4)(a) after "2-4-102" substituted "(2)(a)" for "(1)(a)"; and made minor changes in style. Amendment effective March 15, 1999.

Effective Date: Section 18, Ch. 246, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 11, 1997.

13-2-222. Reactivation of elector.

Compiler's Comments

1999 Amendment: Chapter 208 in (1)(b) inserted "in writing"; inserted (1)(c) requiring completion of a form providing current address information; in (2) inserted reference to (1)(c); inserted (3) requiring reactivation to be accomplished no later than 30 days before the election; and made minor changes in style. Amendment effective March 30, 1999.

Effective Date: Section 18. Ch. 246, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 11, 1997.

Part 3
Close of Registration

13-2-301. Close of registration — procedure.

Compiler's Comments

2001 Amendment: Chapter 7 in (1)(a) after "election" deleted "except as provided in 13-2-212(3)"; and made minor changes in style. Amendment effective October 1, 2001.

1991 Amendment: At end of (1)(a) inserted exception clause. Amendment effective April 1, 1991.

1985 Amendment: Inserted (3) allowing correction of mistakes on completed registration forms.

Case Notes

Durational Residency Requirements: Durational residency requirements of 3 months in county and 1 year in state as conditions precedent to voting violate the Equal Protection Clause of the 14th amendment. The unreasonableness of the classification was established by the fact that the registration books in Tennessee were not closed until 30 days before the election, and this was ample time to complete whatever administrative tasks were necessary to ensure the purity of the ballot box. Dunn v. Blumstein, 405 US 330 (1971), distinguished in Marston v. Lewis, 410 US 679 (1973).

Objection Waived: Under 13-2-303 (now repealed), the objection that a measure created a state debt, levy, or liability, and that therefore it should have been placed upon a separate ballot, is waived if not raised before the election. State ex rel. Graham v. Bd. of Examiners, 125 M 419, 239 P2d 283 (1952).

Date for Holding Election: Under Ch. 122, L. 1915 (now repealed), a period of not less than 60 days was required to lapse between time an election was called and time it was held. State ex rel. Eagye v. Bawden, 51 M 357, 152 P 761 (1915).

Attorney General's Opinions

Applicability of General Election Laws to County Water and Sewer Districts: The specific provisions governing water and sewer district elections in Title 7, ch. 13, part 22, prevail over the requirements of the general election laws when the two conflict; therefore, the closure of registration and notice of closure requirements of 13-2-301 do not apply insofar as the time periods conflict. Reasonable time limitations can be adopted by the Board of Directors, giving electors at least 20 days' notice prior to closing registration. 37 A.G. Op. 45 (1977).

Collateral References

Elections *key* 105, 106.
29 C.J.S. Elections §46.
25 Am. Jur. 2d Elections §§185, 186.

13-2-302. Registration immediately before an election.

Collateral References

Elections *key* 106.
29 C.J.S. Elections §46.
25 Am. Jur. 2d Elections §§185, 186.

Part 4
Cancellation and Challenge of Registration

Part Attorney General's Opinions

Revision of Voter Registration List by School Trustees Prohibited: Montana law does not permit the exercise of discretion by anyone other than the election administrator to revise the number of names on a voter registration list, pursuant to Title 13, ch. 2, part 4. Therefore, school trustees are not permitted under 20-9-428 to revise the number of voters on the certified list of registered electors when determining the percentage of voter turnout at a school bond election. 42 A.G. Op. 19 (1987).

Electors — Cancellation of Registration: The phrase "within forty-five (45) days prior to the closing of registration" in 13-2-403 (now repealed) (as it read prior to 1977 amendment) meant "at any time not less than forty-five (45) days prior to the close of registration". 36 A.G. Op. 43 (1975).

13-2-402. Reasons for cancellation.

Compiler's Comments

2003 Amendment: Chapter 475 in (7) after "received from" inserted "the secretary of state or from" and before "county" substituted "another" for "that". Amendment effective January 1, 2004.

2001 Amendment: Chapter 96 in (8) after "two" substituted "consecutive" for "subsequent". Amendment effective October 1, 2001.

1999 Amendment: Chapter 208 in (8) inserted "general". Amendment effective March 30, 1999.

1997 Amendment: Chapter 246 inserted (8) requiring registration to be canceled if elector fails to respond to mailings or fails to vote; and made minor changes in style. Amendment effective April 11, 1997.

1995 Amendments: Chapter 418 in (2) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (2) substituted "department of public health and human services" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1981 Amendment: In (6), substituted "upon determination of an election judge" for "as provided in 13-13-308".

Case Notes

Incarcerated Felons Excluded From Suffrage: The provisions of the Montana Constitution excluding incarcerated felons from suffrage are constitutionally permissible under the Equal Protection Clause, both in the federal and state constitutional versions. Emery v. St., 177 M 73, 580 P2d 445 (1978).

Effect of Federal Conviction for Offense Not a Felony Under State Law: A Montana voter cannot be denied the right to vote because of conviction of an offense in federal court that would not be a felony by Montana statutory definition. Melton v. Oleson, 165 M 424, 530 P2d 466 (1974), overruling State ex rel. Anderson v. Fousek, 91 M 448, 8 P2d 791 (1932).

Collateral References

Elections *key* 108.

29 C.J.S. Elections §48.

25 Am. Jur. 2d Elections §184.

Part 5
Transfer of Registration

Part Attorney General's Opinions

Election on Annexation of Portions of Yellowstone Park: Eligible residents of the portion of Yellowstone National Park proposed for annexation into Park County under Ch. 447, L. 1977, must be accorded the opportunity to vote on the question of annexation. Each registrant must establish that the Park is where he resides, and to this end, the registrar should require that registrants agree to cancel any prior registrations in the State of Montana or elsewhere. 37 A.G. Op. 161 (1978).

13-2-511. Transferring registration or changing name.

Collateral References

Elections *key* 119.

29 C.J.S. Elections §§48, 52.

13-2-512. Right to vote when precinct or name changed — inactive elector — change of status.

Compiler's Comments

1997 Amendment: Chapter 246 in (1), near end after "change", inserted "or at a central location designated by the election administrator" and after "as provided in" deleted "13-2-207, 13-2-401, or"; in (2), near end after "as provided in", deleted "13-2-207, 13-2-401, or"; inserted (4) requiring that inactive elector be allowed to vote and changed from inactive to active list; and made minor changes in style. Amendment effective April 11, 1997.

Collateral References

Elections *key* 59, 73.

29 C.J.S. Elections §§21, 52.

25 Am. Jur. 2d Elections §167.

13-2-513. Procedure for transferring registration.

Compiler's Comments

2003 Amendment: Chapter 475 at beginning inserted "Subject to rules adopted under 13-2-108" and at end after "registration form" deleted "if he is satisfied the form is valid" and deleted former second sentence that read: "The original registration form may be fastened to the back of the new form, in which case the original and current forms must be retained, or the

original registration form may be marked "canceled" and filed in a canceled file"; and made minor changes in style. Amendment effective January 1, 2004.

Collateral References
Elections *key* 119.
29 C.J.S. Elections §52.

13-2-514. Change of residence to another county.

Compiler's Comments
2003 Amendment: Chapter 475 deleted former (3) that read: "(3) The elector must state his correct name and residence address and date of residence change when offering to vote or when applying for an absentee ballot. The election administrator shall note the information on the elector's registration form if an absentee ballot application is received. The election judges shall note the change of address and date of residence change in the precinct register if the elector votes in person"; in (3) near beginning after "registration" inserted "information", after "subsection (2)" substituted "must be updated in the statewide voter registration list" for "of this section shall be canceled", and at end inserted "pursuant to rules adopted under 13-2-108"; and made minor changes in style. Amendment effective January 1, 2004.

Collateral References
Elections *key* 73, 119.
29 C.J.S. Elections §§21, 52.
25 Am. Jur. 2d Elections §167.

Part 6
Effect of Registration

13-2-601. Special addendum to precinct register.

Compiler's Comments
2003 Amendment: Chapter 475 deleted former (1) that read: "(1) An elector may not vote at an election mentioned in this title unless his name appears on election day in the copy of the official precinct register furnished by the election administrator to the election judges. The fact that his name appears in the copy of the precinct register is prima facie evidence of his right to vote"; deleted former second sentence that read: "The fact that an elector's name appears on a special addendum to the precinct register is prima facie evidence of his right to vote in the precinct"; and made minor changes in style. Amendment effective January 1, 2004.
1987 Amendment: Inserted (2) providing for special addendum to precinct register.

Attorney General's Opinions
School Districts — Elector and Candidate Qualifications: In order to qualify for the office of school trustee, a person must be registered to vote as a resident of the school district in which he proposes to vote. Votes cast in a school election by persons who are residents of the district but who are not registered to vote in that district are invalid. 35 A.G. Op. 91 (1974).

Collateral References
Elections *key* 113.
29 C.J.S. Elections §49.

13-2-602. Joinder of parties in proceedings to compel entry of name in register.

Collateral References
Elections *key* 107, 112.
29 C.J.S. Elections §48.

CHAPTER 3
PRECINCTS AND POLLING PLACES

Chapter Law Review Articles
Clearing CBS, Inc. v. Smith [681 F. Supp. 794] From the Path to the Polls: A Proposal to Legitimize States' Interests in Restricting Exit Polls, 74 Iowa L. Rev. 737 (1989).
Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?, Levinson, 33 UCLA L. Rev. 257 (1985).

The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?, Lowenstein & Steinberg, 33 UCLA L. Rev. 1 (1985).

Partisan Gerrymandering: The Next Hurdle in the Political Thicket?, Weinstein, 1 J. L. & Pol. 357 (1984).

Reapportionment, the Courts, and the Voting Rights Act: A Resegregation of the Political Process?, Butler, 56 U. Colo. L. Rev. 1 (1984).

Constitutional Law—Congressional Reapportionment—Population Equality of Congressional Districts, Usary, 51 Tenn. L. Rev. 169 (1983).

Chapter Collateral References

Elections *key* 46 through 48.
29 C.J.S. Elections §§53, 54.
25 Am. Jur. 2d Elections §7, et seq.

Part 1
Designation of Precincts and Polling Places

13-3-101. Establishment of election precincts.

Attorney General's Opinions

Ballot Division by Precinct: The ballot division required for local government ballots in 7-3-150 should be done according to the boundaries of precincts, as that term is defined in 13-3-101. 41 A.G. Op. 88 (1986).

Collateral References

Elections *key* 46 through 48.
29 C.J.S. Elections §§53, 54.
25 Am. Jur. 2d Elections §7, et seq.

Diluting effect of minorities' votes by adoption of particular election plan, or gerrymandering of election district, as violation of Equal Protection Clause of federal Constitution. 27 ALR Fed. 29.

13-3-102. Change of precinct boundaries.

Attorney General's Opinions

Timetables for Filing Declarations of Nomination and Changing Precinct Boundaries — Study Commission Recommendations: The timetable for filing declarations of nomination found in 13-10-201(6) and the timetable for changing precinct boundaries found in 13-3-102(1) apply to candidates for County Commissioner positions created by the adoption of a local government study commission proposal. 41 A.G. Op. 44 (1986).

Collateral References

Elections *key* 48.
29 C.J.S. Elections §54.
25 Am. Jur. 2d Elections §7, et seq.

Report of the Montana Districting and Apportionment Commission, Montana Legislative Council (1992).

13-3-103. Certification of boundary changes.

Collateral References

Elections *key* 48.
29 C.J.S. Elections §54.
25 Am. Jur. 2d Elections §7, et seq.

13-3-104. Precincts, wards, and election districts.

Collateral References

Elections *key* 46, 47.
29 C.J.S. Elections §§53, 54.
25 Am. Jur. 2d Elections §7.

13-3-105. Designation of polling place.

Compiler's Comments

2003 Amendment: Chapter 414 inserted (5) providing that the exterior of voting systems or their booths and every part of the polling place must be in plain view of the judges; and made minor changes in style. Amendment effective October 1, 2003.

1987 Amendment: In (2) added sentence relating to accessibility designation.

1981 Amendment: Added subsection (4) referring to publicly owned buildings used as polling places.

Case Notes

Changing Designation: The Board of County Canvassers refused to canvass election returns from a precinct on the ground that it appeared upon the face of the returns that the election had not been held at the place designated by the Board of County Commissioners. On application for Writ of Mandate to compel them to act nothing was shown affirmatively by pleadings or otherwise to indicate that the election judges at the precinct had not pursued section 23-407, R.C.M. 1947 (now repealed), giving them authority to change the place of election upon 2 days' notice if for any reason it cannot be held at the place appointed. Therefore, it will be presumed that official duty was regularly performed by the election judges and that they did change the place of election, and the Writ will issue. State ex rel. Moore v. Patch, 65 M 218, 211 P 202 (1922).

Collateral References

Elections *key* 200 through 204.

29 C.J.S. Elections §193.

26 Am. Jur. 2d Elections §322.

Part 2
Accessibility of Polling Places

13-3-201. Purpose.

Compiler's Comments

1997 Amendment: Chapter 472 in first sentence substituted "individuals with disabilities" for "handicapped"; in third sentence substituted "voters with disabilities" for "handicapped"; and made minor changes in style.

13-3-202. Definitions.

Compiler's Comments

1997 Amendment: Chapter 472 in definition of accessible substituted reference to disabilities for reference to handicapped; and substituted disability for handicapped as defined term.

13-3-203. Duty of secretary of state — rulemaking.

Compiler's Comments

1997 Amendment: Chapter 472 in (1) substituted reference to disabilities for reference to handicapped; and made minor changes in style.

1987 Statement of Intent: The statement of intent attached to Ch. 200, L. 1987, provided: "A statement of intent is required for this bill because it grants the secretary of state authority to adopt rules to assure accessibility at the polling place for handicapped and elderly voters. Such rules must be adopted under the Montana Administrative Procedure Act and must be consistent with the provisions of this act.

It is the intent of the legislature that the secretary of state adopt rules to establish standards that a polling place must meet in order to be designated accessible under this act. Wherever possible, these standards should be consistent with the standards established by the American National Standards Institute and the Uniform Federal Accessibility Standards.

In addition, it is intended that the secretary of state establish polling place classifications and survey procedures to determine whether polling places are accessible to handicapped and elderly voters. The secretary of state should also define the basis for an emergency exemption under section 8, which allows an election administrator to relocate an established polling place within 10 days prior to an election.

Finally, it is contemplated that the secretary of state establish procedures to allow an elector to vote on election day by alternative means if he is prevented from voting at his assigned polling place because it is inaccessible."

13-3-205. Adoption of standards for polling place accessibility — rulemaking authority.

Compiler's Comments

1997 Amendment: Chapter 472 substituted reference to disabilities for reference to handicapped.

1987 Statement of Intent: The statement of intent attached to Ch. 200, L. 1987, provided: "A statement of intent is required for this bill because it grants the secretary of state authority to adopt rules to assure accessibility at the polling place for handicapped and elderly voters. Such rules must be adopted under the Montana Administrative Procedure Act and must be consistent with the provisions of this act.

It is the intent of the legislature that the secretary of state adopt rules to establish standards that a polling place must meet in order to be designated accessible under this act. Wherever possible, these standards should be consistent with the standards established by the American National Standards Institute and the Uniform Federal Accessibility Standards.

In addition, it is intended that the secretary of state establish polling place classifications and survey procedures to determine whether polling places are accessible to handicapped and elderly voters. The secretary of state should also define the basis for an emergency exemption under section 8, which allows an election administrator to relocate an established polling place within 10 days prior to an election.

Finally, it is contemplated that the secretary of state establish procedures to allow an elector to vote on election day by alternative means if he is prevented from voting at his assigned polling place because it is inaccessible."

13-3-207. Polling place classifications.

Compiler's Comments

1997 Amendment: Chapter 472 in (6) substituted reference to disabilities for reference to handicapped; and made minor changes in style.

13-3-213. Alternative means for casting ballot.

Compiler's Comments

1997 Amendment: Chapter 472 in (1), in introductory clause, substituted reference to disabilities for reference to handicapped; in (2), in introductory clause, substituted reference to disability for reference to handicapped; and made minor changes in style.

CHAPTER 4
ELECTION JUDGES

Chapter Compiler's Comments

Preamble: The preamble attached to Ch. 414, L. 2003, provided: "WHEREAS, the U.S. Supreme Court in Bush v. Gore, 531 U.S. 98 (2000), found that the lack of uniform procedures for determining voter intent in Florida during the 2000 presidential election led to a violation of the U.S. Constitution's Equal Protection Clause of the 14th Amendment; and

WHEREAS, at the request of the 57th Legislature, the State Administration and Veterans' Affairs Interim Committee devoted much of the 2001-2002 interim to a review of Montana election laws with respect to voting systems and counting processes in light of Bush v. Gore; and

WHEREAS, the interim study found that Montana's statutory provisions relating to ballots, voting systems, and vote counting processes needed to be updated, clarified, and in some instances revised to better define uniform standards and procedures to provide equal protection for votes cast by Montana voters; and

WHEREAS, the Subcommittee on Voting Systems of the State Administration and Veterans' Affairs Interim Committee agreed that statutory changes should be made with an eye on future technology but should also standardize current practices to the greatest extent possible.

THEREFORE, this legislation will enable the Secretary of State to adopt a statewide benchmark performance measure that voting systems must meet before they can be approved for use in the state; allow local election administrators to continue to choose which of the approved voting systems should be used locally; require the Secretary of State to adopt uniform statewide rules regarding ballot form, votes and vote counts, and other operational procedures specific to each voting system and to provide training to local election administrators; and require all counting boards to use the uniform counting procedures specified."

Chapter Collateral References

Elections *key* 49 through 58.

29 C.J.S. Elections §§55 through 65.

25 Am. Jur. 2d Elections §§89 through 95.

Election Judges Handbook, Office of the Secretary of State (1997) (updated biennially).

Part 1
Appointment

13-4-101. Appointment of election judges.

Compiler's Comments

2003 Amendment: Chapter 414 deleted former (2) and (3) that read: "(2) A board of election judges, designated as a counting board, may be appointed in any precinct if recommended by the election administrator.

(3) A board of election judges, designated as a counting board for absentee ballots, may be appointed to count all absentee ballots for all precincts if recommended by the election administrator"; and made minor changes in style. Amendment effective October 1, 2003.

1983 Amendment: At beginning of (2), changed "A second board" to "A board"; and inserted (3) referring to appointment of counting board for absentee ballots.

Collateral References

Elections *key* 50 through 52.
29 C.J.S. Elections §§55 through 59.
25 Am. Jur. 2d Elections §§89 through 92.

13-4-102. Manner of choosing election judges.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) at beginning inserted "Subject to 13-4-107"; in (3) in second sentence near beginning substituted "the number of election judges needed to obtain a simple majority" for "a majority"; in (5) at end substituted "provided in 13-4-103" for "assigned by the election administrator for 2 years"; and made minor changes in style. Amendment effective October 1, 2003.

1993 Amendment: Chapter 232 in (4), in second sentence after "insufficient", deleted "any qualified registered elector from the county may be appointed" and inserted remainder of subsection providing that if one or more eligible political parties fails to submit a list, the qualified registered electors selected to fill vacancies may be selected by a random method, either by manual drawing or by computer; and inserted (5) requiring notification of potential judges and requiring them to attend a training class and to serve for 2 years.

Collateral References

Elections *key* 50 through 52.
29 C.J.S. Elections §§55 through 59.
25 Am. Jur. 2d Elections §§89 through 92.

13-4-103. Judges to serve until others appointed.

Collateral References

Elections *key* 50 through 52.
29 C.J.S. Elections §59.
25 Am. Jur. 2d Elections §91.

13-4-104. Election administrator to notify judges.

Collateral References

Elections *key* 50 through 52.
29 C.J.S. Elections §59.
25 Am. Jur. 2d Elections §§91, 92.

13-4-105. Oath of judges.

Compiler's Comments

1993 Amendment: Chapter 232 at beginning substituted "Before beginning service on each election day" for "Before votes are cast".

Collateral References

Elections *key* 50 through 52.
29 C.J.S. Elections §59.
25 Am. Jur. 2d Elections §90.

13-4-106. Compensation of judges.

Compiler's Comments

2003 Amendment: Chapter 47 in (1) in first sentence after "paid at" inserted "least". Amendment effective October 1, 2003.

2001 Amendment: Chapter 44 in (1) inserted last sentence excluding election judges from unemployment insurance coverage if remuneration received is less than $1,000 in a calendar year. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 44, L. 2001, provided: "WHEREAS, section 21, Chapter 195, Laws of 1995, contained a contingent termination provision based upon the amendment of 26 U.S.C. 3304 to no longer require that election judges receive unemployment insurance coverage, but the authority for states to exclude election officials and election workers from unemployment insurance coverage was contained in 26 U.S.C. 3309(b)(3)(F)."

1995 Amendment: Chapter 195 deleted last sentence in (1) that read: "Election judges are exempt from unemployment insurance coverage for services performed pursuant to this chapter"; and made minor changes in style. Amendment effective January 1, 1996.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

Contingent Termination: Section 21, Ch. 195, L. 1995, provided: "If 26 U.S.C. 3304 is amended to no longer require that election judges receive unemployment insurance coverage, then [section 1 of this act] [13-4-106] terminates on the date on which the U.S.C. amendment is effective." The effect of the termination would be to reinsert the following sentence at the end of (1): "Election judges are exempt from unemployment insurance coverage for services performed pursuant to this chapter." Section 26 U.S.C. 3309(b)(3)(F) contains the authority for states to exclude election officials and election workers from unemployment insurance coverage, so the contingent voidness of certain language was rendered ineffectual. Chapter 44, L. 2001, amended this section by inserting the last sentence of subsection (1).

1991 Amendment: At beginning of (1) inserted exception clause and inserted third sentence concerning exempting election judges from unemployment insurance coverage; and in (2), before "reimbursed", inserted language allowing chief election judge to be paid at higher rate than other election judges.

Collateral References

Elections *key* 53.
29 C.J.S. Elections §63.
25 Am. Jur. 2d Elections §§96 through 99.

13-4-107. Qualifications of election judges.

Collateral References

Elections *key* 50 through 52.
29 C.J.S. Elections §58.
25 Am. Jur. 2d Elections §90.

Part 2
Functions

13-4-201. Duties of chief election judge.

Compiler's Comments

1993 Amendment: Chapter 232 before "shall be responsible for the return" inserted "if assigned to work through the close of the polls" and after "shall be responsible for the return" inserted "of or for arranging the return".

Collateral References

Elections *key* 54.
29 C.J.S. Elections §55.
25 Am. Jur. 2d Elections §§96 through 99.

13-4-202. Administration of oaths.

Collateral References

Elections *key* 54.
29 C.J.S. Elections §55.
25 Am. Jur. 2d Elections §§96 through 99.

13-4-203. Instruction of judges — training materials.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) near beginning inserted "obtained pursuant to 13-1-203(3)", near middle substituted "voting systems" for "voting machines or devices", and at end substituted "how to operate the voting system and how to manually process any paper ballots" for "machines or devices and paper ballots"; in (2) at end inserted "even if they possess a current certificate of instruction"; deleted former (4) that read: "(4) The secretary of state shall prepare and distribute training materials for election judges. The materials shall include instructions on the use of all machines or devices approved for use in this state, as well as paper ballots. Enough copies of the materials to supply all election judges in the county and provide a small extra supply shall be sent to each election administrator. The secretary of state shall hold at least one workshop every 2 years to instruct election administrators and their staffs in use of the materials. Workshops may be held in various locations around the state. Costs of the materials and workshops shall be paid by the secretary of state"; in (4) in first sentence inserted "under this section" and in second sentence at end inserted "obtained under 13-1-203(3) or this section"; and made minor changes in style. Amendment effective October 1, 2003.

Collateral References

Elections *key* 50 through 52.
29 C.J.S. Elections §§55, 63.
25 Am. Jur. 2d Elections §§90, 96 through 99.

13-4-207. Judges to remain at polls — emergency provisions — part-time service.

Compiler's Comments

1993 Amendment: Chapter 232 inserted (5) allowing a judge to work less than a full polling day and requiring at least 3 judges, including a chief judge, to be on duty while polls are open.

Collateral References

Elections *key* 54.
29 C.J.S. Elections §55.
25 Am. Jur. 2d Elections §§96 through 99.

CHAPTER 10
PRIMARY ELECTIONS AND NOMINATIONS

Chapter Compiler's Comments

Preamble: The preamble attached to Ch. 414, L. 2003, provided: "WHEREAS, the U.S. Supreme Court in Bush v. Gore, 531 U.S. 98 (2000), found that the lack of uniform procedures for determining voter intent in Florida during the 2000 presidential election led to a violation of the U.S. Constitution's Equal Protection Clause of the 14th Amendment; and

WHEREAS, at the request of the 57th Legislature, the State Administration and Veterans' Affairs Interim Committee devoted much of the 2001-2002 interim to a review of Montana election laws with respect to voting systems and counting processes in light of Bush v. Gore; and

WHEREAS, the interim study found that Montana's statutory provisions relating to ballots, voting systems, and vote counting processes needed to be updated, clarified, and in some instances revised to better define uniform standards and procedures to provide equal protection for votes cast by Montana voters; and

WHEREAS, the Subcommittee on Voting Systems of the State Administration and Veterans' Affairs Interim Committee agreed that statutory changes should be made with an eye on future technology but should also standardize current practices to the greatest extent possible.

THEREFORE, this legislation will enable the Secretary of State to adopt a statewide benchmark performance measure that voting systems must meet before they can be approved for use in the state; allow local election administrators to continue to choose which of the approved voting systems should be used locally; require the Secretary of State to adopt uniform statewide rules regarding ballot form, votes and vote counts, and other operational procedures specific to each voting system and to provide training to local election administrators; and require all counting boards to use the uniform counting procedures specified."

Chapter Law Review Articles

Setting Voter Qualifications for State Primary Elections: Reassertion of the Right of State Political Parties to Self-Determination, Lubecky, 55 U. Cin. L. Rev. 799 (1987).

Runoff Primaries: Is There a Discriminatory Result?, Wallace, 2 J. L. & Pol. 369 (1985).

Primary Elections and the Collective Right of Freedom of Association, Guttman, 94 Yale L.J. 117 (1984).

The Constitutionality of State Primary Systems: An Associational Rights Analysis, Carr & Scott, 10 J. Contemp. L. 83 (1984).

Better Late Than Never: The John Anderson Case and the Constitutionality of Filing Deadlines, Perkins, 11 Hofstra L. Rev. 691 (1983).

Chapter Collateral References

Elections *key* 120 through 159.

29 C.J.S. Elections §§89 through 148.

26 Am. Jur. 2d Elections §§207 through 276.

Validity of requirement that candidate or public officer has been resident of governmental unit for specified period. 65 ALR 3d 1048.

Right to seek nomination, or to become candidate, for more than one office in the same election. 94 ALR 2d 557.

Fourteenth amendment equal protection clause as affecting nomination or election to state office — federal cases. 59 L. Ed. 2d 852.

Part 2
Preprimary Procedures

13-10-201. Declaration for nomination.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 7 in (4) inserted second sentence concerning filing declaration for only one party; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 475 in (1) inserted second sentence providing that a candidate may not file for more than one office. Amendment effective January 1, 2004.

1999 Amendment: Chapter 40 in (3) near end of second sentence after "signatures" deleted "if sent by mail"; and inserted (7) providing that a declaration for nomination form may be sent by facsimile transmission, delivered in person, or mailed. Amendment effective February 24, 1999.

1997 Amendment: Chapter 5 in (2)(a), near beginning, inserted "placement of a name on the ballot for the presidential preference primary"; and made minor changes in style.

1993 Amendment: Chapter 74 inserted (5)(b) regarding residency of person seeking nomination to the Legislature; and made minor changes in style.

1987 Amendment: In (6) substituted "135 days before the election in which the office first appears on the ballot" for "the first business day in January of an election year for that office".

1985 Amendment: In (6) substituted "75 days" for "50 days".

Case Notes

Constitutionality of Freeholder Requirement — False Swearing-In Declaration Not a Violation: The freeholder requirement of 7-4-4401, prior to its amendment in 1979, was unconstitutional since it had no relation to a person's qualifications and ability to serve as City Councilman, resulting in an invidious discrimination violative of equal protection. Thus, appellant's false swearing as to freeholder status in his filed declaration of nomination did not constitute a violation of the election laws. Sadler v. Connolly, 175 M 484, 575 P2d 51 (1978), distinguished in Johnson v. Killingsworth, 271 M 1, 894 P2d 272, 52 St. Rep. 274 (1995).

Constitutional Convention: Legislature was not empowered to provide for nomination and election of delegates to constitutional convention under Art. XIX, sec. 8, 1889 Mont. Const., solely by nonpartisan means, since this would be a substantial change from manner of election and nomination provided for under this chapter. Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971), distinguished in Mahoney v. Murray, 159 M 176, 496 P2d 1120 (1972).

Attorney General's Opinions

When Judicial Appointee to Run for Election: An individual appointed by the Governor to the office of District Judge need not run in the general election in the year in which Senate confirmation takes place if, at the time of confirmation, the filing date for judicial candidates has passed. 41 A.G. Op. 52 (1986).

Timetables for Filing Declarations of Nomination and Changing Precinct Boundaries — Study Commission Recommendations: The timetable for filing declarations of nomination found in 13-10-201(6) and the timetable for changing precinct boundaries found in 13-3-102(1) apply to

candidates for County Commissioner positions created by the adoption of a local government study commission proposal. 41 A.G. Op. 44 (1986).

Judges — Vacancy Before Primary Election: In an opinion written before revision of the election laws in 1979, the Attorney General held that statutes prescribing time limitations, within which declarations for nomination and certification of nominees by the Secretary of State must be made, do not apply to a case where a vacancy occurs in the office of a regularly elected District Judge if there is sufficient time before the primary to allow declarations to be filed and the ballots printed. 33 A.G. Op. 19 (1970).

Law Review Articles

Freeholder Requirements in Montana Code Annotated: Unconstitutional Restrictions on the Right of Political Participation, Hammond, 41 Mont. L. Rev. 97 (1980).

Collateral References

Elections *key* 126(4).
29 C.J.S. Elections §114.
26 Am. Jur. 2d Elections §§220, 235.

13-10-202. Filing fees.

Attorney General's Opinions

Election of Conservation District Supervisors: Filing fees are not required for election to the office of conservation district supervisor. 37 A.G. Op. 131 (1978).

Collateral References

Elections *key* 139, 145.
29 C.J.S. Elections §114.
26 Am. Jur. 2d Elections §235.

Validity and effect of statutes exacting filing fees from candidates for public office. 89 ALR 2d 864.

13-10-203. Indigent candidates.

Collateral References

Constitutional Law *key* 90.1(1), 91, 225.2(5); Elections *key* 22, 24.
29 C.J.S. Elections §114.
26 Am. Jur. 2d Elections §§231, 274 through 276.

Validity and effect of statutes exacting filing fees from candidates for public office. 89 ALR 2d 864.

13-10-204. Write-in nominations.

Compiler's Comments

2003 Amendment: Chapter 414 in introductory clause near middle inserted "or otherwise placed" and substituted "appear on" for "printed on"; and made minor changes in style. Amendment effective October 1, 2003.

Case Notes

Time for Filing Acceptance by Write-In Candidate: Under section 23-910, R.C.M. 1947 (now repealed), which required write-in candidate to file within 10 days after "election", the term "election" meant the day of election and not the day on which the canvass of the ballots was completed; hence a candidate for House of Representatives who filed acceptance 18 days after election was not entitled to a Writ of Mandate to compel the County Clerk to include his name on the general election official ballot. State ex rel. Wulf v. McGrath, 111 M 96, 106 P2d 183 (1940).

Failure to File Acceptance — Effect of Subsequent Resignation: When a successful write-in candidate at a nominating election failed to file his acceptance within 10 days after election day, his subsequent resignation did not result in a vacancy which the county central committee of his party could fill. State ex rel. Wilkinson v. McGrath, 111 M 102, 106 P2d 186 (1940).

Collateral References

Elections *key* 126(4).
29 C.J.S. Elections §114.

13-10-205. Register of candidates.

Compiler's Comments

1987 Amendment: In first sentence substituted "may each keep a register" for "shall each keep a register" and in last sentence substituted "may prepare and distribute" for "shall prepare and distribute".

13-10-208. Certificate of primary ballot — preparing ballot.

Compiler's Comments

2003 Amendment: Chapter 414 in (2) near end substituted "ballots prepared" for "ballots printed"; and made minor changes in style. Amendment effective October 1, 2003.

1993 Amendment: Chapter 74 inserted (3) regarding notification of legislative candidate who is required to withdraw from candidacy because of residency change; and made minor changes in style.

1985 Amendment: In (1) substituted "Not more than 75 days and not less than 67 days" for "Not more than 50 days and not less than 42 days"; and in (2) substituted "Not more than 67 days and not less than 62 days" for "Not more than 40 days and not less than 30 days".

Collateral References

Elections *key* 126, 156.
29 C.J.S. Elections §135.
26 Am. Jur. 2d Elections §221.

13-10-209. Arrangement and preparing of primary ballots.

Compiler's Comments

2003 Amendment: Chapter 414 in (1)(a) in first sentence near beginning substituted "prepared" for "printed" and in second sentence in two places substituted "appear" for "be printed"; in (1)(b) in introductory clause substituted "prepared" for "printed"; inserted (1)(b)(iii) providing that for ballot issues, written approval must be obtained; in (2) in introductory clause substituted "prepare" for "print"; in (2)(a) and (2)(b) substituted "appear" for "be printed"; in (3) near beginning substituted "prepared" for "printed"; in (4) in first sentence at end substituted "have the same appearance" for "be the same size and color", in second sentence at beginning deleted "The stubs of", and in third sentence at beginning substituted "prepared" for "printed", near middle substituted "appearance" for "size or color", and near end before "must be numbered" deleted "the stubs"; in (5) near middle substituted "appearance" for "size and color" and near end before "must be numbered" deleted "the stubs"; in (6) at end substituted "ballots that includes the party, nonpartisan, and ballot issue choices" for "party ballots and a nonpartisan and ballot issue ballot if those ballots are printed"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 537 in (2)(a) at end deleted "in even-year elections"; in (3) at beginning inserted "If, pursuant to subsection (2), a primary ballot for a political party is not printed" and near middle before "instruct" deleted "certify or"; and made minor changes in style. Amendment effective October 1, 2001.

1987 Amendment: In (1)(a), at end of first sentence, deleted "and separate nonpartisan and ballot issue ballots if necessary"; inserted (1)(b) establishing criteria for when nonpartisan offices and ballot issues may appear on same ballot as partisan offices; and at beginning of third sentence of (3) inserted "If printed as a separate ballot".

Administrative Rules

ARM 44.3.1731 Use of IES (Shoup) voting machines — before polls open.
ARM 44.3.1734 Use of AVM (automatic voting machines) — before polls open.
ARM 44.3.1738 Use of CES (computer election systems votomatic) — before polls open.

Collateral References

Elections *key* 126.
29 C.J.S. Elections §118.
26 Am. Jur. 2d Elections §§298 through 316.

13-10-211. Declaration of intent for write-in candidates.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 414 in (1) at beginning deleted "Except as provided in subsection (5)"; deleted former (5) that read: "(5) The requirements in subsection (1) do not apply to a write-in candidate seeking election to an office for which a candidate has not filed a declaration or petition for nomination or a declaration of intent"; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 475 inserted (6) providing that a declaration is not valid until the filing fee is received. Amendment effective January 1, 2004.

2001 Amendment: Chapter 15 in (1) near beginning of third sentence in exception clause inserted reference to subsection (3); in (2) near middle substituted "after the deadline prescribed

in subsection (1)" for "less than 15 days before the election"; inserted (3) requiring write-in candidate declaration of intent to be filed at least 26 days before election; and made minor changes in style. Amendment effective February 14, 2001.

1999 Amendment — Composite Section: Chapter 40 inserted (5) providing that a declaration of intent may be sent by facsimile transmission, delivered in person, or mailed. Amendment effective February 24, 1999.

Chapter 129 deleted former (4)(a) that read: "(a) as a precinct officer in a primary election"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 143 in (1)(a)(i) substituted "candidate's first and last names" for "candidate's name"; inserted (1)(a)(ii) through (1)(a)(iv) relating to candidate's initials, nickname, or derivative or diminutive name; in (4)(a) substituted "precinct officer" for "precinct committeeman or committeewoman"; and made minor changes in style.

Effective Date: Section 5, Ch. 391, L. 1989, provided: "[This act] is effective on passage and approval." Approved March 30, 1989.

Case Notes

Ballots With Only Last Name Listed Properly Rejected: Paulsen lost an election for Sheriff when 37 ballots were disallowed by election judges, principally ballots with only a last name listed. The District Court rejected Paulsen's challenge because the ballots did not contain a name consistent with one of the 30 names submitted by Paulsen in his declaration of intent to be a write-in candidate. Paulsen argued that because no other person named Paulsen or Paulson filed a declaration of intent, all written-in votes with those names should have been counted for him. However, election laws clearly specify what names voters may write in when the candidate being voted for has filed a declaration of intent, and if one of those names is not used, then the vote may not be counted. Even though there is a strong tradition in Montana jurisprudence to effectuate the honest choice of the electors, marking of ballots must not be expressly forbidden by statute and must substantially comply with the law. The 37 rejected ballots were properly disallowed, and the District Court correctly upheld the election officials' decision. Paulsen v. Huestis, 2000 MT 280, 302 M 157, 13 P3d 931, 57 St. Rep. 1170 (2000). See also Marsh v. Overland, 274 M 21, 905 P2d 1088 (1995).

Plaintiff Only Write-In Candidate — No Requirement That All Write-In Votes With His Surname Be Counted for Him: Marsh argued that all write-in votes for "Marsh" should have been recorded as votes for him rather than rejected by the county recount board because he was the only qualified write-in candidate. The Supreme Court held that a write-in vote had to be unambiguous to be counted and that the argument ignored the fact that there had been write-in votes for other Marshs, thereby making it impossible to determine if a vote for "Marsh" was a vote for him. Marsh v. Overland, 274 M 21, 905 P2d 1088, 52 St. Rep. 1099 (1995).

Collateral References

Validity of write-in vote where candidate's surname only is written in on ballot. 86 ALR 2d 1025.

Part 3
Primary Election Procedure

13-10-301. Casting of ballot.

Compiler's Comments

2003 Amendment: Chapter 414 in (2) in first sentence substituted "cast votes on" for "mark", before "party ballots" deleted "set of", and at end inserted "preparing the ballot as provided in 13-13-117" and in second sentence at beginning substituted "casting votes on" for "marking" and at end substituted "ensure the proper disposition of the ballots in accordance with instructions provided pursuant to 13-13-112" for "fold the marked and unmarked ballots separately in a manner so that the marks cannot be seen, the official stamp is visible on each ballot, and all stubs can be detached by an election judge"; substituted (3) concerning handling of ballots for former (3) that read: "(3) The elector shall hand the marked and unmarked ballots separately to the election judge, identifying them as marked and unmarked. If the judge determines the ballots may be voted, he shall, in the presence of the elector:

(a) remove the stubs from all the ballots;

(b) deposit the unmarked ballot or ballots and all the stubs in the stub and unmarked ballot box;

(c) and deposit the marked ballots in the voted ballot box"; and made minor changes in style. Amendment effective October 1, 2003.

Collateral References
Elections *key* 126.
29 C.J.S. Elections §118.
26 Am. Jur. 2d Elections §§317 through 384.

13-10-302. Write-in votes for previously nominated candidates.

Compiler's Comments
2003 Amendment: Chapter 414 at beginning of (1) inserted "Subject to subsection (2)"; at beginning of (2) deleted "Except as provided in 13-10-211(5)"; and made minor changes in style. Amendment effective October 1, 2003.
2001 Amendment: Chapter 15 near beginning of second sentence substituted "13-10-211(5)" for "13-10-211(4)". Amendment effective February 14, 2001.
1995 Amendment: Chapter 143 inserted second sentence requiring identification of individual by certain designations; and made minor changes in style.

Collateral References
Elections *key* 126.
29 C.J.S. Elections §118(4).
26 Am. Jur. 2d Elections §§352, 353.

13-10-303. Nominations by more than one party.

Compiler's Comments
2003 Amendment: Chapter 414 in last sentence substituted "must appear" for "shall be printed"; and made minor changes in style. Amendment effective October 1, 2003.

Collateral References
Elections *key* 120.
29 C.J.S. Elections §119(4).
26 Am. Jur. 2d Elections §263.

13-10-311. Election judges' duties when preparing for count.

Compiler's Comments
2003 Amendment: Chapter 414 in (1) at beginning inserted exception clause and at end inserted "shall prepare for a count of votes cast on paper ballots in the manner prescribed in 13-15-201"; in (2) at beginning inserted "In preparing for a count of paper ballots, the election judges"; in (2)(d) in second sentence substituted "must be bundled in accordance with rules established pursuant to 13-12-202" for "deposited in the stub box shall be bundled with the stubs"; inserted (3) providing that at a primary, the judges shall prepare for the counting of nonpaper ballots as prescribed by rules adopted under 13-17-211; and made minor changes in style. Amendment effective October 1, 2003.

Collateral References
Elections *key* 126.
29 C.J.S. Elections §119(3).
26 Am. Jur. 2d Elections §385.

13-10-325. Withdrawal from nomination.

Compiler's Comments
1989 Amendment: In (1), at end of last sentence, substituted "85 days before a general election or 75 days before a primary election" for "75 days before an election".
1985 Amendment: At end of (1) substituted "75 days" for "30 days".

Case Notes
Write-In Candidates: When a successful write-in candidate at a nominating election failed to file his acceptance within 10 days after election day, his subsequent resignation did not result in a vacancy which the county central committee of his party could fill. State ex rel. Wilkinson v. McGrath, 111 M 102, 106 P2d 186 (1940).
Defective Proceedings: An election will not be declared void by reason of nonprejudicial defects in the manner in which nomination was declined when question was raised after election. Stackpole v. Hallahan, 16 M 40, 40 P 80 (1895).

Attorney General's Opinions
Judicial Candidates — Right to Withdraw: In an opinion written before 1979 amendment, the Attorney General held that a candidate for nomination to a judicial office may withdraw after

the deadline for filing a declaration for nomination and before the primary nominating election by filing a statement of withdrawal with the Secretary of State's office. On such withdrawal, the former candidate's name is removed from the judicial primary ballot at the direction of the Secretary of State. 33 A.G. Op. 20 (1970).

Collateral References

Elections *key* 146.
29 C.J.S. Elections §94.
26 Am. Jur. 2d Elections §§213, 214.

13-10-326. Vacancy prior to primary election.

Compiler's Comments

1985 Amendment: In (1) and (2) substituted "75 days" for "40 days".

Case Notes

Write-In Candidates — Failure to File Acceptance: When a successful write-in candidate at a nominating election failed to file his acceptance within 10 days after election day, his subsequent resignation did not result in a vacancy which the county central committee of his party could fill. State ex rel. Wilkinson v. McGrath, 111 M 102, 106 P2d 186 (1940).

Collateral References

Elections *key* 147.
29 C.J.S. Elections §93.
26 Am. Jur. 2d Elections §217.

13-10-327. Vacancy after primary and prior to general election.

Compiler's Comments

2001 Amendment: Chapter 537 in (2) near end of first sentence after "no later than" substituted "76 days" for "75 days". Amendment effective October 1, 2001.

1997 Amendment: Chapter 85 at beginning of (1) and (2) inserted exception clause; and made minor changes in style.

1989 Amendment: In (2), in first sentence, substituted "75 days" for "65 days" and in second and third sentences substituted "85 days" for "75 days".

1985 Amendment: In (2) in first sentence, substituted "65 days" for "40 days", in second sentence, substituted "75 days" for "50 days", and in third sentence, substituted "75 days" for "40 days".

Case Notes

Votes for Deceased Candidate — Election of Write-In Candidate: A candidate for reelection to a county office died 24 days before the election. His death was known generally to electors but his name was placed on the ballot. A majority voted for him supposing to retain his widow who had been appointed to fill the vacancy until the next general election. The Supreme Court ruled that a write-in candidate receiving the highest vote cast for any living person was entitled to a Writ of Mandate to compel the County Canvassing Board to reconvene and cause certificate of election to be issued to him. State ex rel. Wolff v. Geurkink, 111 M 417, 109 P2d 1094 (1941).

Attorney General's Opinions

Filling Vacant Office: When the office of County Commissioner has become vacant with no opportunity to nominate candidates in the primary election, the selection of candidates for the general election will be made by each political party according to 13-10-327; and, pursuant to 13-12-208 (now repealed), write-in candidates may also seek the office. The appointee to fill the immediate vacancy will hold that office until the next general election. 37 A.G. Op. 147 (1978).

Vacancies — How Filled: The office of a Public Service Commissioner who dies after the primary election date must be placed on the general election ballot. The elected successor will take office when elected and qualified and will serve out the unexpired term. Political party nominations for the general election may be made in accordance with the customs of each political party. Nominations for independent candidates or candidates of parties not eligible for the direct primary must be made in accordance with Title 13, ch. 10, part 5. 35 A.G. Op. 95 (1974).

Collateral References

Elections *key* 147.
29 C.J.S. Elections §93.
26 Am. Jur. 2d Elections §217.
Result of election as affected by votes cast for deceased or disqualified person. 133 ALR 319.

13-10-328. Vacancy in governor or lieutenant governor candidacy.

Compiler's Comments

1997 Amendment: Chapter 85 at beginning of (1), inserted exception clause; and inserted (2) providing a procedure for designating a replacement candidate in the event that a candidate for Governor or Lieutenant Governor dies less than 85 days before a general election.

Collateral References

Elections *key* 147.
29 C.J.S. Elections §93.
26 Am. Jur. 2d Elections §217.

Part 4
Presidential Preference Primary

Part Compiler's Comments

Contingent Enactment: Section 14(1), Ch. 644, L. 1987, provided that sections 9 and 10 were effective on passage and approval of legislation or adoption of party rules establishing the fourth Tuesday of March as the presidential primary election date or caucus date in any two of the states of Idaho, Washington, or Oregon prior to August 1, 1987. The contingency did not occur, and the sections were not codified.

Part Law Review Articles

You Gotta Be on It to Be in It: State Ballot Access Laws and Presidential Primaries, Stark, 5 Geo. Mason L. Rev. 137 (1997).

The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?, Stark, 15 Yale L. & Pol'y Rev. 331 (1996).

First-in-the-Nation: Disputes Over the Timing of Early Democratic Presidential Primaries and Caucuses in 1984 and 1988, Buell, 4 J.L. & Pol. 311 (1987).

The Constitutionality of Regulating Independent Expenditure Committees in Publicly Funded Presidential Campaigns, Simonett, 18 Harv. J. on Legis. 679 (1981).

The Demise of the Grassroots Political Activity Under the Presidential Election Campaign Fund Act (Colloquium: Election Law in the Eighties), Ifshin, 10 N.Y.U. Rev. L. & Soc. Change 93 (1981).

13-10-401. Date of presidential primary.

Compiler's Comments

Contingent 1987 Amendment: Substituted "election provided for in 20-20-105" for "primary provided for in 13-1-107".

Section 14(1), Ch. 644, L. 1987, provided that the amendment to this section was effective on passage and approval of legislation or adoption of party rules establishing the fourth Tuesday of March as the presidential primary election date or caucus date in any two of the states of Idaho, Washington, or Oregon prior to August 1, 1987. Contingency did not occur.

13-10-402. Ballot.

Compiler's Comments

Contingent 1987 Amendment: At beginning substituted "Separate ballots for each political party" for "The regular party primary ballots" and deleted second sentence relating to placement of presidential section of ballot.

Section 14(1), Ch. 644, L. 1987, provided that the amendment to this section was effective on passage and approval of legislation or adoption of party rules establishing the fourth Tuesday of March as the presidential primary election date or caucus date in any two of the states of Idaho, Washington, or Oregon prior to August 1, 1987. Contingency did not occur.

13-10-403. Form of ballot.

Compiler's Comments

Contingent 1987 Amendment: At beginning, after "The presidential preference ballot", inserted "for each political party".

Section 14(1), Ch. 644, L. 1987, provided that the amendment to this section was effective on passage and approval of legislation or adoption of party rules establishing the fourth Tuesday of March as the presidential primary election date or caucus date in any two of the states of Idaho, Washington, or Oregon prior to August 1, 1987. Contingency did not occur.

13-10-404. Placement of candidate on primary ballot — methods of qualification.

Compiler's Comments

1997 Amendment: Chapter 5 at beginning of introductory clause, after "Before", inserted "an individual intending to qualify as" and at end substituted "individual shall qualify by one or more of the following methods" for "candidate must be"; in (1) reduced required number of verified signatures from 2,000 to 500; inserted (2) regarding submission of a declaration of nomination; and made minor changes in style.

Source: The 1997 amendments to this section, adopted in Ch. 5, L. 1997, were based on sec. 12-6 of the Maryland Election Code.

1993 Amendment: Chapter 52 in first sentence substituted "2,000" for "1,000" and after "electors" deleted "from each congressional district"; and made minor changes in style. Amendment effective July 1, 1993.

Saving Clause: Section 12, Ch. 52, L. 1993, was a saving clause.

Applicability: Section 13, Ch. 52, L. 1993, provided: "[This act] applies to appointments made after [the effective date of this act]." Effective July 1, 1993.

13-10-405. Submission and verification of petition.

Compiler's Comments

1993 Amendment: Chapter 390 after "primary election" inserted "and the affidavits of circulation required by 13-27-302", after "gathered" inserted "at least 1 week before the primary election filing deadline prescribed in 13-10-201(6). A filing fee is not required" and deleted former last two sentences that read: "The petitions must be submitted to the election administrator before the filing deadline established in 13-10-201(6). No filing fee is required"; and made minor changes in style. Amendment effective July 1, 1993.

1987 Amendment: In second to last sentence, before "before the filing deadline", deleted "at least 30 days".

Part 5
Methods of Nomination Other Than by Primary Election

13-10-501. Petition for nomination by independent candidates or political parties not eligible to participate in primary election.

Case Notes

Constitutional Convention: Legislature was not empowered to provide for nomination and election of delegates to constitutional convention under Art. XIX, sec. 8, 1889 Mont. Const., solely by nonpartisan means, since this would be a substantial change from manner of election and nomination provided for under this chapter. Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971), distinguished in Mahoney v. Murray, 159 M 176, 496 P2d 1120 (1972).

Error in Certificate:

Under former law, the inadvertent failure to include the name of a convention nominee for a certain office in the certificate of nominations rendered the certificate insufficient. State ex rel. Galen v. Hays, 31 M 227, 78 P 301 (1904).

Under former law, an error in the party name on the certificate of nomination rendered it void. State ex rel. Scharnikow v. Hogan, 24 M 397, 62 P 683 (1900).

Nominee of Electors Not Party Candidate: It is by means of the certificate of nomination that the County Clerk is informed how to prepare the official ballot for the electors. The Secretary of State cannot certify a candidate nominated by electors as the candidate of a political party, for clearly he is not such a candidate and has no place in a group of candidates certified as nominated by a regular political party convention or organization, under the name of the party making such nomination. State ex rel. Woody v. Rotwitt, 18 M 502, 46 P 370 (1896).

Attorney General's Opinions

Independent Candidate: In an opinion written before the general revision of the election laws in 1979, the Attorney General held that a candidate unsuccessfully seeking a party's nomination in the primary election may afterwards be nominated by certificate to appear on the general election ballot as an independent candidate. 33 A.G. Op. 26 (1970).

Law Review Articles

Ballot Access for Third Party and Independent Candidates After Anderson v. Celebrezze. (Case Note) Anderson v. Celebrezze, 460 U.S. 780 (1983), Roberts, 3 J.L. & Pol. 127 (1986).

Collateral References

Elections *key* 127 through 135, 140 through 145.

29 C.J.S. Elections §§106 through 110.

26 Am. Jur. 2d Elections §§247 through 251.

Validity of percentage of vote or similar requirements for participation by political parties in primary elections. 70 ALR 2d 1162.

13-10-502. Signature requirements for petition.

Compiler's Comments

2001 Amendment: Chapter 537 in (3) near middle after "last election for the office" substituted "the officer with whom nominations for the office sought are filed" for "the secretary of state". Amendment effective October 1, 2001.

Administrative Rules

ARM 44.3.1001 Number of signatures required for petitions for nomination in certain instances.

Collateral References

Elections *key* 144.

29 C.J.S. Elections §§108 through 110.

26 Am. Jur. 2d Elections §§249 through 251.

13-10-503. Filing deadlines.

Compiler's Comments

1993 Amendment: Chapter 390 near beginning of (1), after "nomination", inserted "and the affidavits of circulation required by 13-27-302"; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: In (2) substituted "filed before the scheduled primary election or the filing deadline" for "filed on or before the filing deadline for the primary election".

1983 Amendment: In second sentence of (1), after "Petitions" deleted "to be filed with the secretary of state"; changed "must first be submitted" to "must be submitted"; inserted last sentence of (1) dealing with insufficient signatures.

Case Notes

Election Loss in Primary — Lack of Standing to Challenge Constitutionality of Filing Deadline for Independent Candidates: A former County Attorney who lost a primary election as a party candidate and who attempted to file a late petition for nomination as an independent candidate and his supporter are not the right parties to raise the issue of constitutionality of filing deadlines for independent candidates. The candidate has not been denied access to the general election ballot by law but by the will of the electors in the party he sought to represent. Plaintiffs have each exercised full candidacy and electoral rights as partisans. One cannot attack the constitutionality of laws that now work in one's disfavor, having taken advantage of the same laws when they worked in one's favor. State ex rel. Racicot v. District Court, 244 M 521, 798 P2d 1004, 47 St. Rep. 1785 (1990).

Time of Filing: Prior law requiring certificates of nomination to be filed with the Secretary of State not more than 60 or less than 30 days before election was mandatory, and a certificate of original nominations made at a party convention could not be filed less than 30 days before election. State ex rel. Galen v. Hays, 31 M 227, 78 P 301 (1904).

Collateral References

Elections *key* 139, 145.

29 C.J.S. Elections §108.

26 Am. Jur. 2d Elections §§249, 250.

13-10-504. Independent or minor party candidates for president or vice president.

Compiler's Comments

2001 Amendment: Chapter 537 in (1) near end after "secretary of state" substituted "76 days" for "90 days"; and in (3) at end substituted "no later than 76 days before the general election" for "when the petition for nomination is filed". Amendment effective October 1, 2001.

1999 Amendment: Chapter 193 at end of first sentence in (3) inserted "or 5,000 electors, whichever is less"; and made minor changes in style. Amendment effective October 1, 1999.

1993 Amendment: Chapter 390 in (2), after "petition", inserted "and the affidavits of circulation required by 13-27-302"; inserted (4) authorizing qualified independent presidential

candidate to amend petition and designate or choose named vice presidential candidate until filing date provided in 13-25-101; and made minor changes in style. Amendment effective July 1, 1993.

Collateral References

Elections *key* 127 through 135, 140 through 145.
29 C.J.S. Elections §§106 through 110.
26 Am. Jur. 2d Elections §§247 through 251.

13-10-505. Applicability.

Compiler's Comments

1985 Amendment: Near end of section inserted "for nominations to fill a vacancy".

Part 6
Nominations by Political Parties

Part Case Notes

Error in Certificate:

Under former law, the inadvertent failure to include the name of a convention nominee for a certain office in the certificate of nominations renders the certificate insufficient. State ex rel. Galen v. Hays, 31 M 227, 78 P 301 (1904).

Under former law, an error in the party name on the certificate of nomination renders it void. State ex rel. Scharnikow v. Hogan, 24 M 397, 62 P 683 (1900).

13-10-601. Parties eligible for primary election — petitions by minor parties.

Compiler's Comments

1999 Amendment: Chapter 193 in middle of first sentence in (2) inserted "or 5,000 electors, whichever is less" and at end inserted "or 150 electors in those districts, whichever is less". Amendment effective October 1, 1999.

1993 Amendment: Chapter 390 in (2), near beginning of second sentence after "petition", inserted "and the affidavits of circulation required by 13-27-302". Amendment effective July 1, 1993.

1991 Amendment: In (1), near middle after "governor", substituted "in either of the last two general elections" for "at the last general election"; and made minor change in style.

1985 Amendment: In (2) in third sentence, substituted "75 days" for "50 days".

1981 Amendment: Added subsection (2) providing for nominating petitions by minor parties.

Case Notes

Presidential Electors as Candidates for Public Office: Candidates for presidential electors were candidates for public office, within the meaning of prior section. State ex rel. Foster v. Mountjoy, 83 M 162, 271 P 446 (1928).

Attorney General's Opinions

U.S. Senate Seat as Statewide Office — Senate Candidate Required to Qualify Party for Subsequent Primary Elections: On the question of whether a political party must have a candidate participate in the 1990 U.S. senatorial race in order to remain qualified for ballot status in the 1992 election, the Attorney General noted that subsection (1) of this section (prior to 1991 amendment) requires that a candidate for a statewide office receive a 5% vote in the last general election in order for the party to be eligible to nominate candidates in the subsequent primary election. A reasonable interpretation of "statewide office" is an office for which a statewide election is held, including the office of U.S. Senator. Thus, because the only election decided by a statewide vote in 1990 is for a U.S. Senate seat, a political party must have a candidate receive the requisite number of votes in the 1990 election in order for the party to automatically qualify to nominate candidates by primary election in 1992. 43 A.G. Op. 30 (1989).

Collateral References

Elections *key* 122 through 124.
29 C.J.S. Elections §§91, 111.
26 Am. Jur. 2d Elections §§225, 228 through 231.
Validity of percentage of vote or similar requirements for participation by political parties in primary elections. 70 ALR 2d 1162.

13-10-602. Use of party name.

Case Notes

Use of Term "Independent": Under section 23-609, R.C.M. 1947 (now repealed), assuming (but not deciding) that an existing political party may use the term "Independent" in its party name, such use cannot deprive another candidate from employing that term in designating the character of his candidacy for the same office, and the section prohibiting an independent candidate from using any word of the name of an existing political party has no application in such circumstances. State ex rel. Wheeler v. Stewart, 71 M 358, 230 P 366 (1924).

Collateral References

Elections *key* 168.
29 C.J.S. Elections §159.
26 Am. Jur. 2d Elections §306.

13-10-604. Nominations for minor parties.

Collateral References

Elections *key* 122 through 124.
29 C.J.S. Elections §§106, 107.
26 Am. Jur. 2d Elections §§247, 248.

CHAPTER 12
ELECTION SUPPLIES AND BALLOTS

Chapter Compiler's Comments

Preamble: The preamble attached to Ch. 414, L. 2003, provided: "WHEREAS, the U.S. Supreme Court in Bush v. Gore, 531 U.S. 98 (2000), found that the lack of uniform procedures for determining voter intent in Florida during the 2000 presidential election led to a violation of the U.S. Constitution's Equal Protection Clause of the 14th Amendment; and

WHEREAS, at the request of the 57th Legislature, the State Administration and Veterans' Affairs Interim Committee devoted much of the 2001-2002 interim to a review of Montana election laws with respect to voting systems and counting processes in light of Bush v. Gore; and

WHEREAS, the interim study found that Montana's statutory provisions relating to ballots, voting systems, and vote counting processes needed to be updated, clarified, and in some instances revised to better define uniform standards and procedures to provide equal protection for votes cast by Montana voters; and

WHEREAS, the Subcommittee on Voting Systems of the State Administration and Veterans' Affairs Interim Committee agreed that statutory changes should be made with an eye on future technology but should also standardize current practices to the greatest extent possible.

THEREFORE, this legislation will enable the Secretary of State to adopt a statewide benchmark performance measure that voting systems must meet before they can be approved for use in the state; allow local election administrators to continue to choose which of the approved voting systems should be used locally; require the Secretary of State to adopt uniform statewide rules regarding ballot form, votes and vote counts, and other operational procedures specific to each voting system and to provide training to local election administrators; and require all counting boards to use the uniform counting procedures specified."

Chapter Collateral References

Elections *key* 160 through 196.
29 C.J.S. Elections §§149 through 189.
26 Am. Jur. 2d Elections §§298 through 316.

Part 1
Election Supplies

13-12-101. Copies of election laws to be furnished.

Compiler's Comments

1993 Amendment: Chapter 113 deleted former (2) that read: "(2) The secretary of state shall, at the expense of the state, furnish the election administrator with copies of the election laws relating to penalties, campaign practices, campaign finances, and contested elections. The public official with whom a candidate files a declaration, petition, or acceptance of nomination shall

transmit one copy to the candidate. A copy shall also be furnished to any other person required to file a statement. Upon his own information or at the written request of any elector, the secretary of state shall provide a copy to any other individual who is a candidate or who is required to make a statement required by this title"; and made minor changes in style.

1983 Amendment: Near beginning of (1), after "shall" substituted "furnish to each election administrator copies of this title sufficient to provide" for "publish copies of the election laws and laws which relate to elections. He shall transmit sufficient copies to each election administrator to furnish"; and at end of (1), inserted "for the administrator".

Collateral References

Montana Campaign Finance and Practices Laws and Administrative Rules, Commissioner of Political Practices (January 2000).

13-12-102. Items to be furnished by election administrators.

Collateral References

Elections *key* 163.
29 C.J.S. Elections §155.
26 Am. Jur. 2d Elections §§335, 371, 372.

Part 2
Ballots

Part Administrative Rules

Title 44, chapter 3, subchapter 17, ARM Voting machines and devices.

Part Attorney General's Opinions

Local Government Study Commission: An individual may be elected to a position on a local government study commission by write-in votes when the individual's name is written in and the ballot properly marked. The person receiving the largest number of votes is elected. 35 A.G. Op. 98 (1974).

13-12-201. Secretary of state to certify ballot.

Compiler's Comments

2003 Amendment: Chapter 414 in (2) at end substituted "prepared" for "printed". Amendment effective October 1, 2003.

1993 Amendment: Chapter 74 inserted (3) regarding notification of legislative candidate who is required to withdraw from candidacy because of residency change; and made minor changes in style.

1985 Amendment: At beginning of (1) substituted "Seventy-five days" for "Fifty days".

Case Notes

Ballot Disputes — Necessary Parties: Since the Secretary of State has the duty of prescribing the form of the ballot under this section, only he and not the County Clerk and Recorder is a necessary party in disputes involving ballots. Yunker v. Murray, 170 M 427, 554 P2d 285 (1976).

Attorney General's Opinions

Ineligible Judicial Candidate — No Certification for Ballot: The Secretary of State should not certify to election administrators for the primary election ballot the name of an individual who cannot possibly meet the eligibility requirements of Art. VII, sec. 9, Mont. Const., for the office of Supreme Court Justice or District Court Judge. 41 A.G. Op. 55 (1986).

Collateral References

Elections *key* 162, 163.
29 C.J.S. Elections §155.
26 Am. Jur. 2d Elections §335.

13-12-202. Ballot form and uniformity.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) in first sentence inserted "adopt statewide uniform rules that" and inserted second and third sentences and (1)(a) through (1)(f) regarding requirements for rules; in (2) substituted "to appear on" for "printed upon" and at end substituted "the same font size and style" for "type of the same size and character"; in (3) at beginning inserted "Notwithstanding 13-19-106(1)"; and made minor changes in style. Amendment effective October 1, 2003.

Case Notes

Ballot Disputes — Necessary Parties: Since the Secretary of State has the duty of prescribing the form of the ballot, only he and not the County Clerk and Recorder is a necessary party in disputes involving ballots. Yunker v. Murray, 170 M 427, 554 P2d 285 (1976).

Use of Uniform Ballot Required: Under section 23-1102, R.C.M. 1947 (now repealed), a uniform ballot had been adopted, to be printed and distributed at public expense, and no ballots other than those so provided can be cast or counted. Harrington v. Crichton, 53 M 388, 164 P 537 (1917).

Collateral References

Elections *key* 165 through 179.
29 C.J.S. Elections §156.
26 Am. Jur. 2d Elections §300.
Challenges to punch card ballots and punch card voting systems. 103 ALR 5th 417.
Validity where candidate's surname only is written in on ballot. 86 ALR 2d 1025.

13-12-203. Appearance of candidate's name and party designation on ballot.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) and (2) at beginning inserted "Subject to 13-12-202"; in (1) inserted "for nonpartisan offices", inserted "for certain other candidates", substituted "must appear" for "shall be printed", and at end substituted "appearing" for "or "independent" printed"; in (2) in three places substituted references to appear or appearing for references to printed; and made minor changes in style. Amendment effective October 1, 2003.

Attorney General's Opinions

Dual Candidacy Authorized: In an opinion written before the general revision of the election laws in 1979, the Attorney General held that a candidate for state representative may also be placed on the ballot as a candidate for precinct committeeman. 36 A.G. Op. 80 (1976).

Collateral References

Elections *key* 168.
29 C.J.S. Elections §§161, 163.
26 Am. Jur. 2d Elections §§303, 309.

13-12-204. Method of correction of ballot.

Compiler's Comments

2003 Amendment: Chapter 414 in introductory clause near end substituted "prepared" for "printed"; in (1) substituted "correct the ballot in a manner consistent with rules adopted under 13-12-202" for "order labels printed containing the name of the new candidate and any other information required to go on the ballot. If labels are printed, the election administrator shall affix the labels in the proper place on each ballot or deliver the labels to the chief election judges to be affixed in the proper place on each ballot before it is given to the elector"; and in (2) substituted "redone" for "reprinted". Amendment effective October 1, 2003.

1997 Amendment: Chapter 85 in introductory clause, after "13-10-327", inserted reference to 13-10-328 and advancement of candidate for Lieutenant Governor to Governor; in (1), after "new", substituted "candidate" for "nominee" and at beginning of second sentence inserted "If labels are printed"; inserted (2) and (3) authorizing Election Administrator to either reprint entire ballot or have separate ballot prepared for particular office; and made minor changes in style.

Collateral References

Elections *key* 174, 182.
29 C.J.S. Elections §166.

13-12-205. Arrangement of names — rotation on ballot.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) at end inserted "and rotated as provided in this section"; in (2)(e) substituted "preparing" for "printing"; in (3) near beginning of first sentence substituted "a nonpaper-based voting system is" for "voting devices are" and at end deleted "the election administrator shall rotate candidates' names on the paper ballots" and at end of second sentence inserted "required under 13-17-305"; and made minor changes in style. Amendment effective October 1, 2003.

1985 Amendment: In (2)(a) at beginning, inserted "Except as provided in subsection (3)"; and inserted (3) referring to rotation of names on paper ballots in precincts where voting devices are used.

Attorney General's Opinions

Requirement for Mandatory Name Rotation Not Mandatory When Challenged After Election — Results Not Voidable: Following an election, a candidate whose name appeared at the top of the ballot less frequently, due to an oversight by the election administrator, objected to the method of name placement. In view of the history of Montana law and in light of decisions from courts in other states, the Attorney General held that subsection (2) of this section is not mandatory when challenged after an election because an error in the rotation of names on the ballot does not obstruct a free and intelligent casting of the vote and is not essential to the validity of the election. Therefore, failure of the election administrator to rotate the names of the candidates so that each name appeared at the top of the ballot on substantially an equal number of ballots did not render the results of the election void. 43 A.G. Op. 59 (1990).

Ballots — Rotation of Candidates' Names: The names of all candidates for public office may be rotated on election ballots within legislative districts within the county. A certified list of voters registered in each precinct is not required to implement the rotation of candidates' names on the election ballot. 35 A.G. Op. 75 (1974).

Collateral References

Elections *key* 167.
29 C.J.S. Elections §158.
26 Am. Jur. 2d Elections §§301, 302.

13-12-207. Order of placement.

Compiler's Comments

2001 Amendment: Chapter 7 in (3) near middle after "consolidated" deleted "or confederated"; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

Elections *key* 167.
29 C.J.S. Elections §158.
26 Am. Jur. 2d Elections §§301, 302.

13-12-210. Number of ballots to be provided for each precinct.

Collateral References

Elections *key* 163.
29 C.J.S. Elections §155.
26 Am. Jur. 2d Elections §§335, 371, 372.

13-12-212. Election administrator to provide official ballots — other ballots prohibited.

Compiler's Comments

2003 Amendment: Chapter 414 at beginning deleted "Except as otherwise provided in the election laws of this state"; in first sentence substituted "the official ballots" for "printed ballots" and at end inserted "conducted by the election administrator"; deleted former second sentence that read: "He shall have printed on the ballot the names of all candidates for all offices to be filled at the election and the title and other wording required by law for all ballot issues"; in second sentence substituted "an official ballot" for "those printed by the election administrator"; and made minor changes in style. Amendment effective October 1, 2003.

Case Notes

Sticker With Premarked "X" Not Legal Ballot: District Court erred in finding ballots valid when electors marked ballot with a printed sticker containing name of write-in candidate and premarked "X", without electors marking an "X" before the name on the printed sticker. Since the statute calls for the voter to make his mark, an affirmative act is called for to signify his selection. The provisions of Montana's election laws as to the marking of the ballot and use of stickers are mandatory and not directory. State ex rel. Browne v. District Court, 167 M 477, 539 P2d 1182 (1975).

Use of Uniform Ballot Required: Under section 23-1102, R.C.M. 1947 (now repealed), a uniform ballot had been adopted, to be printed and distributed at public expense, and no ballots

other than those so provided can be cast or counted. Harrington v. Crichton, 53 M 388, 164 P 537 (1917).

Collateral References

Elections *key* 163.
29 C.J.S. Elections §155.
26 Am. Jur. 2d Elections §§335, 371, 372.

CHAPTER 13
ELECTION PROCEDURE

Chapter Compiler's Comments

Preamble: The preamble attached to Ch. 414, L. 2003, provided: "WHEREAS, the U.S. Supreme Court in Bush v. Gore, 531 U.S. 98 (2000), found that the lack of uniform procedures for determining voter intent in Florida during the 2000 presidential election led to a violation of the U.S. Constitution's Equal Protection Clause of the 14th Amendment; and

WHEREAS, at the request of the 57th Legislature, the State Administration and Veterans' Affairs Interim Committee devoted much of the 2001-2002 interim to a review of Montana election laws with respect to voting systems and counting processes in light of Bush v. Gore; and

WHEREAS, the interim study found that Montana's statutory provisions relating to ballots, voting systems, and vote counting processes needed to be updated, clarified, and in some instances revised to better define uniform standards and procedures to provide equal protection for votes cast by Montana voters; and

WHEREAS, the Subcommittee on Voting Systems of the State Administration and Veterans' Affairs Interim Committee agreed that statutory changes should be made with an eye on future technology but should also standardize current practices to the greatest extent possible.

THEREFORE, this legislation will enable the Secretary of State to adopt a statewide benchmark performance measure that voting systems must meet before they can be approved for use in the state; allow local election administrators to continue to choose which of the approved voting systems should be used locally; require the Secretary of State to adopt uniform statewide rules regarding ballot form, votes and vote counts, and other operational procedures specific to each voting system and to provide training to local election administrators; and require all counting boards to use the uniform counting procedures specified."

Chapter Collateral References

Elections *key* 197 through 234.
29 C.J.S. Elections §§190 through 220.
26 Am. Jur. 2d Elections §§336 through 384.

Part 1
Procedure at Polling Place

13-13-101. Duties — proclamation prior to opening and closing polls.

Collateral References

Elections *key* 197 through 209.
29 C.J.S. Elections §§192, 198, 199.
26 Am. Jur. 2d Elections §§317 through 325.

13-13-111. Provision and use of voting stations.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) substituted "voting stations" for "booths, voting machines, or voting devices"; in (2) at beginning substituted "Voting stations" for "Booths, voting machines, or voting devices" and at end deleted "and the election judges may not permit any individual to remain in any position that would allow him to see how the elector votes or has voted"; in (3) substituted "voting station" for "booth"; and in (4) substituted "voting station" for "booth or use a voting machine or device" and at end inserted "from the station"; and made minor changes in style. Amendment effective October 1, 2003.

Collateral References

Elections *key* 215, 222.
29 C.J.S. Elections §§193, 195, 203.
26 Am. Jur. 2d Elections §§324, 330, 365.

13-13-112. Display of instructions for electors.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 414 in (1) at beginning inserted exception clause, near middle substituted "a voting system" for "machines or devices", and substituted "voting station" for "compartment"; in (2)(b) in introductory clause substituted "including how to" for "for deposit in the ballot box"; inserted (2)(b)(i) through (2)(b)(iii) relating to casting a valid vote, correcting a mistake, and ensuring proper disposition of the ballot; in (3) substituted references to a voting system for references to a machine or device and at end substituted "voting station" for "compartment"; in (4) in first sentence after "Official ballots" deleted "for the precinct", substituted "voting station" for "booth or compartment", and at end deleted "in all precincts where paper ballots are used" and deleted former second sentence that read: "Diagrams showing the arrangement of the ballot for that precinct shall be posted in conspicuous places about the polling place in all precincts using machines or devices"; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 475 inserted (2)(d) concerning provisional voting, (2)(e) concerning date and time for voting, and (2)(f) concerning first-time voters; and made minor changes in style. Amendment effective January 1, 2004.

1987 Amendment: In (2) inserted reference to 18-point type or larger.

Administrative Rules

ARM 44.3.111 The elderly elector.

ARM 44.3.112 The visually impaired.

Collateral References

29 C.J.S. Elections §196.

13-13-114. Voter identification and marking precinct register book before elector votes — provisional voting.

Compiler's Comments

2003 Amendment: Chapter 475 in (1)(a) in first sentence after "ballot or vote" substituted "the elector shall present to an election judge a current photo identification showing the elector's name" for "he shall sign his name on the place designated in the precinct register. Before signing the register, the elector shall state his name and current address" and at beginning of second sentence substituted "the elector does not present photo identification" for "the name or address is not as listed in the precinct register" and inserted enumeration of types of identification; inserted (1)(b) pertaining to an elector signing the precinct register and being provided with a ballot; in (1)(c) at beginning before "the elector" inserted clause pertaining to the election judge determining if the information supplied by an elector is sufficient to verify identity and eligibility to vote, after "the elector" deleted "must", inserted "may sign the precinct register", and at end substituted "elector's voter registration information, and vote" for "information"; in (1)(d) deleted second sentence that read: "No elector may sign the precinct register unless his name and address are the same as shown in the register or the proper corrections have been made"; inserted (2) pertaining to an elector casting a provisional ballot if there is insufficient information to verify identity and eligibility to vote; in (4) at end substituted "may cast a provisional ballot as provided in 13-13-601" for "may not vote"; and made minor changes in style. Amendment effective January 1, 2004.

1991 Amendment: Deleted former (2) concerning election judges requiring affidavit from two electors verifying identity of elector unable to sign precinct register and providing for filing of affidavit; inserted (2) concerning use of fingerprint or other identifying mark if elector unable to sign precinct register; and in (3), after "fails to", substituted "provide a fingerprint or other identifying mark" for "procure two electors who will take the oath required".

Administrative Rules

ARM 44.3.1732 Use of IES (Shoup) voting machine — while polls open.

ARM 44.3.1735 Use of Automatic Voting Machines — while polls open.

ARM 44.3.1739 Use of Computer Elections Systems Votomatic — while polls open.

Case Notes

Failure to Sign: Failure of the election judges of a precinct to require the electors to sign the registry books before voting at a primary election was the fault of the judges and not of the electors, and therefore their votes were legal and properly counted. Thompson v. Chapin, 64 M 376, 209 P 1060 (1922).

Collateral References
Elections *key* 212, 218.
29 C.J.S. Elections §197.
26 Am. Jur. 2d Elections §329.

13-13-115. Recording number of voters and ballots.

Compiler's Comments
2003 Amendment: Chapter 414 substituted sentence providing that each precinct's election administrator must use a method to record the number of voters and number of ballots cast that conforms to the method prescribed by the secretary of state for former text that read: "(1) In precincts using paper ballots, the name of each elector who votes shall be entered in a pollbook and numbered in the order voting so that the number corresponds with the number on the stubs of the ballots given the elector or an election judge may use a numbering device to stamp the number of the ballot stub next to the name of the elector in a precinct register/pollbook.

(2) In precincts where machines or devices are used, a pollbook need be used only for paper ballots. The election administrator shall provide such precincts with some method of recording the number of individuals voting." Amendment effective October 1, 2003.

1991 Amendment: At end of (1), after "elector", inserted language concerning election judge using numbering device to stamp ballot stub number next to elector's name.

Administrative Rules
ARM 44.3.1732 Use of IES (Shoup) voting machines — while polls open.
ARM 44.3.1733 Use of IES (Shoup) voting machines — after polls close.
ARM 44.3.1735 Use of AVM (automatic voting machines) — while polls open.
ARM 44.3.1736 Use of AVM (automatic voting machines) — after polls close.
ARM 44.3.1739 Use of CES (computer election systems votomatic) — while polls open.
ARM 44.3.1740 Use of CES (computer election systems votomatic) — after polls close.

Collateral References
Elections *key* 212.
29 C.J.S. Elections §205.
26 Am. Jur. 2d Elections §335.

13-13-116. Paper ballots to be marked — one ballot to elector.

Compiler's Comments
2003 Amendment: Chapter 414 in (1) in first sentence substituted "a paper ballot" for "ballots", after "judges shall" substituted "ensure that the ballot is marked with" for "stamp", after "without part of the" substituted "mark" for "stamp", and at end inserted "if any" and in second sentence substituted "ensure that the ballot is marked with" for "stamp"; and made minor changes in style. Amendment effective October 1, 2003.

1993 Amendment: Chapter 390 in last sentence of (1), after "precinct", deleted "the date of the election"; and made minor changes in style. Amendment effective July 1, 1993.

1987 Amendment: In (1), at end of first sentence, deleted "back near the top of the" before "ballot".

Case Notes
Removal of Stamp With Stub — Effect: Under section 23-1209, R.C.M. 1947 (now repealed), when ballots had been delivered to electors by the judges of election with the official stamp apparently in the place in which the law requires it to be, although in reality it was on the stub instead of on the ballot proper, the act of the judges in removing the stamp with the stub (thus leaving the ballot without the stamp) did not render the ballot void. Harrington v. Crichton, 53 M 388, 164 P 537 (1917).

Collateral References
Elections *key* 218.
29 C.J.S. Elections §204.
26 Am. Jur. 2d Elections §336.

13-13-117. Method of voting.

Compiler's Comments
2003 Amendment: Chapter 414 in (1)(a) after "Upon receipt of a" inserted "paper", inserted "or, if a nonpaper ballot is used, after marking the precinct register pursuant to 13-13-115", and substituted "a voting station" for "one of the booths"; deleted former (3) that read: "(3) The elector

may vote for a write-in candidate by marking the ballot in a manner consistent with the instructions provided by the election administrator pursuant to 13-13-112. Except as provided in 13-15-202, a ballot marked for a write-in candidate in accordance with the appropriate instructions must be counted as if the name of the write-in candidate had been printed on the ballot"; inserted (1)(b) relating to replacement of a spoiled ballot; in (2)(a) substituted "After the elector has completed voting, the elector shall ensure the proper disposition of the elector's ballot in accordance with instructions provided pursuant to 13-13-112" for "The judge receiving the ballots shall remove the stubs in sight of the elector and deposit each ballot in the ballot box and each stub in a box for detached stubs"; in (2)(b) in first sentence inserted "If a paper ballot was cast, an election" and in second sentence after "put a ballot" deleted "any paper resembling a ballot, or anything other than a ballot" and at end inserted "and nothing other than a ballot may be put in a ballot box"; deleted former (6) that read: "(6) An elector who spoils the elector's ballot must, on returning the spoiled ballot, receive another in place of it"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 134 in (2) substituted language requiring preparation of ballot in manner prescribed in instructions provided in 13-13-112 for former language that read: "(2) He shall prepare his ballot by marking an "x" in the square before the name of the individual or individuals for whom he intends to vote"; deleted former (3) through (6) that read: "(3) If the ballot contains a ballot issue, he shall mark an "x" in the applicable square indicating his vote either for or against the issue.

(4) The elector may write the name of an individual for whom he wishes to vote in the blank space or affix a preprinted label in the blank space and may vote for that individual by marking an "x" before the name. When the ballot is marked in this manner, it must be counted the same as though the name were printed upon the ballot and marked by the elector, except as provided in 13-15-202.

(5) An elector voting a ballot that will be counted by an optical scan ballot tabulating device shall mark his ballot in the manner prescribed on his ballot. However, his ballot must not be invalidated if he marks the voting positions with an "x".

(6) After preparing his ballot, the elector must fold it so the face of the ballot will be concealed and the official stamp may be seen and hand it to the election judges"; inserted (3) authorizing elector to vote for write-in candidate by marking ballot in manner consistent with instructions in 13-13-112 and requiring ballot marked in accordance with instructions to be counted as if candidate's name were printed on ballot; in (6) substituted "must" for "may"; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 134, L. 2001, provided: "WHEREAS, most counties use some form of voting or tabulating machines; and

WHEREAS, it is confusing to the elector to be required to mark one ballot one way and mark another ballot another way."

1989 Amendment: At end of (4) inserted "except as provided in 13-15-202". Amendment effective March 30, 1989.

1987 Amendment: In (4), after "label in the blank space", deleted "or over any other name"; and inserted (5) referring to ballots counted by optical scan ballot tabulating device.

Administrative Rules

ARM 44.3.1732 Use of IES (Shoup) voting machines — while polls open.

ARM 44.3.1735 Use of AVM (automatic voting machines) — while polls open.

ARM 44.3.1739 Use of CES (computer election systems votomatic) — while polls open.

Case Notes

Ballots With Only Last Name Listed Properly Rejected: Paulsen lost an election for Sheriff when 37 ballots were disallowed by election judges, principally ballots with only a last name listed. The District Court rejected Paulsen's challenge because the ballots did not contain a name consistent with one of the 30 names submitted by Paulsen in his declaration of intent to be a write-in candidate. Paulsen argued that because no other person named Paulsen or Paulson filed a declaration of intent, all written-in votes with those names should have been counted for him. However, election laws clearly specify what names voters may write in when the candidate being voted for has filed a declaration of intent, and if one of those names is not used, then the vote may not be counted. Even though there is a strong tradition in Montana jurisprudence to effectuate the honest choice of the electors, marking of ballots must not be expressly forbidden by statute and must substantially comply with the law. The 37 rejected ballots were properly disallowed, and the District Court correctly upheld the election officials' decision. Paulsen v. Huestis, 2000

MT 280, 302 M 157, 13 P3d 931, 57 St. Rep. 1170 (2000). See also Marsh v. Overland, 274 M 21, 905 P2d 1088 (1995).

Voter's Intention Not Clear From Ballot: In this case, involving a contest of election, the Supreme Court held that so many questions arose from the contested ballot itself as to the voter's intentions and from attempts to find a consistency in his method of voting that his ballot must be rejected. Rennie v. Nistler, 226 M 412, 735 P2d 1124, 44 St. Rep. 764 (1987).

Sticker With Premarked "X" Not Legal Ballot: District Court erred in finding ballots valid when electors marked ballot with a printed sticker containing name of write-in candidate and premarked "X", without electors marking an "X" before the name on the printed sticker. Since the statute calls for the voter to make his mark, an affirmative act is called for to signify his selection. The provisions of Montana's election laws as to the marking of the ballot and use of stickers are mandatory and not directory. State ex rel. Browne v. District Court, 167 M 477, 539 P2d 1182 (1975).

Voting an Affirmative Act — Vote for Dead Person Not Effective to Oppose Another: The casting of a ballot at an election of public officers is an affirmative, not a negative, act. It is an act done with intention of voting for someone. Hence, if it is the purpose of voters to defeat a certain candidate, that purpose can be accomplished only by voting for some person in opposition to him, and not by voting for a person who died some weeks before election with the expectation that the vote cast for him would be counted as opposed to the person sought to be defeated. One who has died is no longer a person for whom, under Art. IX, sec. 2, 1889 Mont. Const. (now Art. IV, sec. 2, 1972 Mont. Const.), a voter may cast his ballot. State ex rel. Wolff v. Geurkink, 111 M 417, 109 P2d 1094, 133 ALR 304 (1941).

Marking of Ballot:

The statutory provision that a ballot should be marked by an "X" in the square is directory and not mandatory. (See 2001 amendment.) In the absence of a further provision that unless so marked the ballot shall not be counted, a ballot upon which the elector marked all squares with a check mark instead of an "X" should have been counted for contestant, since there was nothing to indicate an attempt to mark the ballot for identification purposes. Peterson v. Billings, 109 M 390, 96 P2d 922 (1939).

Any mark within the square before the candidate's name which can be said to be a crossing of two lines will answer the requirements of the statute that the elector must place an "X" in such square, and in the absence of anything to indicate a purpose on his part to identify his ballot by the use of a third line within the square, a defect in the mark is not sufficient to vitiate the ballot. Carwile v. Jones, 38 M 590, 101 P 153 (1909), explained in Peterson v. Billings, 109 M 390, 96 P2d 922 (1939), distinguished in State ex rel. Browne v. District Court, 167 M 477, 539 P2d 1182 (1975).

In an election contest, the Court properly refused to count for a candidate ballots marked as follows: (1) where the cross was placed after the candidate's name and entirely without his party column; (2) where perpendicular lines were drawn through the names in one party column, but no cross was placed before the candidate's name; and (3) where his name was written in one party column, but no cross marked in the square before the name. In none of these instances was there substantial, nor any, compliance with the provisions of predecessor section. Carwile v. Jones, 38 M 590, 101 P 153 (1909).

In an election contest, the Court properly refused to count a ballot for a candidate which was marked by crossing out all the names in other party columns but which failed to show an "X" before his name. While the intention of the voter is generally a very material consideration, he must express his intention substantially as indicated by the statute. (See 2001 amendment.) Carwile v. Jones, 38 M 590, 101 P 153 (1909).

Where the crossmark was placed after the candidate's name but within his party column, the ballot was void, since the elector did not substantially comply with the requirement that the mark be placed in the square before the name. Carwile v. Jones, 38 M 590, 101 P 153 (1909).

When Act of Voting Complete: Act of voting is not completed until the ballot is deposited in the ballot box. Goodell v. Judith Basin County, 70 M 222, 224 P 1110 (1924).

Error by Election Officer: A ballot properly marked, but from which the stub has not been detached by the ballot judge, should be counted; a voter is not to be disfranchised by the errors or wrongful acts of election officers. Carwile v. Jones, 38 M 590, 101 P 153 (1909).

Collateral References

Elections *key* 219, 221.

29 C.J.S. Elections §§204 through 207.

26 Am. Jur. 2d Elections §§337 through 354.

Validity where candidate's surname only is written in on ballot. 86 ALR 2d 1025.

13-13-118. Taking ballot to disabled elector.

Collateral References

Elections *key* 220.
29 C.J.S. Elections §208.
26 Am. Jur. 2d Elections §331.

13-13-119. Aid to disabled elector.

Compiler's Comments

1987 Amendment: Near beginning of (1) and in (4), near middle of first sentence, substituted "individual" for "qualified elector of the county"; in (1), after "disabled elector", inserted "as specified in subsection (4)"; in (4), before "chosen", substituted "individual" for "elector" and inserted last sentence disallowing assistance of elector's employer, agent of his employer, or officer or agent of elector's union.

Administrative Rules

Title 44, chapter 3, subchapter 1, ARM Voting accessibility for the elderly and handicapped.

Case Notes

Need Not Certify Reason for Assistance: A ballot bearing the endorsement: "Voted by H. and M. (judges of election) for illegibility of voter" was not void on the ground that the reason given for assisting the voter was not one recognized by law, since section 23-1213, R.C.M. 1947 (now repealed), did not require judges to certify the reason for assisting an elector, and the words "for illegibility of voter" were therefore surplusage. In the absence of a showing why they gave assistance, it will be presumed that they regularly performed their official duties. Carwile v. Jones, 38 M 590, 101 P 153 (1909).

Evidence: Under section 1364, Political Code of 1895, when it appeared in an election contest that a voter's ballot had been endorsed by the judges of election, as required by law, it was necessary to show that it could not thereby be identified in order to let in, as secondary evidence, testimony as to how he voted. Lane v. Bailey, 29 M 548, 75 P 191 (1904).

Collateral References

Elections *key* 220.
29 C.J.S. Elections §208.
26 Am. Jur. 2d Elections §331.

13-13-120. Poll watchers — announcement of elector's name.

Collateral References

Elections *key* 210.
29 C.J.S. Elections §200.
26 Am. Jur. 2d Elections §325.

13-13-121. Additional poll watchers.

Collateral References

Elections *key* 210.
29 C.J.S. Elections §200.
26 Am. Jur. 2d Elections §325.

13-13-122. Preventing obstructions.

Attorney General's Opinions

No Obstruction Created by Orderly Signature Gathering: Local election administrators have the authority to limit the gathering of initiative petition signatures at a polling place only if that activity creates an obstruction at a specific polling place. Orderly signature gathering that does not interfere with the election process may not be prohibited. 39 A.G. Op. 62 (1982).

Law Review Articles

Clearing CBS, Inc. v. Smith [681 F. Supp. 794] From the Path to the Polls: A Proposal to Legitimize States' Interests in Restricting Exit Polls, 74 Iowa L. Rev. 737 (1989).

Collateral References

Elections *key* 233, 319.
29 C.J.S. Elections §330.

Part 2
Procedure for Electors Absent From the Polling Place

Part Administrative Rules

Title 44, chapter 3, subchapter 14, ARM Absentee ballot envelopes.

Title 44, chapter 3, subchapter 15, ARM Facsimile voting for electors of the United States service.

Part Law Review Articles

Fraud at the Ballot Box: No Need to Prove That Election Results Are Affected (Local Government Law Symposium), Connor, 14 Stetson L. Rev. 745 (1985).

Elections—Statutory Challenges to Local Elections—Violations of Statutory Requirements Subjects Absentee Ballots to Invalidation (Survey of Recent Developments in New Jersey Law), Zajac, 14 Seton Hall L. Rev. 471 (1984).

13-13-201. Voting by absentee ballot — procedures.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 414 in (2) in introductory clause substituted "vote absentee only by paper ballot and by" for "vote the absentee ballot by"; in (2)(c), (2)(d), and (2)(e) after "return" deleted "and verification"; and in (2)(e) at end substituted "all appropriate enclosures by regular mail, postage prepaid, or by delivering it to the election administrator of the special absentee election board" for "the secrecy envelope containing the ballot or ballots enclosed, as provided in 13-13-221". Amendment effective October 1, 2003.

Chapter 475 in (1) at beginning substituted "A legally registered elector or provisionally" for "A qualified"; and inserted (3) providing the type of identification an elector may use when returning an absentee ballot and providing that insufficient verification requires the ballot to be handled as a provisional ballot. Amendment effective January 1, 2004.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

1999 Amendment: Chapter 151 in (1) after "part" deleted "if the elector:

(a) expects to be absent from the county or precinct and unable to vote in person at the time of holding the election;

(b) is physically incapacitated and unable to go to the polls on election day;

(c) suffers from chronic illness or general ill health; or

(d) is prevented from voting at the polls as a result of an illness or health emergency occurring between 5 p.m. on the Friday preceding the election and noon on election day. The health emergency must arise from unforeseen circumstances that require the elector to seek health care or medical assistance"; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 242 inserted (2) specifying procedures for voting by absentee ballot; and made minor changes in style.

1985 Amendment: Substituted entire section (see 1985 Session Law) for former text that read: "(1) A qualified registered elector who will be absent from the county or physically incapacitated and unable to go to the polls on the day of election may vote as provided in this part.

(2) Election judges who will be serving in a different precinct than the one in which they are registered may vote by absentee ballot."

Collateral References

Elections *key* 213, 216.1.

29 C.J.S. Elections §210.

26 Am. Jur. 2d Elections §§355 through 364.

Construction and effect of absentee voter laws. 97 ALR 2d 257.

Injunction proceedings under absentee voters' laws. 97 ALR 2d 343.

Validity of absentee voter laws. 97 ALR 2d 218.

Voting eligibility of employees absent because of illness, injury, or maternity leave. 85 ALR Fed. 188.

13-13-203. Absentee ballots where nonpaper-based voting systems are used.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) in introductory clause substituted "nonpaper-based voting systems" for "voting machines or devices" and after "administrator shall" deleted "if

necessary print and"; in (1)(a) at beginning inserted "paper" and after "form" inserted "specified according to rules adopted pursuant to 13-12-202"; in (1)(b) substituted "each precinct" for "precincts in which printed ballots are used"; in (2) at end substituted "by law" for "in this chapter"; and made minor changes in style. Amendment effective October 1, 2003.

1985 Amendment: In (1)(a) substituted "qualified electors who may vote absentee as provided in 13-13-201" for "possible absent or physically incapacitated electors".

Collateral References

Elections *key* 216.1.
29 C.J.S. Elections §210(5).
26 Am. Jur. 2d Elections §363.

13-13-204. Authority to vote in person — printing error or ballot destroyed — failure to receive ballot — effect of absentee elector's death.

Compiler's Comments

2003 Amendment: Chapter 475 in (2) deleted former second and third sentences that read: "Before the ballot is given the elector, the election judge shall write upon the back of the ballot the number of the ballot. The ballot may be cast out if it appears to the court to have been wrongfully or illegally voted" and inserted second sentence providing that the ballot must be handled as a provisional ballot. Amendment effective January 1, 2004.

1997 Amendment: Chapter 85 in (1), after "omissions", inserted exception clause providing that appearance of the name of candidate who died after printing of ballot does not constitute error or omission; and made minor changes in style.

1987 Amendment: In (1), after "omissions", deleted "or if the absentee ballot was destroyed"; and inserted (2) establishing procedure to allow elector to vote in person if his absentee ballot was not received or was destroyed.

1983 Amendment: Substituted "(1) If an elector has voted by absentee ballot but the absentee ballot contains printing errors or omissions or if the absentee ballot was destroyed, the elector may vote in person in any manner at his polling place" for former language, which read: "If an elector has voted by absentee ballot but on election day is present in the county and able to go to the polls or if he learns his absentee ballot has been rejected by the judges as provided in 13-13-241, the elector may vote in person at his polling place. If voting machines or devices are used, he may vote by machine or device."

Commissioner Correction: A reference to sec. 130, Ch. 571, L. 1979, has been deleted by the Code Commissioner, 1979. The deleted reference was to a section dealing with procedure after the polls close and would not be applicable to the situation when an elector votes in person.

Collateral References

Elections *key* 216.1.
29 C.J.S. Elections §210(3).
26 Am. Jur. 2d Elections §359.

13-13-205. When paper ballots to be available.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 414 in (1) and (2) before "ballots" inserted "paper". Amendment effective October 1, 2003.

Chapter 475 in (1) near middle decreased the time for absentee ballots to be available from 45 days to 30 days; and inserted (3) providing that a notice of when the voter information pamphlet will be distributed be included with certain absentee ballots. Amendment effective January 1, 2004.

1987 Amendment: At end of (1) inserted "for those elections held in compliance with 13-1-104(1) and 13-1-107(1)"; and inserted (2) referring to elections held under 13-1-104(2) and (3) and 13-1-107(2).

1985 Amendment: Substituted "45 days" for "14 days".

13-13-211. Time period for application.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) at beginning inserted exception clause; in (2) at end inserted "as provided in 13-13-212(3)"; and made minor changes in style. Amendment effective October 1, 2003.

The amendments to this section made by sec. 35, Ch. 414, L. 2003, and sec. 13, Ch. 557, L. 2003, were rendered void by sec. 93(2)(a), Ch. 414, L. 2003, a coordination section.

1999 Amendment: Chapter 151 substituted current text concerning time period for application for absentee ballot for former text that read: "(1) Except as provided in 13-2-214, during a period beginning 75 days before the day of election and ending at noon on the day before the election, an individual may apply to the election administrator for an absentee ballot if the individual is:

(a) an elector expecting to be absent from the county in which the elector's voting precinct is situated;

(b) an elector who is chronically ill or in general ill health;

(c) an elector with a disability or an elderly elector who has been assigned to an inaccessible polling place; or

(d) an elector who will be unable to go to the polls because of physical incapacity.

(2) A qualified elector who is prevented from voting at the polls as a result of an illness or health emergency occurring between 5 p.m. on the Friday preceding the election and noon on election day may request to vote by absentee ballot. The election administrator shall honor a request received up to and including noon on election day. The election administrator is not required to comply with a request by an elector who is absent from the county". Amendment effective October 1, 1999.

1997 Amendment: Chapter 472 in (1)(c) substituted reference to disability for reference to handicapped; and made minor changes in style.

1987 Amendment: Divided (1) into subsections, added (1)(c) referring to handicapped or elderly elector who has been assigned to inaccessible polling place, and made minor changes in phraseology.

1985 Amendments: Chapter 239 near middle of (1) after "situated", inserted "an elector who is chronically ill or in general ill health"; and inserted (2) providing for special absentee ballots in cases of sudden illness.

Chapter 396 at beginning of (1) before "during", inserted "Except as provided in 13-2-214", and near middle after "situated", deleted "an elector in United States service".

Attorney General's Opinions

Providing Ballots on Legal Holiday: The County Clerk and Recorder must provide an opportunity for absentee voters to apply for an absentee ballot until noon on the day before the election, whether or not that day is a legal holiday. 36 A.G. Op. 81 (1976).

Collateral References

Elections *key* 216.1.

29 C.J.S. Elections §210(4).

26 Am. Jur. 2d Elections §360.

Construction and effect of absentee voter laws. 97 ALR 2d 257.

Validity of absentee voter laws. 97 ALR 2d 218.

13-13-212. Application for absentee ballot — special provisions.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 414 in (2)(c) at end substituted "within the time period specified in 13-13-211(2)" for "by noon on election day". Amendment effective October 1, 2003.

Chapter 557 in (1) in first sentence after "ballot" inserted "using only a standardized form provided by rule by the secretary of state" and after "request" inserted "which must include the applicant's birth date and must be" and at beginning of second sentence inserted "The request must be submitted"; deleted former (2) that read: "(2) An elector in the United States service absent from the state and county in which the elector is registered may apply for an absentee ballot as follows:

(a) as provided in subsection (1);

(b) by using the federal postcard application signed by the applicant and made within the time period specified in 13-13-211; or

(c) if eligible, by using the federal write-in ballot as provided in 13-13-271(3)"; and made minor changes in style. Amendment effective October 1, 2003.

The amendments to this section made by sec. 28, Ch. 475, L. 2003, and sec. 14, Ch. 557, L. 2003, were rendered void by sec. 25, Ch. 557, L. 2003, a coordination section.

1999 Amendment: Chapter 164 in (1) after "signed by the applicant" deleted "and addressed to or transmitted by facsimile" and at end inserted reference to time period; in (2) in introductory clause substituted "An elector in the United States service absent from the state and county in which the elector is registered may apply for an absentee ballot as follows" for "Application for an

absentee ballot may be made by any elector in the United States service"; inserted (2)(a) referring to application as provided in subsection (1); in (2)(b) substituted "by using the federal postcard application signed by the applicant and made within the time period specified in 13-13-211" for "by the federal postcard application or by any written request signed by the applicant and addressed to or transmitted by facsimile to the election administrator of the applicant's county of residence"; inserted (2)(c) referring to federal write-in ballot; in (3)(c) substituted "request under this subsection (3) must be received by the election administrator by noon" for "request may be made no later than noon"; and made minor changes in style. Amendment effective March 24, 1999.

1997 Amendment: Chapter 85 inserted (4) authorizing elector to request a replacement absentee ballot in writing or orally upon the death of a candidate after the primary election but before the general election; and made minor changes in style.

1991 Amendment: In (1) and (2), after "addressed to", inserted "or transmitted by facsimile to"; and in (3), near beginning of second sentence after "telephone", inserted "facsimile transmission".

1985 Amendment: Inserted (3) referring to request for special absentee ballot and application.

Administrative Rules

ARM 44.3.1403 Facsimile requests for absentee ballots.

Collateral References

Elections *key* 216.1.
29 C.J.S. Elections §210(4).
26 Am. Jur. 2d Elections §360.

13-13-213. Transmission of application to election administrator — delivery of ballot.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 367 in first sentence in (1) substituted "elector shall mail the application directly to the election administrator" for "elector shall forward the application by mail" and inserted second sentence prohibiting third party from collecting absentee ballot applications to forward to an election administrator; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 557 in (3) in first sentence substituted "13-13-212(2)" for "13-13-212(3)". Amendment effective October 1, 2003.

The amendments to this section made by Ch. 475, L. 2003, were rendered void by sec. 5(2), Ch. 367, L. 2003, a coordination section.

1995 Amendment: Chapter 203 at end of (1) inserted language providing that an absentee ballot may be picked up in person or as provided in 13-13-214; and made minor changes in style.

1985 Amendment: At beginning of (1) inserted exception clause; and inserted (2) referring to delivery of special absentee ballot.

Collateral References

Elections *key* 216.1.
29 C.J.S. Elections §210(4).
26 Am. Jur. 2d Elections §360.

13-13-214. Mailing absentee ballot to elector — delivery to person other than elector.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 414 in (1)(a) near beginning after "official" inserted "paper absentee", near middle inserted "immediately", and near end inserted "under 13-13-211 and 13-13-212" and deleted former second sentence that read: "Ballots must be sent immediately to electors submitting valid requests after the official ballots are printed"; in (2)(b) at beginning substituted "an envelope" for "a self-addressed envelope" and at beginning of second sentence inserted "The envelope must be self-addressed by the election administrator and"; in (3) substituted "ensure that" for "stamp" and inserted "are marked"; deleted former (4) that read: "(4) Both the envelope in which the ballot is mailed to an elector in the United States service and the return envelope must have printed across the face the information and graphics and be of the color prescribed by the secretary of state consistent with the regulations established by the federal election commission, the U.S. postal service, or other federal agency"; in (5) in third sentence near end after "the return" deleted "and verification"; deleted former (7) that read: "(7) The return envelope must be self-addressed to the election administrator"; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 475 in (1)(a) in first sentence near middle after "to each" inserted "legally registered elector and provisionally registered" and near end after "valid" inserted "absentee ballot" and in second sentence after "immediately" deleted "to electors submitting valid requests"; deleted former (6)(b) that read: "(b) the elector is out of the state or will be out of the state at the time of the election"; and made minor changes in style. Amendment effective January 1, 2004.

The amendments to this section made by sec. 37, Ch. 414, L. 2003, and sec. 16, Ch. 557, L. 2003, were rendered void by sec. 93(2)(b), Ch. 414, L. 2003, a coordination section.

1997 Amendment: Chapter 242 inserted (2)(a) requiring enclosure of secrecy ballot; in (3), at end, inserted "and remove the stubs from the ballots, attaching the stubs to the elector's absentee ballot application"; in (6) inserted fourth sentence requiring instructions to include information on use of secrecy ballot and use of return and verification envelope; and made minor changes in style.

1995 Amendments — Composite Section: Chapter 119 at end of (6) inserted requirement that voter information pamphlet be included with certain absentee ballots; and made minor changes in style.

Chapter 203 at beginning of (1)(a) inserted exception clause; inserted (1)(b) providing criteria for allowing elector to designate person to pick up absentee ballot for elector and limiting to four the number of absentee ballots that may be picked up by another person; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier has chosen the most appropriate.

1983 Amendment: In (4), following "across the face" substituted "such information and graphics and be of such color as may be prescribed by the secretary of state consistent with the regulations established by the federal election commission, U.S. postal service, or other federal agency" for "two parallel horizontal red bars, each 1/4-inch wide, extending from one side of the envelope to the other with an intervening space of 1/4-inch, with the words "Official Election Ballot Material—via Air Mail" between the bars. In the upper right-hand corner shall be printed "Free of U.S. Postage". In the upper left-hand corner shall be blanks sufficient for the recipient to place his return address. All printing on the face of the envelope shall be in red. The gummed flap of the envelope supplied for the return of the ballot shall be separated by wax paper or other appropriate protective insert. Voting instructions provided in subsection (6) shall include a procedure to be followed by absentee electors, such as notation of the facts on the back of the envelope, duly signed by the elector, in instances of adhesion of the balloting material."

Statement of Intent: The statement of intent attached to Ch. 110, L. 1983, provided: "A statement of intent is required for this bill because section 1 grants the Secretary of State the authority to adopt rules prescribing the information and graphics to be printed on both the envelope in which a ballot is mailed to an elector in the United States service and the return envelope. Rules are to be adopted under the Montana Administrative Procedure Act.

The Legislature intends that this grant of authority to adopt rules be used only to eliminate inconsistencies that now exist between the specifications established in 13-13-214(4) and existing requirements of federal law. The rules adopted must be consistent with regulations established by the federal election commission, U.S. postal service, or other federal agency. The rules must allow for mailing and return of the ballot free of U.S. postage if that is permitted by the U.S. postal service. The rules may not require information and graphics which are not specifically required by the regulations of a federal agency."

Administrative Rules

ARM 44.3.1401 Ballot envelopes for electors in United States service.

Case Notes

Improper Delivery: Absentee ballots delivered by County Clerk not to electors personally or by mail but to one engaged in procuring electors to apply therefor were void and could not be voted at ensuing election. State ex rel. Van Horn v. Lyon, 119 M 212, 173 P2d 891 (1946).

Collateral References

Elections *key* 216.1.

29 C.J.S. Elections §210(6).

26 Am. Jur. 2d Elections §361.

13-13-222. Marking ballot before election day.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) after "available" inserted "pursuant to 13-13-205", inserted "apply for, receive, and", substituted "an absentee ballot" for "the ballot", and near end

substituted "by appearing in person at the office of the election administrator and marking the ballot in a voting station area designated by" for "before"; and in (3) at end substituted "as provided in 13-13-231" for "in the same manner as if it had come by mail". Amendment effective October 1, 2003.

1999 Amendment: Chapter 151 near middle of (1) after "elector" substituted "to mark the ballot" for "who is present in his county and who has reason to believe that he will be absent from the county, ill, or physically incapacitated on election day to vote"; and made minor changes in style. Amendment effective October 1, 1999.

1985 Amendment: In (1), after "absent from the county", inserted "ill".

1983 Amendment: In (1), at beginning inserted "As soon as the official ballots are available, the election administrator shall permit", and after "his county" deleted "after the official ballots have been printed".

Collateral References

Elections *key* 216.1.
29 C.J.S. Elections §210.
26 Am. Jur. 2d Elections §355.

13-13-225. Special absentee election boards — members — appointment.

Compiler's Comments

1999 Amendment: Chapter 151 at end of (1) substituted "provided in 13-13-229" for "a result of illness or health emergency under 13-13-201"; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 242 in (1), near end, inserted "as a result of illness or health emergency" and at end deleted reference to subsection (4) of 13-13-201; and made minor changes in style.

Source: Sections 10 through 15, Ch. 239, L. 1985, are based on §§16-541 through 16-551, Arizona Revised Statutes.

13-13-226. Manner of selection.

Compiler's Comments

Source: See compiler's comments to 13-13-225.

13-13-227. Oath of board members.

Compiler's Comments

Source: See compiler's comments to 13-13-225.

13-13-228. Compensation.

Compiler's Comments

Source: See compiler's comments to 13-13-225.

13-13-229. Voting performed before special absentee election board.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 414 in (2) substituted reference to 13-13-201 for reference to 13-13-221. Amendment effective October 1, 2003.

Chapter 557 in (1) substituted "13-13-212(2)" for "13-13-212(3)". Amendment effective October 1, 2003.

1999 Amendment: Chapter 151 in (1) deleted former first sentence that read: "As provided in 13-13-201, a qualified elector who becomes ill or is prevented from voting at the polls because of a health emergency may vote by absentee ballot". Amendment effective October 1, 1999.

1997 Amendment: Chapter 242 in (1), near beginning of first sentence, deleted reference to subsection (4) of 13-13-201; in (2), in two places before "envelope", inserted "return"; and made minor changes in style.

Source: See compiler's comments to 13-13-225.

13-13-230. Authorization to increase county mill levy.

Compiler's Comments

2001 Amendment: Chapter 574 near beginning of first sentence after "amount" deleted "not exceeding 1 mill as may be". Amendment effective July 1, 2001.

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

Source: See compiler's comments to 13-13-225.

13-13-231. Disposition of marked ballot upon receipt by election administrator.

Compiler's Comments

2003 Amendment Void: The amendment to this section made by sec. 40, Ch. 414, L. 2003, was rendered void by sec. 93(3)(a), Ch. 414, L. 2003, a coordination section.

1997 Amendment: Chapter 242 in (1), near end before "envelope", inserted "unopened return"; and made minor changes in style.

Collateral References

Elections *key* 216.1.

26 Am. Jur. 2d Elections §363.

13-13-232. Delivery of ballots and secrecy envelopes to election judges — ballots to be rejected.

Compiler's Comments

2003 Amendment: Chapter 475 in (1) near middle after "shall" inserted "process it according to 13-13-241 and then" and after "unopened" substituted "secrecy envelope" for "return envelope" and deleted former second sentence that read: "The return envelopes must be opened and the ballots processed according to the procedures described in 13-13-241"; in (2) near beginning before "ballots are delivered" inserted "official", after "shall" inserted "process it according to 13-13-241 and shall then", and after "unopened" substituted "secrecy envelope" for "return envelopes" and deleted former second sentence that read: "The return envelopes must be opened and the ballots processed according to the procedures described in 13-13-241"; in (3) at end after "must be" substituted "handled in the same manner as provided in 13-13-243" for "retained by the election administrator and placed with the proper records when they are returned to the election administrator"; and made minor changes in style. Amendment effective January 1, 2004.

The amendment to this section made by sec. 41, Ch. 414, L. 2003, was rendered void by sec. 93(3)(b), Ch. 414, L. 2003, a coordination section.

1999 Amendment: Chapter 151 in first sentence of (3) after "was not" substituted "made or received as required by this part" for "received as required by 13-13-211 or if an absentee ballot is received by the election administrator after the close of the polls and was not issued to an elector pursuant to 13-13-201(1)(d)". Amendment effective October 1, 1999.

1997 Amendment: Chapter 242 in (1) and (2), near middle of first sentence before reference to envelope, inserted "unopened return"; in (1) and (2) inserted second sentence requiring opening of envelopes and processing of ballots; in (3), near middle of first sentence, substituted "13-13-210(1)(d)" for 13-13-201(4)"; and made minor changes in style.

1985 Amendment: In (3) before "shall endorse", substituted "If the election administrator receives an absentee ballot for which an application or request was not received as required by 13-13-211, or if an absentee ballot is received by the election administrator after the close of the polls and was not issued to an elector pursuant to 13-13-201(4), the election administrator" for "If absentee ballots for which an application was not received prior to noon on the day preceding an election are received by the election administrator or if absentee ballots are received by the election administrator after the close of the polls, he".

Collateral References

Elections *key* 216.1.

29 C.J.S. Elections §211.

26 Am. Jur. 2d Elections §§362, 363.

13-13-233. Issue and record of absentee ballots — certificate to election judges.

Compiler's Comments

2003 Amendment: Chapter 414 in (1), (2), and (3) substituted current text concerning absentee ballots, record of absentee ballots, and delivery of absentee ballots for former text that read: "(1) The absentee ballots delivered shall be regular official ballots beginning with ballot number 1 and following consecutively according to the number of applications for absentee ballots.

(2) The election administrator shall keep a record of all absentee ballots delivered, as well as of ballots marked before him.

(3) The election administrator shall deliver to the chief election judges to whom the ballots are delivered a certificate stating:

(a) the number of absentee ballots delivered as well as those marked before him;

(b) the number of ballots retained for late absentee voting; and

(c) the names of the electors to whom such ballots were delivered or by whom they have been marked if marked before him." Amendment effective October 1, 2003.

1983 Amendment: Inserted (4) requiring list of names of absentee voters to be posted.

Collateral References

Elections *key* 216.1.

26 Am. Jur. 2d Elections §363.

13-13-234. Duty of election judges — pollbook.

Compiler's Comments

2003 Amendment: Chapter 414 in (1)(a) inserted "appropriate ballot", after "numbers" deleted "corresponding to the number of absentee ballots issued", and near end inserted "as absentee ballots"; in (1)(b) substituted "electors who may vote late under 13-13-211(2)" for "the absent, chronically ill, or physically incapacitated electors, as well as those electors prevented from voting at the polls because of a sudden illness or health emergency"; in (2) inserted "pursuant to 13-13-233(3)"; and made minor changes in style. Amendment effective October 1, 2003.

1985 Amendment: In (1) after "absent", inserted "chronically ill" and at end, inserted "as well as those electors prevented from voting at the polls because of a sudden illness or health emergency"; and deleted former last sentence of (1) that read: "The notation may be made by writing the words "absent or physically incapacitated voters" opposite the numbers."

Collateral References

Elections *key* 216.1.

26 Am. Jur. 2d Elections §363.

13-13-241. Examination of absentee ballot return envelopes and affirmations — deposit of absentee and unvoted ballots.

Compiler's Comments

2003 Amendment: Chapter 475 in (1)(a) in first sentence at beginning substituted "As soon as an absentee ballot is received, an election administrator shall compare" for "While the polls are open, the election judges may compare" and at end after "request" substituted "with the signature on the absentee ballot return envelope" for "and affirmation", deleted former second sentence that read: "If they find that the signatures correspond, that the affirmation is sufficient, and that the absentee elector is qualified, they may open the absentee ballot return envelope", and inserted second and third sentences providing for the opening of the outer envelope to determine sufficiency of identification information and providing for placing ballot in a secrecy envelope if necessary; inserted (1)(b) providing for the handling of unvoted party ballots; inserted (1)(c) establishing procedures for handling a ballot with sufficient information and handling a ballot with insufficient information as a provisional ballot; in (2) near beginning of first sentence after "If the" substituted "signature on the absentee ballot return envelope does not match the signature on the absentee ballot request form" for "absentee ballot does not meet the requirements specified in subsection (1)" and in second sentence at beginning substituted "The election administrator" for "The election judges" and at end after "rejection" deleted "and a majority of the judges shall sign their initials"; in (3) near beginning after "After" substituted "receiving an absentee ballot secrecy envelope" for "opening the absentee ballot return envelope" and after "shall" inserted "on election day" and deleted former second sentence that read: "In a primary election, the unvoted ballots must be deposited in the unvoted ballot box without being removed from their enclosure envelopes"; deleted former (4) that read: "(4) After opening the absentee ballot return envelope and if the ballot has not been placed in the secrecy envelope, without unfolding the ballot or permitting it to be examined, the election judges shall place the ballot in the secrecy envelope and place the secrecy envelope in the proper ballot box"; and made minor changes in style. Amendment effective January 1, 2004.

The amendment to this section made by sec. 44, Ch. 414, L. 2003, was rendered void by sec. 93(3)(c), Ch. 414, L. 2003, a coordination section.

1997 Amendment: Chapter 242 in (1), near end, and in (2), in two places after "absentee ballot", inserted "return"; inserted (3) requiring disposition of return and secrecy envelopes; in (4), near beginning after "absentee", inserted "ballot return", after "envelope and" inserted "if the

ballot has not been placed in the secrecy envelope", and at end substituted "place the ballot in the secrecy envelope and place the secrecy envelope in the proper ballot box" for "ascertain whether the stubs are attached or enclosed and whether the numbers correspond to the numbers in the certificate of the election administrator. If so, they shall detach the stubs and deposit the stubs and ballots in the proper ballot boxes. In a primary election, the unvoted ballots must be deposited in the unvoted ballot box without being removed from their enclosure envelope"; deleted former (4) that read: "(4) If upon opening the absentee ballot envelope it is found that the number does not correspond to the number on the certificate of the election administrator, the ballot must be rejected. The reason for rejection must be marked on the back of the ballot or ballots, and the statement must be initialed by a majority of the election judges"; and made minor changes in style.

1987 Amendment: Near end of last sentence of (1), before "they", deleted "and has not yet voted" and after "they" substituted "may open the absentee ballot envelope" for "shall place the absentee elector's envelope in a box or envelope marked "unopened — checked and valid absentee ballots""; inserted (3) establishing procedure for deposit of absentee ballots; inserted (4) providing for rejection of certain absentee ballots; and made minor changes in phraseology.

Commissioner Correction: A reference to 13-13-237 has been deleted by the Code Commissioner, 1979. Section 13-13-237 was repealed by sec. 407, Ch. 571, L. 1979.

Administrative Rules

ARM 44.3.1733 Use of IES (Shoup) voting machines — after polls close.

ARM 44.3.1736 Use of AVM (automatic voting machines) — after polls close.

Case Notes

How Voting Accomplished: Voting is accomplished not merely by marking the ballot but by having it delivered to the election officials and deposited in the ballot box before the closing of the polls on election day. Under section 23-1313, R.C.M. 1947 (now repealed), this is equally true for absent voters. Maddox v. Bd. of St. Canvassers, 116 M 217, 149 P2d 112 (1944).

Collateral References

Elections *key* 216.1.

29 C.J.S. Elections §211.

26 Am. Jur. 2d Elections §363.

13-13-243. Rejected absentee ballots.

Compiler's Comments

1983 Amendment: In (2), following "voted in person" deleted "on election day" and substituted "must" for "shall" after "13-13-204".

Collateral References

Elections *key* 216.1.

29 C.J.S. Elections §211.

26 Am. Jur. 2d Elections §363.

13-13-244. Opening of return envelopes after deposit.

Compiler's Comments

2003 Amendment: Chapter 414 near beginning substituted "a return envelope" for "an envelope" and at end substituted "the return envelope must be processed as provided in 13-13-241" for "the envelope shall be opened without a court order and the ballot cast". Amendment effective October 1, 2003.

The amendment to this section made by sec. 45, Ch. 414, L. 2003, was rendered void by sec. 93(3)(d), Ch. 414, L. 2003, a coordination section.

Collateral References

Elections *key* 216.1.

26 Am. Jur. 2d Elections §363.

13-13-270. Absentee voting provisions for United States electors supersede.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

Part 3
Challenges

13-13-301. Challenges on election day.

Compiler's Comments

2003 Amendment: Chapter 475 deleted former (2)(a) and (2)(b) that read: "(a) that he is not the individual whose name appears on the register;

(b) that he does not reside at the residence listed unless the elector is voting under the provisions of 13-2-512 and 13-2-514"; inserted (3) providing that a challenged elector may cast a provisional ballot; and made minor changes in style. Amendment effective January 1, 2004.

Case Notes

No Authority in School Board to Remove Unqualified Voters From List of Registered Voters: Under 20-9-428 a school board of trustees removed from the certified list of registered voters the names of several persons who the board determined were disqualified to vote. The court held that 20-9-428 must be read with other statutes governing elections, including 20-20-303, concerning how an elector's qualifications may be challenged; 13-13-301, et seq., concerning how qualifications are determined; and 13-15-101, concerning general canvassing requirements. The court determined the school board had no authority to remove names of unqualified voters. Bischoff v. School District, 230 M 336, 749 P2d 533, 45 St. Rep. 253 (1988).

Attorney General's Opinions

Challenge for Lack of Residency Qualifications — School Election: An elector in a school election may be challenged on election day by any registered elector of the district and may be disqualified from voting by the election judges if he is not a resident of the school district in which the election is held. 35 A.G. Op. 56 (1974).

Collateral References

Elections *key* 223.

29 C.J.S. Elections §209.

26 Am. Jur. 2d Elections §329.

Part 6
Provisional Voting — Rulemaking

Part Compiler's Comments

Effective Date: Section 46, Ch. 475, L. 2003, provided that this section is effective January 1, 2004.

CHAPTER 14
NONPARTISAN ELECTIONS

Chapter Compiler's Comments

Preamble: The preamble attached to Ch. 414, L. 2003, provided: "WHEREAS, the U.S. Supreme Court in Bush v. Gore, 531 U.S. 98 (2000), found that the lack of uniform procedures for determining voter intent in Florida during the 2000 presidential election led to a violation of the U.S. Constitution's Equal Protection Clause of the 14th Amendment; and

WHEREAS, at the request of the 57th Legislature, the State Administration and Veterans' Affairs Interim Committee devoted much of the 2001-2002 interim to a review of Montana election laws with respect to voting systems and counting processes in light of Bush v. Gore; and

WHEREAS, the interim study found that Montana's statutory provisions relating to ballots, voting systems, and vote counting processes needed to be updated, clarified, and in some instances revised to better define uniform standards and procedures to provide equal protection for votes cast by Montana voters; and

WHEREAS, the Subcommittee on Voting Systems of the State Administration and Veterans' Affairs Interim Committee agreed that statutory changes should be made with an eye on future technology but should also standardize current practices to the greatest extent possible.

THEREFORE, this legislation will enable the Secretary of State to adopt a statewide benchmark performance measure that voting systems must meet before they can be approved for use in the state; allow local election administrators to continue to choose which of the approved voting systems should be used locally; require the Secretary of State to adopt uniform statewide rules regarding ballot form, votes and vote counts, and other operational procedures specific to

each voting system and to provide training to local election administrators; and require all counting boards to use the uniform counting procedures specified."

Chapter Law Review Articles

Judicial Responsibility, Judicial Independence and the Election of Judges, Hefferhnan, 80 Marq. L. Rev. 1031 (1997).

The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, Croley, 62 U. Chi. L. Rev. 689 (1995).

Local Nonpartisan Elections, Political Parties and the First Amendment, Northup, 87 Colum. L. Rev. 1677 (1987).

Chapter Collateral References

26 Am. Jur. 2d Elections §§225, 305.

Constitutionality, construction, and application of statutes providing that candidates for certain offices shall be placed upon nonpartisan ballots. 125 ALR 1044.

Part 1
General Provisions

13-14-112. Declarations for nomination — fee.

Compiler's Comments

2003 Amendment: Chapter 475 in (1) inserted second sentence providing that a candidate may not file for more than one office; and made minor changes in style. Amendment effective January 1, 2004.

Attorney General's Opinions

When Judicial Appointee to Run for Election: An individual appointed by the Governor to the office of District Judge need not run in the general election in the year in which Senate confirmation takes place if, at the time of confirmation, the filing date for judicial candidates has passed. 41 A.G. Op. 52 (1986).

Applicability to Newly Created Judgeships: This section applies to candidates for a judicial position created under Ch. 293, L. 1983. 40 A.G. Op. 13 (1983).

Collateral References

Elections *key* 126(4).

29 C.J.S. Elections §114.

26 Am. Jur. 2d Elections §235.

13-14-113. Filing for offices without salary or fees.

Compiler's Comments

2003 Amendment: Chapter 475 inserted (5) providing that a candidate may not file for more than one office; and made minor changes in style. Amendment effective January 1, 2004.

Collateral References

Elections *key* 126(4).

29 C.J.S. Elections §114.

26 Am. Jur. 2d Elections §§236, 237.

13-14-114. Register of candidates.

Compiler's Comments

1987 Amendment: Near middle after "shall" inserted "if a register is kept".

13-14-115. Preparation and distribution of nonpartisan primary ballots — determination on conducting primary.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) in second sentence substituted "and prepared as provided in 13-10-209" for "as other primary ballots"; deleted former (2) that read: "(2) The number of nonpartisan primary ballots and sample ballots furnished must be the same as other primary ballots"; and made minor changes in style. Amendment effective October 1, 2003.

1995 Amendment: Chapter 135 in (3)(a)(i) and (3)(a)(ii) substituted "three times" for "twice"; and made minor changes in style.

1991 Amendment: At beginning of (3)(a) substituted "election administrator" for "governing body"; inserted (3)(b) concerning election administrator giving notice to governing body that primary election will not be held; in (4) substituted language that governing body may require a

primary election upon passage of a resolution within 10 days after close of candidate filing for language that governing body could pass a resolution within 7 days of close of candidate filing stating that primary election need not be held; and made minor changes in style.

1985 Amendment: At beginning of (3) substituted "The governing body of a political subdivision" for "In a political subdivision with a population of 10,000 or less, the governing body".

Case Notes

Write-In Candidate: The Nonpartisan Judiciary Act did not restrict electors to the privilege of voting only for candidates whose names appeared on the primary judicial ballot. Though the act was silent as to their right to write in the name of a qualified person to judicial office, they could do so under the act when it was construed together with the laws relating to primary and general elections. State ex rel. McHale v. Ayers, 111 M 1, 105 P2d 686 (1940).

Collateral References

Elections *key* 163.
29 C.J.S. Elections §155.
26 Am. Jur. 2d Elections §335.

13-14-116. Counting and canvassing of nonpartisan ballots.

Compiler's Comments

2003 Amendment: Chapter 414 substituted "Nonpartisan ballots must be counted and canvassed as provided for in chapter 15" for former text that read: "(1) After closing the polls, the election officers shall separately count, canvass, record, and certify nonpartisan ballots, showing the number of votes cast for each person, except as provided in 13-15-202.

(2) Nonpartisan ballots, stubs, and unused ballots must be disposed of in the same manner as other ballots, stubs, and unused ballots. Returns must be made as provided by law." Amendment effective October 1, 2003.

1989 Amendment: At end of (1) inserted "except as provided in 13-15-202"; and made minor changes in phraseology. Amendment effective March 30, 1989.

Collateral References

Elections *key* 235 through 268.
29 C.J.S. Elections §§221 through 240.
26 Am. Jur. 2d Elections §§385 through 404.

13-14-117. Placing names on ballots for general election.

Compiler's Comments

2003 Amendment: Chapter 414 in (2) substituted "13-14-115(2)" for "13-14-115(3)". Amendment effective October 1, 2003.

1995 Amendment: Chapter 135 at beginning of (1) inserted exception clause; and inserted (2) relating to procedure when primary election is not held.

Case Notes

Write-In Candidate: The Nonpartisan Judiciary Act did not restrict electors to the privilege of voting only for candidates whose names appeared on the primary judicial ballot. Though the act was silent as to their right to write in the name of a qualified person to judicial office, they could do so under the act when it was construed together with the laws relating to primary and general elections. State ex rel. McHale v. Ayers, 111 M 1, 105 P2d 686 (1940).

Collateral References

Elections *key* 172.
29 C.J.S. Elections §162.
26 Am. Jur. 2d Elections §309.

13-14-118. Vacancies among nominees after nomination and before general election.

Compiler's Comments

2003 Amendment: Chapter 414 in (3) substituted "must appear" for "printed"; and made minor changes in style. Amendment effective October 1, 2003.

1985 Amendment: In (2) in lead-in clause, substituted "75 days" for "50 days"; and in (4) substituted "75 days" for "50 days".

Collateral References

Elections *key* 174.
29 C.J.S. Elections §167.

Part 2
Judicial Offices

13-14-211. Judicial offices separate and independent offices for election purposes.

Case Notes

Purpose and Construction of Prior Act: Purpose of sections 23-2001 through 23-2014, R.C.M. 1947 (now repealed), was to eliminate, so far as possible, the selection of judges from partisan politics. The word "candidate" as used in the act was not to receive a different construction from that given to the same word when used in the general primary law. The act was to be construed in pari materia with the primary and general election laws. State ex rel. McHale v. Ayers, 111 M 1, 105 P2d 686 (1940).

Collateral References

26 Am. Jur. 2d Elections §225.

13-14-212. Form of ballot on retention of certain incumbent judicial officers.

Compiler's Comments

2003 Amendment: Chapter 414 at end substituted sentence requiring that provision be made, as provided in rules, for a ballot form for

"[ ] YES

[ ] NO

(Mark an "x" before the word "YES" if you wish the official to remain in office. Mark and "x" before the word "NO" if you do not wish the official to remain in office.)"; and made minor changes in style. Amendment effective October 1, 2003.

Case Notes

Definition of Incumbent:

Use of "incumbent" is not limited, qualified, or restricted by the method by which one attained office. Keller v. Smith, 170 M 399, 553 P2d 1002 (1976).

An "incumbent" judge, for the purposes of the predecessor to this section, is one who is in office and who seeks to remain a District Court Judge. Yunker v. Murray, 170 M 427, 554 P2d 285 (1976).

Constitutionality: The predecessor of this section was not unconstitutional as being violative of the provisions of Art. VII, sec. 8, Mont. Const. Keller v. Smith, 170 M 399, 553 P2d 1002 (1976).

Write-In Candidate: The Nonpartisan Judiciary Act did not restrict electors to the privilege of voting only for candidates whose names appeared on the primary judicial ballot. Though the act was silent as to their right to write in the name of a qualified person to judicial office, they could do so under the act when it was construed together with the laws relating to primary and general elections. State ex rel. McHale v. Ayers, 111 M 1, 105 P2d 686 (1940).

Attorney General's Opinions

Required Form of Ballots for Justice of the Peace: Under 3-10-201, in an election for Justice of the Peace, the ballot must be the same in form as the ballot used to elect District Court Judges. This includes the form of ballot used by an incumbent who is unopposed. 35 A.G. Op. 61 (1974).

Law Review Articles

Retention Elections: Who Wins When No One Loses, Jenkins, 61 Judicature 79 (1977).

Collateral References

26 Am. Jur. 2d Elections §225.

13-14-213. Form of ballot on retention for other judicial offices.

Case Notes

Constitutionality: The predecessor to this section was not unconstitutional as being violative of the provisions of Art. VII, sec. 8, Mont. Const. Keller v. Smith, 170 M 399, 553 P2d 1002 (1976).

Definition of Incumbent: An "incumbent" judge, for the purposes of the predecessor to this section, is one who is in office and who seeks to remain a District Court Judge. Yunker v. Murray, 170 M 427, 554 P2d 285 (1976).

Write-In Candidate: The Nonpartisan Judiciary Act did not restrict electors to the privilege of voting only for candidates whose names appeared on the primary judicial ballot. Though the act was silent as to their right to write in the name of a qualified person to judicial office, they could do so under the act when it was construed together with the laws relating to primary and general elections. State ex rel. McHale v. Ayers, 111 M 1, 105 P2d 686 (1940).

Law Review Articles
Retention Elections: Who Wins When No One Loses, Jenkins, 61 Judicature 79 (1977).

Collateral References
26 Am. Jur. 2d Elections §225.

CHAPTER 15
CANVASSING, RETURNS, AND CERTIFICATES

Chapter Compiler's Comments
Preamble: The preamble attached to Ch. 414, L. 2003, provided: "WHEREAS, the U.S. Supreme Court in Bush v. Gore, 531 U.S. 98 (2000), found that the lack of uniform procedures for determining voter intent in Florida during the 2000 presidential election led to a violation of the U.S. Constitution's Equal Protection Clause of the 14th Amendment; and

WHEREAS, at the request of the 57th Legislature, the State Administration and Veterans' Affairs Interim Committee devoted much of the 2001-2002 interim to a review of Montana election laws with respect to voting systems and counting processes in light of Bush v. Gore; and

WHEREAS, the interim study found that Montana's statutory provisions relating to ballots, voting systems, and vote counting processes needed to be updated, clarified, and in some instances revised to better define uniform standards and procedures to provide equal protection for votes cast by Montana voters; and

WHEREAS, the Subcommittee on Voting Systems of the State Administration and Veterans' Affairs Interim Committee agreed that statutory changes should be made with an eye on future technology but should also standardize current practices to the greatest extent possible.

THEREFORE, this legislation will enable the Secretary of State to adopt a statewide benchmark performance measure that voting systems must meet before they can be approved for use in the state; allow local election administrators to continue to choose which of the approved voting systems should be used locally; require the Secretary of State to adopt uniform statewide rules regarding ballot form, votes and vote counts, and other operational procedures specific to each voting system and to provide training to local election administrators; and require all counting boards to use the uniform counting procedures specified."

Chapter Case Notes
Contested School Elections — Applicable Law: The validity of contested school elections is determined by the laws of general elections, including canvassing statute. Woolsey v. Carney, 141 M 476, 378 P2d 658 (1963).

Chapter Collateral References
Elections *key* 235 through 268.
29 C.J.S. Elections §§235 through 240.
26 Am. Jur. 2d Elections §§394 through 401.
Injunction against canvassing votes and declaring result of election. 1 ALR 2d 588.
Failure to comply with statutory provisions relating to the form or manner in which election returns from voting districts or precincts are to be made. 106 ALR 398.

Part 1
General Provisions

13-15-101. Votes to be publicly counted — return forms.

Compiler's Comments
2003 Amendment: Chapter 414 in (1) at beginning deleted former first sentence that read: "When the polls are closed, the election judges shall immediately count the votes" and at beginning of first sentence substituted "Any official vote count" for "The count"; and made minor changes in style. Amendment effective October 1, 2003.

1987 Amendments: Chapter 100 in (2), in first clause after "counted", deleted "in each precinct"; and in (3) substituted "place of counting" for "polling place".

Chapter 298 in (2) substituted "by precinct" for "in each precinct"; and in (3) substituted "place of counting" for "polling place".

Administrative Rules
ARM 44.3.1733 Use of IES (Shoup) voting machines — after polls close.
ARM 44.3.1736 Use of AVM (automatic voting machines) — after polls close.

ARM 44.3.1740 Use of CES (computer election systems votomatic) — after polls close.

ARM 44.3.1741 through ARM 44.3.1750 Organization and function of Central Counting Center for tabulation of CES (computer election systems votomatic) ballots.

Case Notes

No Authority in School Board to Remove Unqualified Voters From List of Registered Voters: Under 20-9-428 a school board of trustees removed from the certified list of registered voters the names of several persons who the board determined were disqualified to vote. The court held that 20-9-428 must be read with other statutes governing elections, including 20-20-303, concerning how an elector's qualifications may be challenged; 13-13-301, et seq., concerning how qualifications are determined; and this section, concerning general canvassing requirements. The court determined the school board had no authority to remove names of unqualified voters. Bischoff v. School District, 230 M 336, 749 P2d 533, 45 St. Rep. 253 (1988).

Return Forms: Under sections 23-710 through 23-713, R.C.M. 1947 (now repealed), forms on which judges of election were to summarize the result of the vote were not a part of the election returns and were not required to be transmitted to the Clerk in sealed packages. Dubie v. Batani, 97 M 468, 37 P2d 662 (1934).

Collateral References

Elections *key* 240 through 245.

29 C.J.S. Elections §§221 through 233.

26 Am. Jur. 2d Elections §§385 through 389, 391.

13-15-102. Defect in form of returns to be disregarded.

Case Notes

Voter's Intention Not Clear From Ballot: In this case, involving a contest of election, the Supreme Court held that so many questions arose from the contested ballot itself as to the voter's intentions and from attempts to find a consistency in his method of voting that his ballot must be rejected. Rennie v. Nistler, 226 M 412, 735 P2d 1124, 44 St. Rep. 764 (1987).

Collateral References

Elections *key* 244.

29 C.J.S. Elections §227.

26 Am. Jur. 2d Elections §398.

Failure to comply with statutory provisions relating to the form or manner in which election returns from voting districts or precincts are to be made. 106 ALR 398.

13-15-104. Absentee ballot counting board.

Compiler's Comments

2003 Amendment: Chapter 414 in (1)(a) substituted reference to 13-15-112 for reference to 13-4-101; substituted (4) providing: "The absentee ballot counting board shall take the oath and sign the affirmation specified in 13-15-207(4)" for former text that read: "(4) (a) In addition to the official oath taken and subscribed to by the election judges, the members of the counting board for absentee ballots shall complete and sign the following affirmation: "I, ..., will not discuss or disclose or allow anyone else to discuss or disclose to anyone the results of the early counting of votes while the polls are open.

(b) The chief election judge shall witness and sign the affirmation"; and made minor changes in style. Amendment effective October 1, 2003.

1987 Amendment: In (2)(c) substituted "13-13-241" for "13-13-242".

13-15-105. Notices relating to absentee ballot counting board.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) in introductory clause substituted reference to 13-15-112 for reference to 13-4-101; in (2) at beginning substituted "If the count will begin while the polls are open, the notice required under subsection (1) must" for "The notice must" and at end substituted "and is required to take the oath provided in 13-15-207(4)" for "and the counting board is released and must take the oath provided in 13-15-104"; and made minor changes in style. Amendment effective October 1, 2003.

13-15-107. Handling and counting provisional and challenged ballots.

Compiler's Comments

Effective Date: Section 46, Ch. 475, L. 2003, provided that this section is effective January 1, 2004.

13-15-111. Write-in elections — general election.

Compiler's Comments

2003 Amendment: Chapter 475 in (2) after "fails to" substituted "comply with the requirements in subsection (1)" for "file the declaration as required under subsection (1)(a)"; and made minor changes in style. Amendment effective January 1, 2004.

1991 Amendment: Inserted (1)(c) concerning payment of filing fee; and made minor changes in style.

13-15-112. Appointment of counting boards.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

Part 2
Vote Count Procedures

Part Case Notes

Plaintiff Only Write-In Candidate — No Requirement That All Write-In Votes With His Surname Be Counted for Him: Marsh argued that all write-in votes for "Marsh" should have been recorded as votes for him rather than rejected by the county recount board because he was the only qualified write-in candidate. The Supreme Court held that a write-in vote had to be unambiguous to be counted and that the argument ignored the fact that there had been write-in votes for other Marshs, thereby making it impossible to determine if a vote for "Marsh" was a vote for him. Marsh v. Overland, 274 M 21, 905 P2d 1088, 52 St. Rep. 1099 (1995).

Determining Elector's Intention:

The Supreme Court upheld the lower court's rejection of a ballot, holding that when the expression of the voter cannot be gleaned without speculation, the vote must be voided to ensure the objectivity of the election process. Spaeth v. Kendall, 245 M 352, 801 P2d 591, 47 St. Rep. 2177 (1990), followed in Marsh v. Overland, 274 M 21, 905 P2d 1088, 52 St. Rep. 1099 (1995).

A ballot bearing a rather indistinct "X" before contestant's name but sufficient to be discernible should have been counted for him where there was no erasure and the elector voted for no other candidate for that office. Under the rule that the elector's intention must plainly appear, where the voter marked two squares for the office of sheriff, one of which showed an extra line through the "X", the intention was not clear and the ballot should not have been counted. Peterson v. Billings, 109 M 390, 96 P2d 922 (1939), distinguished in State ex rel. Browne v. District Court, 167 M 477, 539 P2d 1182 (1975).

Under section 23-1704, R.C.M. 1947 (now repealed), and the rule that election laws must be liberally construed, a ballot showing the intersection of the "X" outside the square should have been counted for contestant, and one showing the intersection of the cross squarely on the line of the square was properly so counted for him. Peterson v. Billings, 109 M 390, 96 P2d 922 (1939), distinguished in State ex rel. Browne v. District Court, 167 M 477, 539 P2d 1182 (1975).

When, from the manner in which a ballot was marked, it was impossible to determine the elector's choice, the ballot was void under section 23-1210, R.C.M. 1947 (now repealed), and should not have been counted in an election contest. Carwile v. Jones, 38 M 590, 101 P 153 (1909).

13-15-201. Preparation for count.

Compiler's Comments

2003 Amendment: Chapter 414 substituted current text concerning counting of ballots for former text that read: "(1) To begin the count after the close of the polls, the election judges shall take ballots out of the box unopened to determine whether each ballot is single. The election judges shall remove each absentee ballot secrecy envelope and open it to determine whether the ballot for each election is single. A ballot must be rejected if in the envelope there is more than one ballot for each election.

(2) They shall count the ballots to ensure that the number of ballots corresponds with the number of names on the pollbook.

(3) If they cannot reconcile the total number of ballots with the pollbook, they shall submit a written report stating how many ballots were missing or in excess and any reason of which they are aware for the discrepancy. All judges shall sign the report.

(4) A ballot that is not endorsed by the official stamp is void and may not be counted unless the judges agree that the stamp is missing because of their error. The ballot must be marked "unstamped by error" on the back and must be initialed by all judges.

(5) If two or more ballots are folded together to look like a single ballot, they must be laid aside until the count is complete. The election judges shall compare the count with the pollbooks, and if a majority believes that the ballots folded together were voted by one elector, they must be rejected; otherwise they must be counted." Amendment effective October 1, 2003.

1997 Amendment: Chapter 242 in (1) inserted second and third sentences regarding removal of secrecy envelope by election judges and rejection of ballot; and made minor changes in style.

Administrative Rules

ARM 44.3.1733 Use of IES (Shoup) voting machines — after polls close.
ARM 44.3.1736 Use of AVM (automatic voting machines) — after polls close.
ARM 44.3.1740 Use of CES (computer election systems votomatic) — after polls close.

Case Notes

Unstamped and Excess Ballots: Although discarding the ballots in excess of the number of names on the pollbooks would not have affected the outcome of a legislative primary election, the District Court properly ordered a new election when it could not be determined with mathematical certainty that petitioner had won the nomination because some ballots had not been endorsed with the official stamp and the number of such unstamped ballots cast for petitioner was unknown. In re Recount of Ravalli County Primary Election, Petition of Thoft, 178 M 272, 583 P2d 430 (1978).

Official Stamp on Ballot Stub — Stamp Removed With Stub: When ballots had been delivered to electors by the judges of election with the official stamp apparently in the place in which the law requires it to be, although in reality it was on the stub instead of on the ballot proper, the act of the judges in removing the stamp with the stub, thus leaving the ballot without the official designation, did not render the ballots void, and the same should have been counted. Harrington v. Crichton, 53 M 388, 164 P 537 (1917).

Collateral References

Elections *key* 259.
29 C.J.S. Elections §§235 through 239.
26 Am. Jur. 2d Elections §§395 through 398.
Validity where candidate's name only is written in on ballot. 86 ALR 2d 1025.
Injunction against canvassing votes and declaring result of election. 1 ALR 2d 588.

13-15-203. Marking rejected ballots.

Collateral References

Elections *key* 240, 241.
29 C.J.S. Elections §227.
26 Am. Jur. 2d Elections §386.

13-15-204. Signing and certifying pollbook.

Administrative Rules

ARM 44.3.1733 Use of IES (Shoup) voting machines — after polls close.
ARM 44.3.1736 Use of AVM (automatic voting machines) — after polls close.
ARM 44.3.1740 Use of CES (computer election systems votomatic) — after polls close.

Collateral References

Elections *key* 250.
29 C.J.S. Elections §231.
26 Am. Jur. 2d Elections §392.

13-15-205. Items to be delivered to election administrator by election judges — disposition of other items.

Administrative Rules

ARM 44.3.1733 Use of IES (Shoup) voting machines — after polls close.
ARM 44.3.1736 Use of AVM (automatic voting machines) — after polls close.
ARM 44.3.1740 Use of CES (computer election systems votomatic) — after polls close.

Case Notes

One Copy to Be Returned: Section 23-1709, R.C.M. 1947 (now repealed), contemplated that the Election Board in the precinct would return to the Clerk and Recorder but one tally sheet and one copy of the pollbook. State ex rel. Lynch v. Batani, 103 M 353, 62 P2d 565 (1936).

Return Forms: Under sections 23-710 through 23-713, R.C.M. 1947 (now repealed), forms on which judges of election were to summarize the result of the vote were not a part of the election

returns and not required to be transmitted to the Clerk in sealed packages. Dubie v. Batani, 97 M 468, 37 P2d 662 (1934).

Collateral References

Elections *key* 246 through 254.
29 C.J.S. Elections §232.
26 Am. Jur. 2d Elections §396.

Failure to comply with statutory provisions relating to the form or manner in which election returns from voting districts or precincts are to be made. 106 ALR 398.

13-15-206. Counting votes — uniformity — rulemaking — definitions.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

13-15-207. Counting board procedures.

Compiler's Comments

2003 Amendment: Chapter 414 substituted current text concerning vote counting procedures for former text that read: "(1) In any precinct where a counting board has been appointed in addition to the regular board of election judges, the counting board shall meet at a place designated by the election administrator.

(2) The election administrator may provide duplicate boxes for voted ballots and duplicate pollbooks at any precinct for which a counting board has been appointed and may arrange for the counting board to begin the count of the votes cast before the polls close. The counting board shall be sequestered in a separate room from where the ballots are being cast until after the polls close. Any individual observing the counting board procedures must be sequestered with the board until after the polls close. The counting board shall proceed by counting all ballots in the first box and then that box and pollbook shall be exchanged for the second box and duplicate pollbook. The board shall continue counting until the votes cast for all candidates and issues are counted. The election administrator may appoint an extra election judge to act as a marshal to be responsible for exchanging ballot boxes and pollbooks and enforcing sequestering of the board and observers.

(3) The election administrator may have the counting board for a precinct begin work as soon as the polls close instead of using the procedure outlined in subsection (2).

(4) In a county where voting devices are used, the election administrator may make provisions for the delivery of voted ballots to the counting center at any time prior to the closing of the polls. The ballots may be processed and counted as they are received, but the results of this early count may not be released to the public until after all the polls are closed.

(5) No election judge or other individual having access to the information may disclose any results of early counting while the polls are open." Amendment effective October 1, 2003.

13-15-208. Determining total vote cast for all candidates for an office.

Collateral References

Elections *key* 299.
29 C.J.S. Elections §292.
26 Am. Jur. 2d Elections §391.

Part 3
Registrar's Duties

13-15-301. Disposition of items by election administrator.

Attorney General's Opinions

Public Inspection: Precinct registers are public records available for inspection as provided in 13-1-109, after the election returns are canvassed. 38 A.G. Op. 65 (1980).

Collateral References

Elections *key* 255.
29 C.J.S. Elections §234.
26 Am. Jur. 2d Elections §395.

Part 4
County Canvass

13-15-401. Governing body as board of county canvassers.

Compiler's Comments

2003 Amendment: Chapter 475 in (1) near end extended time from within 3 days to within 3 to 7 days. Amendment effective January 1, 2004.

2001 Amendment: Chapter 7 in (1) and (3) after "consolidated" deleted "or confederated"; and made minor changes in style. Amendment effective October 1, 2001.

1995 Amendment: Chapter 118 at end of (1) substituted "a time determined by the board" for "8 a.m."; and made minor changes in style.

Case Notes

Change in Membership of Board: Under former law, membership of a County Board of Canvassers was not necessarily comprised of the same officers but was subject to change depending upon circumstances. A Writ of Mandate, issued to compel a Board to reconvene and canvass the returns from an election precinct which they had excluded, was properly directed to the particular individuals comprising the Board, describing them by name, and as constituting the Board of County Canvassers of election returns for a certain county of the state. State ex rel. Leech v. Bd. of Canvassers of Choteau County, 13 M 23, 31 P 879 (1892).

Collateral References

Elections *key* 258.

29 C.J.S. Elections §236.

26 Am. Jur. 2d Elections §395.

13-15-402. Canvass of votes by board — procedures if all returns not received by time of canvass.

Compiler's Comments

2003 Amendment: Chapter 475 in (3) near middle extended time from within 3 days to within 3 to 7 days; and made minor changes in style. Amendment effective January 1, 2004.

Collateral References

Elections *key* 256 through 263.

29 C.J.S. Elections §§235 through 237.

26 Am. Jur. 2d Elections §§394 through 398.

Injunction against canvassing votes and declaring result of election. 1 ALR 2d 588.

13-15-403. Canvass to be public — nonessentials to be disregarded — petition for recount.

Compiler's Comments

1991 Amendment: At end of (4), after "13-16-201", inserted language concerning inspection of ballots.

1987 Amendment: Inserted (4) referring to petition for recount of votes.

Case Notes

Rejection of Returns:

Under former law, a County Board of Canvassers had no authority to inquire into the validity of a certificate of nomination of a nominee for office. Therefore, when the election returns were genuine and properly certified, prohibition would not lie to restrain the Board from canvassing such returns and counting the vote cast for such person. Pigott v. Bd. of Canvassers of Cascade County, 12 M 537, 31 P 536 (1892).

Under former law, the duties of a County Canvassing Board were ministerial, and such Board had no authority to exclude the returns of an election precinct, regularly made, upon the ground that the voting was shown by affidavits to be illegal. When the Board has done so it may be compelled by mandamus to canvass such returns. State ex rel. Leech v. Bd. of Canvassers of Choteau County, 13 M 23, 31 P 879 (1892). See also State ex rel. Breen v. Toole, 32 M 4, 79 P 403 (1905); Poe v. Sheridan County, 52 M 279, 157 P 185 (1916).

Under former law, neither the fact that returns in the pollbook were left blank nor the fact that the certificate thereto was not properly filled in was ground for rejecting returns. State ex rel. Leech v. Bd. of Canvassers of Choteau County, 13 M 23, 31 P 879 (1892).

Under former law, it was the duty of the Board of Canvassers to procure the check lists and surrendered lists before rejecting the vote of a precinct as returned by the pollbooks alone. State ex rel. Leech v. Bd. of Canvassers of Choteau County, 13 M 23, 31 P 879 (1892).

Collateral References

Elections *key* 259.

29 C.J.S. Elections §§236, 237.

26 Am. Jur. 2d Elections §§396, 397.

Failure to comply with statutory provisions relating to the form or manner in which election returns from voting districts or precincts are to be made. 106 ALR 398.

13-15-404. Information to be entered on record.

Compiler's Comments

1983 Amendment: In (1)(a) and (1)(d), after "precinct," deleted "municipality,"; and inserted (1)(f) referring to municipal elections.

Case Notes

Voter's Intention Not Clear From Ballot: In this case, involving a contest of election, the Supreme Court held that so many questions arose from the contested ballot itself as to the voter's intentions and from attempts to find a consistency in his method of voting that his ballot must be rejected. Rennie v. Nistler, 226 M 412, 735 P2d 1124, 44 St. Rep. 764 (1987).

Collateral References

Elections *key* 259.

29 C.J.S. Elections §237.

26 Am. Jur. 2d Elections §396.

13-15-405. Declaration or certification of results.

Compiler's Comments

1991 Amendment: Inserted (5) requiring board certification of canvass results. Amendment effective April 2, 1991.

Case Notes

Deceased Candidate Receiving Majority: A candidate for reelection to a county office died 24 days before election. His death was known generally to electors, but his name was placed on the ballot and a majority voted for him, supposing to retain his widow who had been appointed to fill the vacancy until the next general election. A write-in candidate receiving the highest vote cast for any living person was entitled to a Writ of Mandate to compel the County Canvassing Board to reconvene and cause certificate of election to be issued to him. State ex rel. Wolff v. Geurkink, 111 M 417, 109 P2d 1094 (1941).

Effect of Tie Vote:

If there is a clause in the Constitution providing that an officer shall hold for a definite term and until his successor is elected and qualified and the people fail to elect his successor, there is no vacancy, and he is entitled to hold over until the people have chosen his successor in the usual way. However, the provisions of Art. VIII, sec. 8, 9, 1889 Mont. Const. (now Art. VII, sec. 7, 1972 Mont. Const.), fixing the terms of judicial officers were exclusive, and vacancies occurred by operation of law upon the expiration of the terms designated, even when the people failed to elect their successors. Therefore, if, by reason of a tie vote, there was a failure to elect the successor of a Clerk of a District Court upon the expiration of the incumbent's term, there was a vacancy which the County Commissioners were authorized to fill by appointment. State ex rel. Jones v. Foster, 39 M 583, 104 P 860 (1909). See also State ex rel. Patterson v. Lentz, 50 M 322, 146 P 932 (1915).

Under Art. XVI, sec. 5, 1889 Mont. Const., which provided that County School Superintendents were to hold office for 2 years "and until their successors are elected and qualified", a tie vote did not result in a vacancy that could be filled by the County Commissioners under a former chapter. The incumbent was entitled to remain in office. State ex rel. Chenoweth v. Acton, 31 M 37, 77 P 299 (1904).

Collateral References

Elections *key* 264 through 268.

29 C.J.S. Elections §240.

26 Am. Jur. 2d Elections §§400, 401.

Injunction against canvassing votes and declaring result of election. 1 ALR 2d 588.

Result of election as affected by votes cast for deceased or disqualified person. 133 ALR 319.

13-15-406. Certificates to be issued by the election administrator.

Collateral References
Elections *key* 265.
29 C.J.S. Elections §240.
26 Am. Jur. 2d Elections §§400, 401.

Part 5
State Canvass

13-15-501. Certification of canvass to state canvassers.

Collateral References
Elections *key* 247.
29 C.J.S. Elections §§235 through 237.
26 Am. Jur. 2d Elections §§394 through 396.

13-15-502. Composition and meeting of board of state canvassers.

Administrative Rules
ARM 44.1.101 Organizational rule of Secretary of State.

Collateral References
Elections *key* 258.
29 C.J.S. Elections §236.
26 Am. Jur. 2d Elections §397.

13-15-503. Notification if returns not received from counties.

Collateral References
Elections *key* 252.
29 C.J.S. Elections §236.
26 Am. Jur. 2d Elections §397.

13-15-504. Governor to issue commissions.

Collateral References
Elections *key* 264 through 268.
29 C.J.S. Elections §240.
26 Am. Jur. 2d Elections §400.

13-15-505. Canvass to be public — procedure.

Collateral References
Elections *key* 259.
29 C.J.S. Elections §§235 through 237.
26 Am. Jur. 2d Elections §§394 through 396.

13-15-506. Report of the canvass.

Collateral References
Elections *key* 247.
29 C.J.S. Elections §237.
26 Am. Jur. 2d Elections §394.

13-15-507. Declaration, proclamation, and certification of results.

Collateral References
Elections *key* 264 through 268.
29 C.J.S. Elections §240.
26 Am. Jur. 2d Elections §§400, 401.

CHAPTER 16
RECOUNTS AND TIE VOTES

Chapter Compiler's Comments
Preamble: The preamble attached to Ch. 414, L. 2003, provided: "WHEREAS, the U.S. Supreme Court in Bush v. Gore, 531 U.S. 98 (2000), found that the lack of uniform procedures for

determining voter intent in Florida during the 2000 presidential election led to a violation of the U.S. Constitution's Equal Protection Clause of the 14th Amendment; and

WHEREAS, at the request of the 57th Legislature, the State Administration and Veterans' Affairs Interim Committee devoted much of the 2001-2002 interim to a review of Montana election laws with respect to voting systems and counting processes in light of Bush v. Gore; and

WHEREAS, the interim study found that Montana's statutory provisions relating to ballots, voting systems, and vote counting processes needed to be updated, clarified, and in some instances revised to better define uniform standards and procedures to provide equal protection for votes cast by Montana voters; and

WHEREAS, the Subcommittee on Voting Systems of the State Administration and Veterans' Affairs Interim Committee agreed that statutory changes should be made with an eye on future technology but should also standardize current practices to the greatest extent possible.

THEREFORE, this legislation will enable the Secretary of State to adopt a statewide benchmark performance measure that voting systems must meet before they can be approved for use in the state; allow local election administrators to continue to choose which of the approved voting systems should be used locally; require the Secretary of State to adopt uniform statewide rules regarding ballot form, votes and vote counts, and other operational procedures specific to each voting system and to provide training to local election administrators; and require all counting boards to use the uniform counting procedures specified."

Chapter Attorney General's Opinions

No Authority of State Board of Canvassers to Amend Official State Canvass — Exception: The State Board of Canvassers has no authority to amend the official state canvass except when amended election results are certified by a county recount board after compliance with the procedures set forth in this chapter. 44 A.G. Op. 6 (1991).

Part 1
County Recount Board

13-16-101. County governing body as county recount board.

Collateral References

Elections *key* 299.
29 C.J.S. Elections §289.
26 Am. Jur. 2d Elections §§389 through 391.

Part 2
Recounts in Close Elections

13-16-201. Conditions under which recount to be conducted.

Compiler's Comments

2003 Amendment: Chapter 414 in (1)(b) in second sentence deleted registered mail as a method of giving notice; inserted (1)(f) relating to a canvassing board petition for a recount; in (2) at beginning inserted "When a recount is required under subsection (1)(b), (1)(d), or (1)(e)" and at end substituted "affected county" for "county"; deleted former (7) that read: "(7) If during a canvass of election returns a board of county canvassers finds an error, as provided in 13-15-403, the board immediately may file a petition with the election administrator"; and made minor changes in style. Amendment effective October 1, 2003.

1987 Amendment: Inserted (7) allowing petition by Board of County Canvassers for recount of votes.

Attorney General's Opinions

No Authority of State Board of Canvassers to Amend Official State Canvass — Exception: The State Board of Canvassers has no authority to amend the official state canvass except when amended election results are certified by a county recount board after compliance with the procedures set forth in this chapter. 44 A.G. Op. 6 (1991).

Collateral References

Elections *key* 299.
29 C.J.S. Elections §290.
26 Am. Jur. 2d Elections §§389 through 391.

13-16-203. Recount for tie votes.

Compiler's Comments

1981 Amendment: Rearranged internal reference; made minor change in grammar.

Collateral References

Elections *key* 299.
29 C.J.S. Elections §290.
26 Am. Jur. 2d Elections §§389 through 391.

13-16-204. Meeting of recount board when recount requested.

Compiler's Comments

1987 Amendment: In (1), in two places, substituted "a petition" for "an application" and made minor changes in phraseology.

Collateral References

Elections *key* 299.
29 C.J.S. Elections §292.
26 Am. Jur. 2d Elections §391.

13-16-205. Expenses of recount.

Compiler's Comments

1981 Amendment: Substituted "Recount expenses" for "Expenses"; substituted "board of state canvassers" for "state board of canvassers".

Collateral References

Elections *key* 299.
29 C.J.S. Elections §292.
26 Am. Jur. 2d Elections §391.

13-16-211. Recounts allowed if bond posted to cover all costs.

Collateral References

Elections *key* 299.
29 C.J.S. Elections §§290, 292.
26 Am. Jur. 2d Elections §§389 through 391.

Part 3
Recounts Under Court Order

Part Case Notes

Wrongful Canvass — Remedies: Former recount statutes did not afford a legal remedy for an alleged wrongful canvass by a County Canvassing Board and therefore did not defeat the right of a citizen to compel proper performance of the Board's duty by Writ of Mandate. State ex rel. Lynch v. Batani, 103 M 353, 62 P2d 565 (1936).

13-16-301. Application and court order for recount.

Case Notes

Grounds Sufficient: Under sections 23-2301 through 23-2307, R.C.M. 1947 (now repealed), when an application for Writ of Supervisory Control alleged that the votes had not been correctly counted, such ground was sufficient to justify the court's finding that the votes "might not" have been correctly counted, as well as its issuance of a Writ directing respondents to order a recount. State ex rel. Thomas v. District Court, 116 M 510, 154 P2d 980 (1945).

Nature of Proceedings: Under sections 23-2301 through 23-2307, R.C.M. 1947 (now repealed), a proceeding to obtain a recount of votes was in no sense of the word an election contest; it was absolutely independent of the law relating to contesting of elections and either or both remedies were available. State ex rel. Peterson v. District Court, 107 M 482, 86 P2d 403 (1939).

Successive Recounts: Under sections 23-2301 through 23-2307, R.C.M. 1947 (now repealed), when an unsuccessful candidate for Sheriff obtained a recount and was declared elected, and his opponent also asked for and was granted a recount, on application for a Writ of Supervisory Control, the 5-day limitation commenced to run from the time the Board of Canvassers announced the result of the first recount, and since the application came within that time, the court had jurisdiction to grant the second recount. State ex rel. Peterson v. District Court, 107 M 482, 86 P2d 403 (1939).

Function and Jurisdiction of Court:

Under sections 23-2301 through 23-2307, R.C.M. 1947 (now repealed), the law relating to proceedings for election recounts specifically divided the functions of the court and the Canvassing Board. The court determined the grounds of and necessity for a recount and ordered it done. The Board was entrusted with the duty of making the recount, just as the election judges and clerks of election were entrusted with the duty of making the count and certifying thereto in the first place. State ex rel. Peterson v. District Court, 107 M 482, 86 P2d 403 (1939).

Under sections 23-2301 through 23-2307, R.C.M. 1947 (now repealed), the rule that District Courts may not advise Boards of County Canvassers on questions arising on a recount of ballots as to the legality or illegality of ballots cast, etc., applied also to the Supreme Court on application for extraordinary relief by way of writs, and it could not control the actions of such Boards indirectly by directions or suggestions to District Courts. If State ex rel. Riley v. District Court, 103 M 576, 64 P2d 115 (1937), be open to a contrary construction, it is to that extent overruled. State ex rel. Peterson v. District Court, 107 M 482, 86 P2d 403 (1939).

Under sections 23-2301 through 23-2307, R.C.M. 1947 (now repealed), the Court could proceed in any suitable manner or mode most conformable "to the spirit" of the Code in the absence of specific direction as to how proceedings should be conducted and was within its jurisdiction in directing canvassers' attention to sections of the Code covering points in dispute. State ex rel. Riley v. District Court, 103 M 576, 64 P2d 115 (1937).

Candidates for Legislature: Under Art. V, sec. 9, 1889 Mont. Const., courts could not try contests for seats in the Legislature or decide issues involved in such contests. However, mandamus lay to compel the court to perform the duty specially imposed upon it by recount statutes, i.e., to proceed on an application for a recount. In this case, the District Court found that the application for the recount was sufficient both in form and in substance. Therefore, the recount should have been ordered even though it might not have been binding on the Senate. State ex rel. Ainsworth v. District Court, 107 M 370, 86 P2d 5 (1938).

Applicability: Under sections 23-2301 through 23-2307, R.C.M. 1947 (now repealed), any unsuccessful candidate, including a candidate for the office of District Judge, could apply to the District Court for a recount. State ex rel. Riley v. District Court, 103 M 576, 64 P2d 115 (1937).

Application Timely: Under sections 23-2301 through 23-2307, R.C.M. 1947 (now repealed), when the Board of Canvassers was compelled by the Supreme Court by Writ of Mandate to reconvene and correct its findings with relation to two candidates for District Judge, the application filed within 5 days after the corrected canvass was timely. State ex rel. Riley v. District Court, 103 M 576, 64 P2d 115 (1937).

Qualifications for Office Irrelevant: Under sections 23-2301 through 23-2307, R.C.M. 1947 (now repealed), the District Court committed error in dismissing the application for a recount on the ground that applicant, convicted of a felony in federal court, had lost his citizenship and thus was ineligible to hold public office. The subject of applicant's qualifications for office is beyond the scope of a proceeding for recount. State ex rel. Stone v. District Court, 103 M 515, 63 P2d 147 (1936).

13-16-303. Presumption of incorrectness from failure to comply with provisions for counting votes.

Compiler's Comments

2003 Amendment: Chapter 414 substituted reference to 13-15-206 for reference to 13-15-202. Amendment effective October 1, 2003.

Collateral References

Elections *key* 291.

29 C.J.S. Elections §274.

26 Am. Jur. 2d Elections §439.

13-16-304. Ordering in another judge — jurisdiction.

Case Notes

Jurisdiction Retained: The jurisdiction of the District Court before which an application for a recount of the votes is filed does not cease when it orders the Board of Canvassers to reconvene and recanvass the votes. Rather, the court retains jurisdiction of the proceeding until it has been advised of the completion of the canvass. State ex rel. Riley v. District Court, 103 M 576, 64 P2d 115 (1937).

Part 4
Recount Procedure

Part Collateral References

Elections *key* 299.
29 C.J.S. Elections §292.
26 Am. Jur. 2d Elections §391.

13-16-411. Individuals entitled to appear at recount.

Compiler's Comments

2003 Amendment: Chapter 414 in (2) at end substituted "the entire recount process" for "the opening of all ballot boxes and the count of all ballots"; in (3) at end deleted "and represent his side"; deleted former (4) that read: "(4) The recount shall proceed as provided in 13-16-412 and as expeditiously as possible until completed"; and made minor changes in style. Amendment effective October 1, 2003.

Subsection Not Codified: Subsection (3) of section 23-4116, R.C.M. 1947, which is redundant with 13-16-412(1), MCA, was not codified in the MCA. This subsection has not been repealed and is still valid law. Citation may be made to sec. 206, Ch. 368, L. 1969, as amended by sec. 49, Ch. 365, L. 1977.

13-16-412. Procedure for recounting ballots.

Compiler's Comments

2003 Amendment: Chapter 414 substituted introductory clause of (1) concerning recount for former introductory clause that read: "The county recount board in recounting the ballots shall count, at the same time, the votes cast in the precincts in which a recount is ordered for the several candidates in whose behalf a recount is ordered in the following manner"; in (1)(a) after "shall" substituted "provide to the recount board" for "produce" and near end before "ballots" inserted "paper"; in (1)(b) before "recount board" deleted "county" and at end inserted clause concerning counting as provided in 13-15-206(2); at beginning of (1)(c) substituted "the recount must be tallied" for "One of the members of the board shall read each ballot aloud. As the ballots are read, two clerks shall write the votes cast for each individual in each precinct, at full length"; and inserted (2) relating to preparation for a recount of ballots cast using a nonpaper-based voting system. Amendment effective October 1, 2003.

Part of Section Not Codified: A portion of subsection (7) of section 23-4109, R.C.M. 1947, which is redundant with 13-16-418, MCA, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 198, Ch. 368, L. 1969.

Subsection Not Codified: Subsection (3) of section 23-4116, R.C.M. 1947, which is redundant with 13-16-412(1), MCA, was not codified in the MCA. This subsection has not been repealed and is still valid law. Citation may be made to sec. 206, Ch. 368, L. 1969, as amended by sec. 49, Ch. 365, L. 1977.

Case Notes

Jurisdiction of Recount Board to Disallow Votes: Marsh argued that only election judges are vested with the authority to reject ballots and that a recount board is limited to simply recounting the ballots that the election judges have determined to be valid. The Supreme Court held that in reading all the statutes together, a recount board is required to count the votes cast and is further required to ascertain the correctness of all reports of votes cast. Therefore, in this case, the recount board could not perform its duties without determining if certain votes could be counted pursuant to the strictures contained in 13-15-202 (now repealed). Marsh v. Overland, 274 M 21, 905 P2d 1088, 52 St. Rep. 1099 (1995).

13-16-414. Recount of votes using voting system.

Compiler's Comments

2003 Amendment: Chapter 414 substituted current text concerning recount of votes for former text that read: "(1) The recount board shall test the automatic tabulating equipment used for votes cast by voting devices. If the test does not show any errors, the votes cast for the candidates or on the issues for which a recount is ordered shall be recounted by the tabulating equipment.

(2) If any errors are found in the test or if any questions remain as to the accuracy of the count, the board may have the program and equipment checked by a qualified individual who did not participate in the original preparation of the program and equipment.

(3) The board may also order manual counting of the votes cast if they believe it is necessary to resolve all questions relating to the election.

(4) The board may remove the seals from any voting device and check the ballot on the device with the official certification of the ballot arrangement for each precinct.

(5) Any paper ballots voted in a precinct shall be recounted as prescribed in 13-16-412.

(6) Write-in votes shall be recounted in the same manner as the count is made after the closing of the polls." Amendment effective October 1, 2003.

1981 Amendment: In (1), in first sentence following "cast by voting devices" deleted "in the same manner provided in 13-16-201 for preelection testing. However, the board shall prepare a new group of preaudited ballots for this test".

13-16-415. Recount totals.

Case Notes

Jurisdiction of Recount Board to Disallow Votes: Marsh argued that only election judges are vested with the authority to reject ballots and that a recount board is limited to simply recounting the ballots that the election judges have determined to be valid. The Supreme Court held that in reading all the statutes together, a recount board is required to count the votes cast and is further required to ascertain the correctness of all reports of votes cast. Therefore, in this case, the recount board could not perform its duties without determining if certain votes could be counted pursuant to the strictures contained in 13-15-202 (now repealed). Marsh v. Overland, 274 M 21, 905 P2d 1088, 52 St. Rep. 1099 (1995).

13-16-417. Sealing ballots and voting systems.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) near beginning substituted "of paper ballots that was conducted using a voting system" for "in a precinct"; in (2) after "All voting" substituted "systems must be secured as provided in rules adopted under 13-17-211" for "machines or devices from which seals have been removed shall be resealed in the presence of the election administrator and the recount board and shall be delivered to the election administrator for custody"; and made minor changes in style. Amendment effective October 1, 2003.

13-16-418. Certification after recount.

Compiler's Comments

Part of Section Not Codified: A portion of subsection (7) of section 23-4109, R.C.M. 1947, which is redundant with 13-16-418, MCA, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 198, Ch. 368, L. 1969.

13-16-419. Recount by board of state canvassers.

Compiler's Comments

1981 Amendment: Changed "state board of canvassers" to "board of state canvassers" in two places.

Attorney General's Opinions

No Authority of State Board of Canvassers to Amend Official State Canvass — Exception: The State Board of Canvassers has no authority to amend the official state canvass except when amended election results are certified by a county recount board after compliance with the procedures set forth in this chapter. 44 A.G. Op. 6 (1991).

13-16-420. Misplaced or missing paper ballots.

Compiler's Comments

2003 Amendment: Chapter 414 in first sentence near middle after "sealed" inserted "paper". Amendment effective October 1, 2003.

Part 5
Tie Votes

Part Case Notes

Effect of Constitutional Provisions: If there is a clause in the Constitution providing that an officer shall hold for a definite term and until his successor is elected and qualified and the people fail to elect his successor, there is no vacancy, and he is entitled to hold over until the people have chosen his successor in the usual way. However, the provisions of Art. VIII, sec. 8, 9, 1889 Mont. Const. (now Art. VII, sec. 7, 1972 Mont. Const.), fixing the terms of judicial officers

were exclusive, and vacancies occurred by operation of law upon the expiration of the terms designated, even when the people failed to elect their successors; hence, if, by reason of a tie vote, there was a failure to elect the successor of a Clerk of a District Court upon the expiration of the incumbent's term, there was a vacancy which the County Commissioners were authorized to fill by appointment. State ex rel. Jones v. Foster, 39 M 583, 104 P 860 (1909). See also State ex rel. Patterson v. Lentz, 50 M 322, 146 P 932 (1915).

Former Law Invalid as Applied to County School Superintendent: Under Art. XVI, sec. 5, 1889 Mont. Const., which provided that County School Superintendents were to hold office for 2 years "and until their successors are elected and qualified", a tie vote did not result in a vacancy that could be filled by the County Commissioners under a former chapter. The incumbent was entitled to remain in office. State ex rel. Chenoweth v. Acton, 31 M 37, 77 P 299 (1904).

Part Collateral References

Elections *key* 238.
29 C.J.S. Elections §244.
26 Am. Jur. 2d Elections §411.

13-16-506. Tie vote in election for other county officers.

Attorney General's Opinions

Appointee to County Attorney's Office — Term of Office: The term of an individual appointed to fill a vacancy in the office of County Attorney, due to a tie vote, extends until the next general election. 42 A.G. Op. 48 (1987).

CHAPTER 17
VOTING SYSTEMS

Chapter Compiler's Comments

Preamble: The preamble attached to Ch. 414, L. 2003, provided: "WHEREAS, the U.S. Supreme Court in Bush v. Gore, 531 U.S. 98 (2000), found that the lack of uniform procedures for determining voter intent in Florida during the 2000 presidential election led to a violation of the U.S. Constitution's Equal Protection Clause of the 14th Amendment; and

WHEREAS, at the request of the 57th Legislature, the State Administration and Veterans' Affairs Interim Committee devoted much of the 2001-2002 interim to a review of Montana election laws with respect to voting systems and counting processes in light of Bush v. Gore; and

WHEREAS, the interim study found that Montana's statutory provisions relating to ballots, voting systems, and vote counting processes needed to be updated, clarified, and in some instances revised to better define uniform standards and procedures to provide equal protection for votes cast by Montana voters; and

WHEREAS, the Subcommittee on Voting Systems of the State Administration and Veterans' Affairs Interim Committee agreed that statutory changes should be made with an eye on future technology but should also standardize current practices to the greatest extent possible.

THEREFORE, this legislation will enable the Secretary of State to adopt a statewide benchmark performance measure that voting systems must meet before they can be approved for use in the state; allow local election administrators to continue to choose which of the approved voting systems should be used locally; require the Secretary of State to adopt uniform statewide rules regarding ballot form, votes and vote counts, and other operational procedures specific to each voting system and to provide training to local election administrators; and require all counting boards to use the uniform counting procedures specified."

Chapter Administrative Rules

Title 44, chapter 3, subchapter 17, ARM Voting machines and devises.

Chapter Case Notes

Constitutionality: Prior voting machine law was not invalid for being in violation of Art. IX, sec. 1, 1889 Mont. Const. (now Art. IV, sec. 1, 1972 Mont. Const.). That section provided that all elections shall be "by ballot". The term "ballot" was employed in that section not to designate a piece of paper but rather to designate a method to ensure the secrecy and integrity of the popular vote. State ex rel. Fenner v. Keating, 53 M 371, 163 P 1156 (1917).

Chapter Collateral References

Elections *key* 222.
29 C.J.S. Elections §203.

26 Am. Jur. 2d Elections §365.
Constitutionality of statutes providing for use of voting machines. 66 ALR 855.

Part 1
General Provisions

13-17-101. Secretary of state to approve voting systems.

Compiler's Comments

2003 Amendment: Chapter 414 throughout section substituted references to voting systems for references to voting machines or devices; in (2)(a) substituted "13-17-103" for "this chapter"; in (2)(d) inserted reference to school election administrators; and made minor changes in style. Amendment effective October 1, 2003.

Administrative Rules

ARM 44.3.1701 Examination of voting machines and devices.
ARM 44.3.1702 Conduct of examination.
ARM 44.3.1704 Criteria of examination.
ARM 44.3.1706 Notification to applicant.
ARM 44.3.1708 Waiver of conditions.
ARM 44.3.1710 Extension of previous approval of voting machines or devices.

13-17-102. Use of qualified technicians and advisers.

Compiler's Comments

2003 Amendment: Chapter 414 substituted current text concerning examination of voting systems for former text that read: "(1) The secretary of state may employ and compensate qualified technicians and advisors who are electors of this state to assist him in duties required by 13-17-101. Advisors who are public officers or employees shall serve without additional compensation other than expenses of attending the examination if the examination takes place during their regular working hours.

(2) The person or company submitting a machine or device for examination shall pay the compensation and expenses of technicians and advisors connected with the examination to the secretary of state for deposit in the state general fund. The secretary of state and the person or company shall reach agreement on the number of technicians and advisors to be compensated before the examination is held." Amendment effective October 1, 2003.

13-17-103. Required specifications for voting systems.

Compiler's Comments

2003 Amendment: Chapter 414 substituted current text concerning requirements for voting systems for former text that read: "A voting machine or device may not be approved unless:

(1) an elector can vote in secrecy;

(2) an elector is prevented from voting for any candidate or upon any ballot issue more than once and is also prevented from voting on any office or ballot issue for which he is not entitled to vote;

(3) an elector can secretly select the party for which he wishes to vote in a primary election and the machine or device will count only votes for the candidates of that party by the elector in the primary election;

(4) an elector can vote a split ticket in a general election if he desires;

(5) every valid vote cast is registered and recorded;

(6) the machine or device is constructed so that it cannot be tampered with for a fraudulent purpose and is also constructed so that during the progress of the voting no individual can see or know the number of votes registered for any candidate or on any ballot issue;

(7) it allows write-in voting; and

(8) a guarantee to provide training and assistance to election officials is included in each contract for purchase of the machine or device." Amendment effective October 1, 2003.

1987 Amendment: In (8) substituted "is included" for "will be included".

Administrative Rules

ARM 44.3.1703 Criteria of construction.

Case Notes

Requirement of Tamper-Proof Machine: Section 23-1602, R.C.M. 1947 (now repealed), did not require a voting machine that would be tamper-proof against all tampering or manipulation, but one that, when honestly operated, would enable an elector to secretly cast his vote as he wished

to cast it and have it counted as cast, and that could not be tampered with or manipulated in such a way that, though properly operated by the elector, it would seem to receive and record his vote without doing so. State ex rel. Fenner v. Keating, 53 M 371, 163 P 1156 (1917).

13-17-104. Providing voting systems — payment.

Compiler's Comments

2003 Amendment: Chapter 414 throughout section substituted references to voting systems for references to voting machines or devices; in (1) substituted "may, as practicable, provide for the use of any voting system approved pursuant to 13-17-101" for "may provide approved voting machines or devices as practicable"; and inserted (4) allowing a county governing body to submit a voting system for consideration. Amendment effective October 1, 2003.

13-17-105. Experimental use of voting systems.

Compiler's Comments

2003 Amendment: Chapter 414 throughout section substituted references to voting systems for references to voting machines or devices; at end of first sentence inserted "under 13-17-101"; near end of second sentence substituted "system" for "equipment" and at end inserted "by the county"; and made minor changes in style. Amendment effective October 1, 2003.

13-17-106. General application of election laws.

Compiler's Comments

2003 Amendment: Chapter 414 in two places substituted references to voting systems for references to voting machines or devices; and made minor changes in style. Amendment effective October 1, 2003.

13-17-107. Secretary of state to prescribe rules.

Compiler's Comments

2003 Amendment: Chapter 414 throughout section substituted references to voting systems for references to voting machines or devices. Amendment effective October 1, 2003.

Statement of Intent: The statement of intent that accompanied SB 65 (Ch. 571, L. 1979) provided in part: "1. In subsection (1) of section 200 the secretary of state is authorized to adopt rules in accordance with the Montana Administrative Procedure Act relating to the examination and approval for use of voting machines and devices. The rapidly changing technology used to develop these machines and devices makes it impossible to anticipate and address every problem that may occur in determining if a machine or device is desirable for use in Montana. It is the intent of the Legislature that the secretary of state adopt rules specifying criteria for approval that must be met by new types of machines or devices. The secretary of state may find it necessary to adopt additional rules relating to hearings on allowing the use of machines or devices in Montana if a number of companies request approval of their equipment.

2. In subsection (2) of section 200 the secretary of state is required to prescribe rules for the use of the machines and devices approved for use in Montana. The development of new types of machines and devices makes it impossible to provide detailed procedures for local election officials to follow in using machines and devices by statute. The secretary of state should provide, by rule, the same type of procedural guidance given by statutory law for elections conducted by paper ballots in those cases when the procedures need to be different than those used for paper ballot elections. Rules prescribed under this authority shall include specific procedures needed to insure that the machine or device is working properly and has not been tampered with, special procedures needed to count or record the votes cast, and special procedures to be used during a recount."

Administrative Rules

Title 44, chapter 3, subchapter 17, ARM Voting machines and devices.

13-17-108. Punchcard voting systems prohibited.

Compiler's Comments

Effective Date: Section 3, Ch. 320, L. 2003, provided that this section is effective on passage and approval. Approved April 15, 2003.

Part 2
Preparation for Use of Systems

13-17-201. Election administrator to instruct election judges.

Compiler's Comments

2003 Amendment: Chapter 414 throughout section substituted references to voting systems for references to voting machines or devices; in (1) at beginning after "election" inserted "in which a voting system is used" and at end inserted "as provided in 13-4-203" and deleted former second sentence that read: "He shall give to each election judge who has received instruction and is fully qualified to conduct an election with the machine a certificate to that effect"; and made minor changes in style. Amendment effective October 1, 2003.

13-17-203. Publication of information concerning voting systems.

Compiler's Comments

2003 Amendment: Chapter 414 throughout section substituted references to voting systems for references to voting machines or devices; in (3) at beginning deleted "illustrated"; and made minor changes in style. Amendment effective October 1, 2003.

13-17-204. Voting systems to be exhibited.

Compiler's Comments

2003 Amendment: Chapter 414 in two places substituted references to voting systems for references to voting machines or devices; near end of first sentence substituted "the voting system" for "equipment"; and made minor changes in style. Amendment effective October 1, 2003.

13-17-206. Arrangement of voting system ballot.

Compiler's Comments

2003 Amendment: Chapter 414 substituted references to voting systems for references to voting machines or devices; at end substituted "in accordance with rules adopted pursuant to 13-12-202" for "before each election"; and made minor changes in style. Amendment effective October 1, 2003.

13-17-211. Uniform procedures for using voting systems.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

13-17-212. Performance certification of voting systems prior to election.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

Part 3
Voting Procedure

13-17-305. Request to use paper ballots.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) in first sentence at beginning substituted "When a nonpaper-based voting system is" for "Where voting machines are" and at end substituted "system" for "machine"; in former (1)(b) deleted first two sentences that read: "Where voting devices are used, the election administrator, with approval of the governing body of the county if the election administrator is an appointed official, may provide paper ballots if the election administrator believes such ballots are necessary. However, if more than 5% of the electors voting in the last preceding general election voted using paper ballots, the election administrator shall provide paper ballots"; in (2) substituted "section" for "subsection"; in (3) at beginning substituted "A paper ballot provided pursuant to this section must be cast according to proper instructions" for "Paper ballots shall be cast" and at end substituted "in 13-15-206" for "by law"; and deleted former (3) that read: "(3) For the purposes of this section, "voting machine" means a mechanical apparatus which is used for voting by using levers which provide a tabulating system within the machine." Amendment effective October 1, 2003.

1985 Amendment: In (1)(a) after "voting machines", deleted "or devices" and after "machine", deleted "or device"; inserted (1)(b) referring to voting devices; and inserted (3) defining voting machine.

Collateral References
Elections *key* 27, 222.
29 C.J.S. Elections §204.
26 Am. Jur. 2d Elections §335.

13-17-306. Use of separate paper ballots for voting on certain candidates or issues.

Compiler's Comments
2003 Amendment: Chapter 414 at beginning substituted "Subject to 13-12-202, whenever a voting system" for "Whenever a voting machine or device does not allow proper lockout or"; and made minor changes in style. Amendment effective October 1, 2003.

Collateral References
Elections *key* 27, 222.
29 C.J.S. Elections §204.
26 Am. Jur. 2d Elections §335.

CHAPTER 19
MAIL BALLOT ELECTIONS

Chapter Compiler's Comments
Preamble: The preamble attached to Ch. 414, L. 2003, provided: "WHEREAS, the U.S. Supreme Court in Bush v. Gore, 531 U.S. 98 (2000), found that the lack of uniform procedures for determining voter intent in Florida during the 2000 presidential election led to a violation of the U.S. Constitution's Equal Protection Clause of the 14th Amendment; and

WHEREAS, at the request of the 57th Legislature, the State Administration and Veterans' Affairs Interim Committee devoted much of the 2001-2002 interim to a review of Montana election laws with respect to voting systems and counting processes in light of Bush v. Gore; and

WHEREAS, the interim study found that Montana's statutory provisions relating to ballots, voting systems, and vote counting processes needed to be updated, clarified, and in some instances revised to better define uniform standards and procedures to provide equal protection for votes cast by Montana voters; and

WHEREAS, the Subcommittee on Voting Systems of the State Administration and Veterans' Affairs Interim Committee agreed that statutory changes should be made with an eye on future technology but should also standardize current practices to the greatest extent possible.

THEREFORE, this legislation will enable the Secretary of State to adopt a statewide benchmark performance measure that voting systems must meet before they can be approved for use in the state; allow local election administrators to continue to choose which of the approved voting systems should be used locally; require the Secretary of State to adopt uniform statewide rules regarding ballot form, votes and vote counts, and other operational procedures specific to each voting system and to provide training to local election administrators; and require all counting boards to use the uniform counting procedures specified."

Chapter Administrative Rules
Title 44, chapter 9, ARM Mail ballot elections.

Chapter Law Review Articles
Voting by Mail, Moreton, 58 S. Cal. L. Rev. 1261 (1985).

Part 1
General Provisions

13-19-101. Statement of purpose.

Case Notes
Return of Mail Ballot by Person Other Than Elector — Election Valid: Official county voter records showed that 19 ballots in a mail ballot election, including ballots of two of the plaintiffs, were returned by persons other than the elector, which plaintiffs claimed violated 13-19-106 and 13-19-306 through 13-19-308, warranting invalidation of the election. Absent any hint of voter fraud, the fact that ballots were delivered by family members or election employees did not constitute a substantial deviation from mail ballot election guidelines sufficient to void the election results. Drummond v. Virginia City, 253 M 428, 833 P2d 1067, 49 St. Rep. 510 (1992).

13-19-102. Definitions.

Compiler's Comments

1997 Amendment: Chapter 146 in definition of mail ballot election substituted "any election conducted by mail pursuant to 13-19-104 and in compliance" for "any election that involves either candidates or ballot issues and is conducted in compliance"; and made minor changes in style.

1987 Amendment: Inserted definition of political subdivision.

13-19-104. Mail ballot elections not mandatory — when authorized — when prohibited — when county election administrator conducts.

Compiler's Comments

1997 Amendment: Chapter 146 at beginning of (2) substituted "Except as provided in subsection (3), any election may" for "The following elections may" and deleted (2)(a)through (2)(e) that read: "(a) an election in a political subdivision required to hold annual elections under 13-1-104(3);

(b) an election in a city of the third class, as defined in 7-1-4111(3), if all of the candidates whose names will appear on the ballot are candidates for offices to be elected without party designation;

(c) an election in a town as defined in 7-1-4111(4);

(d) an election conducted under 7-13-2236 in an unincorporated area; and

(e) a special election called by a local government unit for the sole purpose of submitting one or more ballot issues to its qualified electors if such special election is not held in conjunction with a statutorily scheduled election"; in (3) deleted former (3)(a) through (3)(e) that read: "an election held for one of the purposes or at the time provided in 13-1-104(1) and 13-1-107(1);

(b) an election held for one of the purposes or at the time provided in 13-1-104(2) and 13-1-107(2), except as specifically allowed by subsections (2)(b) and (2)(c) of this section;

(c) an election being held under the provisions of the Montana Recall Act, in Title 2, chapter 16, part 6;

(d) an election involving candidates for public office, except as specifically allowed by subsections (2)(a) through (2)(c) of this section; and

(e) a special election being held in conjunction with a statutorily scheduled election"; inserted (3)(a) referring to a regularly scheduled federal, state, or county election; inserted (3)(b) referring to a special federal or state election; inserted (3)(c) referring to a regular or special election when another election is held at the polls on the same day; inserted (4) requiring county election administrator to conduct elections if more than one mail ballot election is being conducted on the same day; and made minor changes in style.

1987 Amendment: At end of (2)(a) deleted "other than a school district"; and deleted former (3)(c) that read: "(c) an election for any purpose conducted by or on behalf of a school district".

13-19-105. Role of secretary of state.

Compiler's Comments

Statement of Intent: The statement of intent attached to Ch. 196, L. 1985, provided: "A statement of intent is required for this bill because section 6 [13-19-105] grants the secretary of state authority to adopt rules for the conduct of mail ballot elections. It is intended that the authority to adopt rules extends only to the areas specifically provided for in section 6 [13-19-105]. Rules are to be adopted under the Montana Administrative Procedure Act. The rules must be consistent with the provisions of the act.

It is intended that use of the mail ballot option will be entirely optional and within the discretion of the applicable jurisdiction and election administrator.

It is intended that nothing in this act be interpreted as requiring either the election administrator or the applicable jurisdiction to select or use the mail ballot option.

It is intended that use of the mail ballot option is authorized only for the specific elections enumerated in this act. It is further intended that the elections for which the mail ballot option may be used will be only those elections for which special circumstances make the use of the mail ballot option potentially the most desirable of the available options."

Administrative Rules

Title 44, chapter 9, ARM Mail ballot elections.

13-19-106. General requirements for mail ballot election.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 414 in (1) at beginning substituted "Subject to 13-12-202, official mail ballots" for "Official ballots" and inserted "must be paper ballots and"; in (4) after "mark the ballot" deleted "at home"; in (8) at end substituted "in chapter 15" for "by law"; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 443 in (2) at beginning deleted "Except as provided in subsection (2)(b)"; deleted former (2)(b) that read: "(b) In an election to determine whether to adopt a building code enforcement program within a county jurisdictional area, as defined in 50-60-101 and designated by a board of county commissioners pursuant to 50-60-310, an official ballot must be mailed to every record owner of real property in the county jurisdictional area"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 546 in (2)(a) at beginning inserted exception clause; inserted (2)(b) concerning building code enforcement election; and made minor changes in style. Amendment effective May 1, 2001.

1997 Amendment: Chapter 338 inserted (3) requiring a form to be included in the return verification envelope for the elector to verify the elector's address or notify the election administrator of the elector's correct mailing address; and made minor changes in style.

1991 Amendment: At end of (1) inserted exception from stub requirement for mail ballots.

Case Notes

Process for Establishing County Building Code Jurisdictional Area Based on Franchise Limitation Unconstitutional: The 2001 Legislature enacted Senate Bill No. 242 (SB 242), which established a process for designating a county building code jurisdictional area and eliminating municipal jurisdictional areas by an election procedure limited to record owners of real property instead of the general constituency. When questioned regarding the constitutionality of the process, the Supreme Court noted that because voting rights cases involve a fundamental political right, strict scrutiny required the state to demonstrate a compelling governmental interest in restricting the voting franchise. The court concluded that: (1) the application and enforcement of building codes is an issue of public safety that affects all persons living in the area, not just record owners of real property; (2) governmental entities that oversee building codes are not special-purpose units whose functions and actions exclusively or disproportionately affect record owners of real property over other constituents in the area that do not own real property; and (3) elections to determine who may impose and enforce building codes in a given area are general interest elections rather than special interest elections. The state failed to show a compelling interest in limiting the voting franchise to only record owners of real property, and because the valid provisions of SB 242 were not severable from the invalid provisions, the court held that SB 242 was invalid in its entirety. (However, see Ch. 443, L. 2003, wherein the Legislature amended the voting procedure to address the franchise limitation.) Finke v. State ex rel. McGrath, 2003 MT 48, 314 M 314, 65 P3d 576 (2003). See also Kramer v. Union School District, 395 US 621 (1969).

Return of Mail Ballot by Person Other Than Elector — Election Valid: Official county voter records showed that 19 ballots in a mail ballot election, including ballots of two of the plaintiffs, were returned by persons other than the elector, which plaintiffs claimed violated 13-19-306 through 13-19-308 and this section, warranting invalidation of the election. Absent any hint of voter fraud, the fact that ballots were delivered by family members or election employees did not constitute a substantial deviation from mail ballot election guidelines sufficient to void the election results. Drummond v. Virginia City, 253 M 428, 833 P2d 1067, 49 St. Rep. 510 (1992).

Attorney General's Opinions

Who May Vote in Elections Concerning Municipal Jurisdictional Areas: Prior to 2001, state law provided authority for municipal governments, with the consent of the counties in which they were located, to exercise building code enforcement jurisdiction in an area within 4.5 miles of the city known as the municipal jurisdictional area or donut area. The 2001 Legislature sought to eliminate that extraterritorial municipal jurisdiction by providing for county elections on various provisions allowing for either county or municipal building code enforcement. The question arose as to who should vote in the elections. The Attorney General held that real property owners, as defined in 50-60-101, in the jurisdictional area in question were the proper electorate. Under this section, a ballot list must be compiled that includes every record owner of real property in the county or municipal jurisdictional area who fits the definition of owner and whose ownership interest appears of record, and county election officials should use the property

records in existence on the date 30 days prior to the election day to determine who is eligible to vote. 49 A.G. Op. 11 (2001).

Part 2
Preelection Procedure

13-19-206. Distributing materials to electors — procedure.

Compiler's Comments

1997 Amendment: Chapter 338 deleted former (3)(a) that read: "(a) clearly marked on its face with words stating the appropriate postal regulation language to prohibit forwarding of the packet"; and made minor changes in style.

1991 Amendment: At end of (2)(a) inserted exception concerning election administrator including separate ballots for each type of election held concurrently; at end of (3)(a), after "words", substituted "stating the appropriate postal regulation language to prohibit forwarding of the packet" for ""DO NOT FORWARD. RETURN TO SENDER. RETURN POSTAGE GUARANTEED""; and made minor change in style.

Part 3
Election Procedure

13-19-306. Returning marked ballots — when — where.

Compiler's Comments

1991 Amendment: In (1), near beginning after "elector", inserted "or his designee"; and in (1)(b), after "it", deleted "in person".

Case Notes

Return of Mail Ballot by Person Other Than Elector — Election Valid: Official county voter records showed that 19 ballots in a mail ballot election, including ballots of two of the plaintiffs, were returned by persons other than the elector, which plaintiffs claimed violated 13-19-106 and 13-19-306 through 13-19-308, warranting invalidation of the election. Absent any hint of voter fraud, the fact that ballots were delivered by family members or election employees did not constitute a substantial deviation from mail ballot election guidelines sufficient to void the election results. Drummond v. Virginia City, 253 M 428, 833 P2d 1067, 49 St. Rep. 510 (1992).

13-19-307. Places of deposit.

Case Notes

Return of Mail Ballot by Person Other Than Elector — Election Valid: Official county voter records showed that 19 ballots in a mail ballot election, including ballots of two of the plaintiffs, were returned by persons other than the elector, which plaintiffs claimed violated 13-19-106 and 13-19-306 through 13-19-308, warranting invalidation of the election. Absent any hint of voter fraud, the fact that ballots were delivered by family members or election employees did not constitute a substantial deviation from mail ballot election guidelines sufficient to void the election results. Drummond v. Virginia City, 253 M 428, 833 P2d 1067, 49 St. Rep. 510 (1992).

13-19-308. Disposition of ballots returned in person.

Compiler's Comments

1991 Amendment: In (2)(a), at end after "receives ballots", inserted "and the names of the people who deliver the ballots"; deleted former (2)(b) concerning elector signing log; and deleted former (2)(c) concerning comparing elector's signature in log with signature on return/verification envelope.

Case Notes

Return of Mail Ballot by Person Other Than Elector — Election Valid: Official county voter records showed that 19 ballots in a mail ballot election, including ballots of two of the plaintiffs, were returned by persons other than the elector, which plaintiffs claimed violated 13-19-106 and 13-19-306 through 13-19-308, warranting invalidation of the election. Absent any hint of voter fraud, the fact that ballots were delivered by family members or election employees did not constitute a substantial deviation from mail ballot election guidelines sufficient to void the election results. Drummond v. Virginia City, 253 M 428, 833 P2d 1067, 49 St. Rep. 510 (1992).

13-19-309. Disposition of ballots returned by mail.

Compiler's Comments

2003 Amendment: Chapter 414 in (2) substituted "If at any point there is a question concerning the validity of a particular ballot, the question must be resolved as provided in 13-19-314" for "If at any point there is a question concerning a particular ballot, the election administrator may not deposit the ballot in question. The election administrator shall retain all materials relating to the questioned ballot until the question is resolved satisfactorily or the question is determined as provided in 13-19-314." Amendment effective October 1, 2003.

13-19-311. Valid ballots — requirements.

Compiler's Comments

1997 Amendment: Chapter 338 inserted (4) providing that the failure of an elector to verify the elector's address or notify the election administrator of the elector's correct mailing address invalidates an otherwise valid mailed ballot.

1991 Amendment: In (3)(a), at end after "secrecy envelope", inserted language concerning exception if multiple election being held and there is only one ballot for each election in envelope.

13-19-312. Counting procedure.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) in introductory clause at beginning inserted exception clause and near end substituted "the counting board appointed pursuant to 13-15-112" for "election officials"; in (1)(c) at end substituted "in chapter 15" for "by law"; at end of (2) inserted reference to subsection (3) of 13-15-207; and made minor changes in style. Amendment effective October 1, 2003.

1991 Amendment: Inserted (2) concerning election administrator opening ballot boxes and secrecy envelopes and counting votes.

13-19-313. Notice to elector — opportunity to resolve questions.

Compiler's Comments

2003 Amendment: Chapter 475 in (4) in first sentence after "shall" inserted "investigate the reason for the return and" and after "notice" deleted "provided for in 13-2-207"; and made minor changes in style. Amendment effective January 1, 2004.

1997 Amendment: Chapter 246 inserted (4) requiring election administrator to mail confirmation notice by forwardable, first-class mail and requiring elector to be placed on inactive list if notice is returned; and made minor changes in style. Amendment effective April 11, 1997.

13-19-314. Resolving ballots in question.

Compiler's Comments

2003 Amendment: Chapter 414 substituted current text of (1) through (4) concerning resolving ballot validity for former text that read: "(1) If the election administrator is unable to resolve the issue to his satisfaction, he shall give notice to the elector as provided in 13-19-313.

(2) If the elector fails to appear or, if even after such an appearance, the issue is still not resolved to the election administrator's satisfaction, the election administrator shall present the issue for a determination to the board of judges appointed to count the ballots.

(3) If the counting board is unable to resolve the issue to its satisfaction, it may not count the ballot in question. Instead, the election administrator shall present the issue to the board of canvassers for a determination of the issue.

(4) If the board of canvassers is unable to resolve the issue, the ballot must not be counted." Amendment effective October 1, 2003.

CHAPTER 21
MONTANA ABSENT UNIFORMED SERVICES AND OVERSEAS ELECTOR VOTING ACT

Chapter Compiler's Comments

Effective Date: This chapter is effective October 1, 2003.

Part 1
General Provisions

13-21-104. Adoption of rules — acceptance of funds.

Compiler's Comments

2003 Amendment: Chapter 557 in (1) and (2) at end substituted "this chapter" for "13-13-276 through 13-13-278"; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 80 in (1) at end of third sentence deleted "except that the rules may provide for different times for the acceptance of facsimile ballots after the closing of the polls"; and made minor changes in style. Amendment effective March 16, 1999.

1997 Amendment: Chapter 42 in (1), at end, and in (2), at end, deleted reference to 13-13-279. Amendment effective March 12, 1997.

Preamble: The preamble attached to Ch. 111, L. 1991, provided: "WHEREAS, there is increasing interest on the part of both state and federal agencies in the use of facsimile transmissions for the purpose of voting in state and federal elections, particularly for the casting of absentee ballots by men and women of the Armed Forces serving in Operation Desert Shield; and

WHEREAS, the federal Uniformed and Overseas Citizens Absentee Voting Act authorizes but does not require the use of facsimile ballots in federal elections; and

WHEREAS, state election laws currently present severe obstacles to the use of facsimile voter registration and the sending and receiving of absentee election ballots by facsimile; and

WHEREAS, the adoption of state laws allowing registration of absentee voters and the sending and receiving of absentee ballots by facsimile may increase the likelihood that absentee voters would exercise their right to vote; and

WHEREAS, adoption of rules by the Secretary of State that provide for absentee voter registration and the casting of absentee ballots by facsimile would provide maximum flexibility for state and local election officials to work with one another and appropriate federal officials to see that voting by facsimile becomes a reality in this state."

Effective Date: Section 4(1), Ch. 111, L. 1991, provided: "[Sections 1 [13-13-276], 2(2) [13-13-278(1), renumbered 13-21-104(1)], 2(3) [13-13-278(2), renumbered 13-21-104(2)], 3 [13-13-279, now repealed], 5 [not codified], and this section] are effective on passage and approval." Approved March 20, 1991.

Administrative Rules

ARM 44.3.1501 through 44.3.1509 Voting by facsimile transmission for members of the United States service.

Part 2
Absentee Voting

13-21-201. Registration of United States electors — simultaneous application for absentee ballot.

Compiler's Comments

2003 Amendment: Chapter 557 in (1) at beginning substituted "A United States elector" for "An elector in the United States service who is absent from the state and the county of which the elector is a resident" and after "residence" substituted "by properly completing, signing, and returning" for "as follows"; deleted former (1)(a) that read: "(a) by the close of registration provided for in 13-2-301, by using"; in (1)(c) substituted "the federal write-in absentee ballot transmission envelope" for "if eligible, the federal write-in ballot as provided in 13-13-271(3)"; in (2) in first sentence at beginning substituted "A registration application under this section" for "after the close of registration, only by federal post card application, which" and after "administrator" substituted "not less than 30 days before the election for the registration to be valid for the election" for "by noon on the day before the election" and inserted second sentence requiring application to be processed for the next election if received less than 30 days before the election; deleted former (2) that read: "(2) The form of the federal post card application must be prescribed by the secretary of state"; inserted (3) requiring application using federal post card application or federal write-in absentee ballot transmission envelope to be considered simultaneous application for absentee ballots under 13-21-210; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 164 at end of (1) substituted "may register with the election administrator in the elector's county of residence as follows" for "may register by mailing to the

election administrator"; inserted (1)(a) introductory clause relating to registration by close of registration; inserted (1)(a)(iii) allowing use of federal write-in ballot; inserted (1)(b) limiting registration after close of registration to federal post card application; in (2) after "post card application" deleted "which may be used both as an application for registration and for a ballot"; deleted former (3) that read: "(3) An elector in the United States service who is absent from the state and county of which he is a resident may register to vote by federal post card application and vote by federal write-in absentee ballot for the next primary or general election up to noon on the day before the election"; and made minor changes in style. Amendment effective March 24, 1999.

1991 Amendment: Inserted (3) to provide that electors in United States service who are absent from the state may register to vote and vote by absentee ballot up to noon on the day before certain elections; and made minor change in style. Amendment effective April 1, 1991.

1985 Amendment: In (1)(a) and (1)(b) after "signed", deleted "under oath".

Subsection Not Codified: Subsection (1) of section 23-3719, R.C.M. 1947, which is redundant with 13-2-212 (renumbered 13-21-201), was not codified in the MCA. This subsection has not been repealed and is still valid law. Citation may be made to sec. 137, Ch. 368, L. 1969. See 1-2-208, MCA.

Collateral References

Elections *key* 74, 98, 106.

29 C.J.S. Elections §§24, 40(1), 46.

25 Am. Jur. 2d Elections §§171, 185 through 187.

State voting rights of residents of federal military establishment. 34 ALR 2d 1193.

13-21-202. Classification of applications — notification of elector.

Compiler's Comments

2003 Amendment: Chapter 557 deleted former (1) that read: "(1) Unless the elector is already registered, a federal post card application received from an elector in the United States service shall be treated as a simultaneous application for registration and for ballot for each primary and general election in which he is entitled to vote during the year of its receipt"; in (1) after "administrator of" substituted "an application pursuant to 13-13-212 or 13-21-210" for "a federal post card application properly filled out and signed"; in (1)(b) in first sentence and in (2) before "post card" inserted "federal"; in (1)(b) inserted second sentence providing that information is sufficient to meet any identification requirements for an elector; in (1)(c) near beginning after "available" inserted "which may include facsimile transmission or electronic mail", in middle after "absentee ballot for" inserted "that election or for", and after "subsection (1)" inserted "or, if the application is rejected, a notice that the application has been rejected and the reasons for the rejection"; and made minor changes in style. Amendment effective October 1, 2003.

1985 Amendment: Inserted (1) providing for simultaneous application for registration; in introductory clause of (2) after "signed", deleted "under oath"; at beginning of (2)(b), deleted "The election administrator shall, upon receipt of any federal post card application"; at beginning of (2)(c) deleted "The election administrator shall"; in (2)(c) near middle, after "informing him that", substituted "a ballot is enclosed or that he will be mailed an absentee ballot for the next election in which he is entitled to vote under subsection (1)" for "in order to secure a ballot he must mail at any time within 75 days preceding the election another federal post card application to the election administrator"; and in (3) deleted first two sentences that read: "A federal post card application received from an elector in the United States service within 75 days preceding an election shall be treated as a simultaneous application for registration and for ballot. Where the elector is already registered, the federal post card application shall be treated as an application for a ballot."

13-21-203. Registration of United States electors after return.

Compiler's Comments

2003 Amendment: Chapter 557 in first sentence at beginning substituted "A United States elector who has returned to the elector's residence" for "Electors in the United States service who have been honorably discharged from the armed forces of the United States or who have terminated their service or employment outside the territorial limits of the United States" and near middle after "next" substituted "election after the date of the elector's return" for "ensuing election after such discharge or termination of employment"; and made minor changes in style. Amendment effective October 1, 2003.

Collateral References

Elections *key* 98, 105, 106.

29 C.J.S. Elections §§40(1), 46.

25 Am. Jur. 2d Elections §§185 through 187.

13-21-204. Federal write-in absentee ballot — qualifications.

Compiler's Comments

2003 Amendment: Chapter 557 at beginning substituted "A United States elector who" for "An elector in the United States service, as defined in 13-2-211, who is overseas" and after "ballot" substituted "pursuant to 13-21-210 for a federal general election but who has not yet received the regular absentee ballot for the federal general election" for "as provided in 13-13-212 or subsection (3) of this section, and fears that the elector might not receive a regular ballot in time to vote and return it to the election administrator"; deleted former (2) through (4) that read: "(2) The federal write-in absentee ballot is available to military personnel and civilians overseas through the same source that provides federal post card application forms and is only valid for federal elections.

(3) An overseas elector in the United States service may use a federal write-in absentee ballot transmission envelope to register to vote and to apply for a regular absentee ballot if the envelope is received by the election administrator not less than 30 days before the election and the envelope has been properly completed and signed.

(4) As used in this section, "overseas" means outside the territorial limits of the United States and does not mean any location within the continental United States, Alaska, Hawaii, or Guam"; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 164 in (1) substituted current language allowing use of federal write-in absentee ballot as provided in 13-13-272 (renumbered 13-21-205) for former language that read: "An elector qualified by 13-2-211 who fears his regular absentee ballot might not arrive in time to vote and return to the election administrator of the county of his residence and registration may also vote a federal write-in absentee ballot"; deleted former (3) that read: "(3) Except as provided in 13-2-212(3), the elector shall apply for a regular absentee ballot as provided in 13-13-212(2) not less than 30 days before the general election"; inserted (3) allowing federal write-in absentee ballot transmission envelope to be used as voter registration form and application for regular absentee ballot; inserted (4) defining overseas; and made minor changes in style. Amendment effective March 24, 1999.

1991 Amendment: At beginning of (3) inserted exception clause. Amendment effective April 1, 1991.

Collateral References

26 Am. Jur. 2d Elections §§355, 356, 359.

13-21-205. Procedure for voting federal write-in absentee ballot.

Compiler's Comments

2003 Amendment: Chapter 557 in (1) at beginning of first sentence substituted "A United States elector" for "An elector" and after "federal" substituted "write-in absentee ballot for a federal general election" for "write-in ballot" and inserted second sentence requiring written designation of political party to be counted as vote for candidate of that party; in (2) after "ballot" inserted "for the federal general election"; and made minor changes in style. Amendment effective October 1, 2003.

13-21-206. Counting of federal write-in absentee ballots.

Compiler's Comments

2003 Amendment: Chapter 557 in (1) after "ballot" substituted "received by an election administrator may be counted only if" for "must be counted if"; in (1)(a) substituted "a valid application was received pursuant to 13-21-210" for "the election administrator received the elector's application for a regular absentee ballot not less than 30 days before the election"; deleted former (1)(c) that read: "(c) it has not been submitted from any location within the continental United States, Alaska, Hawaii, or Guam"; inserted (3) providing that a regular absentee ballot received from a United States elector after the polls close may not be counted; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 164 in (1)(a) substituted "the election administrator received the elector's application for a regular absentee ballot not less than 30 days before the election" for

"the condition in 13-13-271(3) has been met"; and made minor changes in style. Amendment effective March 24, 1999.

13-21-207. Registration and voting by facsimile and internet authorized.

Compiler's Comments

2003 Amendment: Chapter 557 in introduction after "internet" substituted "for a United States elector" for "for overseas electors in the United States service". Amendment effective October 1, 2003.

1999 Amendment: Chapter 80 near end of introductory clause substituted "or electronically through the internet for overseas electors in the United States service, if internet facilities that provide for secrecy are available, in place of the public mails" for "in place of the use of the public mails when requested by an elector or, for the purposes of registration under subsection (1), an individual intending to become an elector, in the United States service, as defined in 13-2-211". Amendment effective March 16, 1999.

Preamble: The preamble attached to Ch. 111, L. 1991, provided: "WHEREAS, there is increasing interest on the part of both state and federal agencies in the use of facsimile transmissions for the purpose of voting in state and federal elections, particularly for the casting of absentee ballots by men and women of the Armed Forces serving in Operation Desert Shield; and

WHEREAS, the federal Uniformed and Overseas Citizens Absentee Voting Act authorizes but does not require the use of facsimile ballots in federal elections; and

WHEREAS, state election laws currently present severe obstacles to the use of facsimile voter registration and the sending and receiving of absentee election ballots by facsimile; and

WHEREAS, the adoption of state laws allowing registration of absentee voters and the sending and receiving of absentee ballots by facsimile may increase the likelihood that absentee voters would exercise their right to vote; and

WHEREAS, adoption of rules by the Secretary of State that provide for absentee voter registration and the casting of absentee ballots by facsimile would provide maximum flexibility for state and local election officials to work with one another and appropriate federal officials to see that voting by facsimile becomes a reality in this state."

Effective Date: Section 4(2), Ch. 111, L. 1991, provided: "[Section 2(1)] [13-13-277, renumbered 13-21-207] is effective July 1, 1992."

Administrative Rules

Title 44, chapter 3, subchapter 15, ARM Facsimile voting for electors of the United States service.

CHAPTER 22
YOUTH VOTING ACT

Part 1
General Provisions

13-22-104. Program development.

Compiler's Comments

1997 Amendment: Chapter 142 near middle of (1)(c), after "ballots", inserted "at a location designated as a youth voting location or" and substituted "while accompanying an eligible voter" for "while accompanying their parents"; and made minor changes in style.

13-22-106. Polling place procedures.

Compiler's Comments

1997 Amendment: Chapter 142 in (1) substituted "work with participating schools or county election officials, as necessary" for "work with county election officials"; at end of (1)(a) substituted "distributed to locations designated as youth voting locations" for "distributed to polling places in counties with participating schools"; and in (1)(b) substituted "accompanied by an eligible voter" for "accompanied by a parent or eligible voter" and at end inserted "at regular polling places".

13-22-107. Funding.

Compiler's Comments

2003 Amendment: Chapter 475 in (1) at beginning inserted exception clause; and made minor changes in style. Amendment effective January 1, 2004.

CHAPTER 25
ELECTIONS FOR FEDERAL OFFICE

Chapter Law Review Articles

Sending the Parties "Pac-ing"? The Constitution, Congressional Control, and Campaign Spending after Colorado Republican Federal Campaign Committee v. Federal Elections Commission, Dykstra, 81 Marq. L. Rev. 1201 (1998).

Campaigns, Contributions and Citizenship: The First Amendment Right of Resident Aliens to Finance Federal Elections, Horrocks, 38 B.C.L. Rev. 771 (1997).

Still Blinking at Political Reality in Federal Elections, Lekich, 75 N.C.L. Rev. 1848 (1997).

Independent Expenditures by PAC's in Federal Elections: Is Election Law Reform Needed Again, Mermelstein, 51 Mo. L. Rev. 997 (1986).

Part 1
Presidential Elections

Part Case Notes

Nomination for Public Office: The nomination for presidential electors is a nomination for public office. State ex rel. Wheeler v. Stewart, 71 M 358, 230 P 366 (1924). See also State ex rel. Foster v. Mountjoy, 83 M 162, 271 P 446 (1928).

Part Law Review Articles

The Constitutionality of Regulating Independent Expenditure Committees in Publicly Funded Presidential Campaigns, Simonett, 18 Harv. J. on Legis. 679 (1981).

The Demise of the Grassroots Political Activity Under the Presidential Election Campaign Fund Act, (Colloquium: Election Law in the Eighties), Ifshin, 10 N.Y.U. Rev. L. & Soc. Change 93 (1981).

Part Collateral References

United States *key* 25.

91 C.J.S. United States §28.

77 Am. Jur. 2d United States §19.

13-25-101. Nomination of electors — ballot.

Compiler's Comments

2003 Amendment: Chapter 414 in (3) substituted "appear on" for "be printed upon". Amendment effective October 1, 2003.

2001 Amendment: Chapter 537 in (1) near middle of first sentence after "no later than" substituted "76 days" for "75 days" and near end of second sentence after "less than" substituted "76 days" for "75 days"; and in (2) near middle of second sentence after "less than" substituted "76 days" for "75 days". Amendment effective October 1, 2001.

1997 Amendment: Chapter 85 inserted second sentence in (1) authorizing nomination of a new candidate for President or Vice President in the event of the death of the candidate for either office; and near end of first sentence in (2) substituted "must be placed" for "must be printed" and after "ballot" inserted "by one of the methods provided in 13-12-204" and inserted second sentence requiring Secretary of State to immediately certify and place new name or names of candidates for President or Vice President on the ballot.

1993 Amendment: Chapter 390 in middle of (1), after "state", inserted "in a form prescribed by the secretary of state"; and made minor changes in style. Amendment effective July 1, 1993.

1985 Amendment: In (1) substituted "75 days" for "45 days".

Collateral References

29 C.J.S. Elections §§91, 174.

13-25-102. Election of electors.

Case Notes

Residence Requirements: As it did in the Voting Rights Act Amendments of 1970, 42 U.S.C. §1973aa-1, Congress can prohibit states from disqualifying voters in elections for presidential and vice-presidential electors because the voters have not met state residency requirements and Congress can set residency requirements and provide for absentee balloting in presidential and vice-presidential elections. Oregon v. Mitchell, 400 US 112 (1970).

13-25-104. Meeting and voting of electors.

Compiler's Comments

1981 Amendment: Added subsection (3) requiring electors to cast their ballots for persons who won Montana general election.

Case Notes

Extension of Time Unconstitutional: Since, under section 23-2104, R.C.M. 1947 (now repealed), and the federal act (3 U.S.C. §5, enacted pursuant to Art. II, sec. 1, U.S. Const.), the presidential electors must meet on the first Monday after the second Wednesday in December following their election, the Legislature could not, by enacting Ch. 101, L. 1943 (since repealed), constitutionally extend the time for depositing military ballots for the general election for 7 weeks beyond the Tuesday after the first Monday in November. Maddox v. Bd. of St. Canvassers, 116 M 217, 149 P2d 112 (1944).

13-25-106. Compensation of electors.

Compiler's Comments

1997 Amendment: Chapter 42 in second sentence substituted "state treasurer" for "state auditor"; and made minor changes in style. Amendment effective March 12, 1997.

Part 2
Congressional Elections

Part Law Review Articles

A Proposal for Democratically Financed Congressional Elections, Jezer, Kehler, & Senturia, 11 Yale L. & Pol'y Rev. 333 (1993).

Federal Election Regulation and the States: An Analysis of the Minnesota and New Hampshire Attempts to Regulate Congressional Elections, Forbes, 42 Case W. Res. L. Rev. 509 (1992).

The Campaign Finance Reform Act: A Measured Step to Limit the PAC's Role in Congressional Elections, Dunn, Hofman, & Moynihan, 11 J. Legis. 496 (1984).

Money in Congressional Elections, White, 17 Harv. J. on Legis. 389 (1980).

Part Collateral References

United States *key* 10.

29 C.J.S. Elections §1; 91 C.J.S. United States §11.

77 Am. Jur. 2d United States §§9, 10.

13-25-201. Election of United States senators and representatives.

Collateral References

State court jurisdiction over contest involving primary election for member of Congress. 68 ALR 2d 1320.

13-25-202. Vacancy in office of United States senator.

Collateral References

91 C.J.S. United States §22.

77 Am. Jur. 2d United States §10.

13-25-203. Vacancy in office of United States representative.

Compiler's Comments

1985 Amendment: In (2) substituted "no less than 75 or more than 90 days" for "within 90 days".

Collateral References

91 C.J.S. United States §22.

77 Am. Jur. 2d United States §10.

13-25-204. Certificates issued by governor.

Compiler's Comments

1981 Amendment: Substituted "report of the canvass" for "statement"; substituted "13-15-507" for "[13-15-502]".

13-25-205. Nominations for special election.

Compiler's Comments

1985 Amendment: In (1) substituted "75 days" for "50 days"; and in (2) substituted "75th day" for "50th day".

Collateral References

91 C.J.S. United States §22.
77 Am. Jur. 2d United States §10.

CHAPTER 26
CONVENTION TO RATIFY AMENDMENTS TO UNITED STATES CONSTITUTION

Part 1
Ratification of Amendments

Part Collateral References

Constitutional Law *key* 10.
16 C.J.S. Constitutional Law §6.
16 Am. Jur. 2d Constitutional Law §§22 through 25.

13-26-103. Nomination of delegates.

Compiler's Comments

1985 Amendment: In (3) substituted "75 days" for "30 days".

CHAPTER 27
BALLOT ISSUES

Chapter Case Notes

No Constitutional Conflict in Initiative Absent Enactment — Time for Objections: In considering the question of a constitutional conflict in an initiative measure that, if enacted, would abolish property taxes, the Supreme Court declined to intervene in the initiative process prior to a vote absent extraordinary causes, finding that it would be an unjustified infringement of the people's initiative rights to remove the measure from the ballot. The court noted that no constitutional conflict existed until and unless the measure passed by popular vote and that the time period until the effective date would allow sufficient time to raise objections to the measure. State ex rel. Mont. School Bd. Ass'n v. Waltermire, 224 M 296, 729 P2d 1297, 43 St. Rep. 2198 (1986).

Legislative Resolution in Excess of Initiative Power: In this original proceeding for a Writ of Injunction, plaintiffs sought an order declaring a constitutional initiative void and unconstitutional. The initiative, if adopted by the voters, would have amended the Montana Constitution to direct the 1985 Legislature to adopt a resolution requesting Congress to call a constitutional convention for the sole purpose of adopting a balanced budget amendment. It also would have required that if the resolution was not adopted within 90 legislative days, the Legislature would remain in session without pay until the resolution was adopted. The Supreme Court, in granting injunctive relief, held that although the initiative was in form a constitutional amendment, it was in substance a legislative resolution. The initiative power conferred by the Montana Constitution does not include the power to enact a legislative resolution. The electorate cannot circumvent the constitution by indirectly doing that which can be done directly. State ex rel. Harper v. Waltermire, 213 M 425, 691 P2d 826, 41 St. Rep. 2212 (1984).

Judicial Interpretation of Initiatives — Rules: The rules applicable to judicial interpretation of legislation enacted by the Legislature apply to the interpretation of initiatives. State ex rel. Palmer v. Hart, 201 M 526, 655 P2d 965, 39 St. Rep. 2277 (1982).

Chapter Law Review Articles

A Comment of the Evolution of Direct Democracy in Western State Constitutions, Baude, 28 N.M.L. Rev. 343 (1998).

The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?, Cooper, 28 N.M.L. Rev. 227 (1998).

Ballot Initiatives: Recommendations for Change, Anderson & Ciampa, 71 Fla. B.J. 71 (1997).

Initiative Petition Reforms and the First Amendment, Calhoun, 66 U. Colo. L. Rev. 129 (1995).

Representative Government and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition, Arrow, 17 Okla. City U.L. Rev. 3 (1992).

Pre-Election Judicial Review of Initiatives and Referendums, Gordon & Magleby, 64 Notre Dame L. Rev. 298 (1989).

Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative, Fountaine, 61 S. Cal. L. Rev. 733 (1988).

The Legislative Function: Initiative and Referendum (A Symposium on State Constitutional Revision: Oregon), Gillette, 67 Or. L. Rev. 55 (1988).

Public Safety Legislation and the Referendum Power: A Reexamination, Lowe, 37 Hastings L.J. 591 (1986).

The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure, Castello, 74 Cal. L. Rev. 491 (1986).

Ballot Access for Initiatives and Popular Referendums: The Importance of Petition Circulation and Signature Validation Procedures, Magleby, 2 J. L. & Pol. 287 (1985).

Pre-Election Review of Voter Initiatives—AFL-CIO v. Eu, 686 P.2d 609 (Cal.), Hunting, 60 Wash. L. Rev. 911 (1985).

The Unconstitutionality of Voter Initiative Applications for Federal Constitutional Conventions, Walcoff, 85 Colum. L. Rev. 1525 (1985).

Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence, Fischer, 11 Hastings Const. L.Q. 43 (1983).

The Constitutionality of the Initiative and Referendum, Sirico, Jr., 65 Iowa L. Rev. 637 (1980).

Chapter Collateral References

Statutes *key* 301 through 327, 341 through 375.

82 C.J.S. Statutes §§115 through 151.

42 Am. Jur. 2d Initiative and Referendum.

Validity, under state constitutions, of private shopping center's prohibition or regulation of political, social, or religious expression or activity. 38 ALR 4th 1219.

Ballot Issues Guidelines Booklet, Office of the Secretary of State (2000) (updated biennially).

Part 1
General Provisions

13-27-101. Establishment of initiative and referendum procedures.

Law Review Articles

Debating Initiative Reform: A Summary of the Second Annual Symposium on Elections at the Center for the Study of Law and Politics, Ertukel, 2 J.L. & Pol. 313 (1985).

Collateral References

Statutes *key* 301, 341.

82 C.J.S. Statutes §115.

42 Am. Jur. 2d Initiative and Referendum §1.

Adoption of zoning ordinance or amendment thereto as subject of referendum. 72 ALR 3d 1030.

Adoption of zoning ordinance or amendment thereto through initiative process. 72 ALR 3d 991.

13-27-102. Who may petition.

Case Notes

Withdrawal of Signatures:

In the absence of legislative expression to the contrary, the right of signers to withdraw signatures from a petition exists until the Secretary of State has finally determined that the petition is sufficient. State ex rel. O'Connell v. Mitchell, 111 M 94, 106 P2d 180 (1940).

Any person signing the petition has absolute right to withdraw his name at any time before the person or body created by law to determine the matter submitted by the petition has finally acted. For an initiative, such time expires when the Secretary of State finally determines the petition sufficient. Ford v. Mitchell, 103 M 99, 61 P2d 815 (1936).

Collateral References

Statutes *key* 309, 349.

82 C.J.S. Statutes §123.

42 Am. Jur. 2d Initiative and Referendum §26.

Right of signer of petition or remonstrance to withdraw therefrom or revoke withdrawal and time therefor. 27 ALR 2d 604.

13-27-103. Sufficiency of signature.

Case Notes

No Mandamus to Certify Signatures: A Writ of Mandate may not be issued to control discretion, absent an abuse thereof. The function of the County Clerk and Recorder in deciding if signatures on a petition for a ballot issue are "signed in substantially the same manner" as the signatures on the voter registry cards involves the exercise of discretion. Therefore, the District Court properly refused to issue a Writ to compel the certification of certain signatures. State ex rel. Miller v. Murray, 183 M 499, 600 P2d 1174 (1979).

Address on Petition for Identification Purposes Only: The only purpose of the address on a petition for a proposed initiative is to aid the Clerk and Recorder in the identification of the signer for certification of the signature. State ex rel. Miller v. Murray, 183 M 499, 600 P2d 1174 (1979).

Attorney General's Opinions

Address on Petition Different From That on Voter Registry Card: A signature of a properly registered voter on a petition for a ballot measure should not be disqualified if the address on the petition is not the same as the address on the voter registry card. 39 A.G. Op. 50 (1982).

Collateral References

Statutes *key* 311, 351.

82 C.J.S. Statutes §123.

42 Am. Jur. 2d Initiative and Referendum §27.

13-27-104. Time for filing.

Compiler's Comments

1991 Amendment: Near middle substituted reference to third Friday for reference to second Friday.

Collateral References

Statutes *key* 314, 354.

82 C.J.S. Statutes §129.

42 Am. Jur. 2d Initiative and Referendum §32.

13-27-105. Effective date of initiative and referendum issues.

Compiler's Comments

1987 Amendment: At end of (2) inserted "unless the amendment provides otherwise"; and made minor change in phraseology.

1983 Amendment: In first sentence of (1), inserted ", other than a constitutional amendment,"; at beginning of (2), deleted "Unless the legislature provides otherwise,"; and in (2), inserted "by initiative or" and substituted "July 1" for "October 1".

1981 Amendment: Changed the effective date of an initiative, constitutional amendment, or referendum from July 1 to October 1 following approval; inserted the however clause in (1).

Attorney General's Opinions

Applicability of Referendum Containing Retroactive Effective Date: Unless a law that has been suspended by referendum contains a specific effective date, upon approval by the voters,

the law becomes effective upon completion of the canvass of the election results, as provided in this section. However, when a law that has been suspended by referendum contains a retroactive effective date, approval of the law by the voters also includes approval of its retroactive applicability. 45 A.G. Op. 20 (1993).

Collateral References

Statutes *key* 325, 357.
82 C.J.S. Statutes §§145, 146.
42 Am. Jur. 2d Initiative and Referendum §53.

13-27-111. Definitions.

Compiler's Comments

2003 Amendment: Chapter 323 in definition of signature gatherer after "collects" deleted "or intends to collect". Amendment effective July 1, 2003.

Effective Date: Section 5(2), Ch. 117, L. 1999, provided: "[Sections 1, 2, and 3(1)] [enacting 13-27-111, 13-27-112, and 13-27-113(1)] are effective October 1, 1999."

13-27-112. Required reports — time and manner of reporting — exceptions — penalty.

Compiler's Comments

Effective Date: Section 5(2), Ch. 117, L. 1999, provided: "[Sections 1, 2, and 3(1)] [enacting 13-27-111, 13-27-112, and 13-27-113(1)] are effective October 1, 1999."

13-27-113. Powers and duties of commissioner.

Compiler's Comments

Effective Dates: Section 5, Ch. 117, L. 1999, provided: "(1) [Sections 3(2) [enacting 13-27-113(2)] and 4 [not codified] and this section] are effective on passage and approval. [Approved March 19, 1999.]

(2) [Sections 1, 2, and 3(1)] [enacting 13-27-111, 13-27-112, and 13-27-113(1)] are effective October 1, 1999."

Part 2
Form of Petitions

13-27-201. Form of petition generally.

Compiler's Comments

2003 Amendment: Chapter 323 inserted (3) relating to internet posting of petition language; and made minor changes in style. Amendment effective July 1, 2003.

1995 Amendment: Chapter 545 in (2), at end of fifth sentence after "legislative", substituted "services division" for "council". Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

Case Notes

Severance of Constitutional Amendment Language Not Curative of Defect When Initiative Improperly Submitted to Voters: Constitutional Initiative No. 75 (CI-75) expressly amended

three parts of the Montana Constitution without allowing a separate vote on each amendment and thus was unconstitutional under Art. XIV, sec. 11, Mont. Const. Language in the initiative that would have severed the invalid parts from the valid parts could not cure the constitutional defect in CI-75 because the defect was in the submission of CI-75 to voters with more than one constitutional amendment. Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999).

Submission of Constitutional Initiative Amending Three Parts of Constitution Violative of Separate Vote Requirement: Plaintiffs filed an original application for declaration of judgment and injunctive relief, challenging the validity of Constitutional Initiative No. 75 (CI-75), which was passed by the voters and stated that no new tax or tax increase could be enacted unless approved by a majority of the electorate. The initiative amended Art. VIII, Mont. Const., revising state revenue and finance provisions; amended Art. II, sec. 18, Mont. Const., providing that sovereign immunity did not shield public officials or employees from appropriate civil liability for violating CI-75; and provided that notwithstanding the referendum provisions of Art. VI, sec. 10, Mont. Const., before a bill imposing new or increased taxes is referred to the people, the Governor had veto power. The dispositive issue was that CI-75 had two or more constitutional amendments, in violation of Art. XIV, sec. 11, Mont. Const., which is a cogent constitutional recognition of the circumstances under which Montana voters receive constitutional initiatives, namely that a separate vote is required for each proposed constitutional amendment. Citing Armatta v. Kitzhaber, 959 P2d 49 (Oreg. 1998), the Supreme Court held that the separate vote requirement is distinguishable as different and narrower than the single subject requirement in Art. V, sec. 11, Mont. Const., and that to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, holdings to the contrary in State ex rel. Teague v. Bd. of Comm'rs, 34 M 426, 87 P 450 (1906), State ex rel. Hay v. Alderson, 49 M 387, 142 P 210 (1914), and State ex rel. Corry v. Cooney, 70 M 355, 225 P 1007 (1924), were overruled. Because CI-75 expressly amended three parts of the Montana Constitution without allowing a separate vote on each amendment, CI-75 was unconstitutional under Art. XIV, sec. 11, Mont. Const. Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999), following State ex rel. Hinz v. Moody, 71 M 473, 230 P 575 (1924), and Sawyer Stores, Inc. v. Mitchell, 103 M 148, 62 P2d 342 (1936).

Initiative Amendment Void — Material Language Difference — Improper Publication Procedures: The language of an amendment to Art. II, sec. 16, Mont. Const., as filed and certified by the Secretary of State, was not the same language submitted to the voters at the election. Because the difference in language was material and because publication of the proposed initiative prior to election did not follow constitutional mandates, the purported amendment was held to be void. State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 227 M 85, 738 P2d 1255, 44 St. Rep. 913 (1987). Petitions for rehearing, reconsideration, and clarification denied, 44 St. Rep. 929A (1987).

Attaching Title and Text Mandatory: Section 37-102, R.C.M. 1947 (now repealed), requiring that the sheets provided for signatures on a petition must be attached to a full and correct copy of the title and text thereof, was mandatory and not directory, because its purpose was to advise signers as to the contents of the proposed law, especially where question of noncompliance is raised prior to election. Ford v. Mitchell, 103 M 99, 61 P2d 815 (1936).

Difference in Text of Petitions: When two petitions differed substantially in text of the proposed law, they could not be considered as parts of one petition for the purpose of the sufficiency of the number of signatures. Ford v. Mitchell, 103 M 99, 61 P2d 815 (1936).

Collateral References

Statutes *key* 307, 347.
82 C.J.S. Statutes §132.
42 Am. Jur. 2d Initiative and Referendum §§18 through 23.
Bill Drafting Manual, Montana Legislative Council.

13-27-202. Recommendations — approval of form required.

Compiler's Comments

2003 Amendment: Chapter 323 in (6) in two places inserted "by a signature gatherer". Amendment effective July 1, 2003.

2001 Amendment: Chapter 537 in (4)(b) deleted former second sentence and former (4)(b)(i) and (4)(b)(ii) that read: "The secretary of state shall send written notice to the person who submitted the petition sheet of the final approval or rejection of the petition within 5 days of:

(i) the date on which a final court decision is entered under 13-27-316 if a challenge to the attorney general's review of the petition is filed pursuant to that section; or

(ii) the expiration of the time for filing a challenge to the attorney general's review under 13-27-316 if no challenge is filed. If the petition is rejected, the notice must include reasons for rejection"; and inserted (4)(c) requiring the secretary of state to notify the person who submitted the petition sheet if an action is filed challenging the validity of the petition. Amendment effective October 1, 2001.

1999 Amendment: Chapter 191 at end of second sentence in (3) substituted "county election administrator" for "secretary of state" and inserted fifth, sixth, seventh, eighth, and ninth sentences requiring attorney general to review petition for legal sufficiency, providing procedures upon determination of legal insufficiency, defining legal sufficiency, and providing that review for legal sufficiency does not include consideration of merits or application if adopted; at end of (4)(a) substituted "the petition" for "the form of the petition"; in first sentence in (4)(b) after "rejection" inserted "of the form of the petition" and inserted second sentence and (4)(b)(i) requiring secretary of state to send written notice to petitioner of final approval or rejection of petition within 5 days of final court decision challenging attorney general's review; at beginning of (4)(b)(ii) inserted first sentence allowing approval or rejection by time of expiration of filing time to challenge attorney general's review if no challenge is filed; inserted third sentence in (6) allowing petition to be circulated upon approval of form by secretary of state and attorney general pending final determination of legal sufficiency; and made minor changes in style. Amendment effective October 1, 1999.

Applicability: Section 5, Ch. 191, L. 1999, provided: "[This act] applies to initiative petitions submitted to the secretary of state after October 1, 1999."

1997 Amendment: Chapter 42 in (1)(b), before "staff", deleted reference to Council; and made minor changes in style. Amendment effective March 12, 1997.

1995 Amendment: Chapter 545 throughout section substituted reference to Legislative Services Division for reference to Legislative Council; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1991 Amendment: In (3) inserted fifth sentence regarding rejection of a petition based on material not submitted to Legislative Council; in (4), in second sentence after "approval", inserted "or rejection" and substituted third sentence requiring that reasons for rejection be included in petition for former third sentence that read: "The secretary of state shall send written notice if the petition has been rejected, together with reasons for rejection, within 14 days after submission of the petition sheet"; inserted (5) regarding petition with technical defects; and inserted (6) concerning preparation of a sample petition form.

1983 Amendment: Provided for Legislative Council review before submission of sample sheet to Secretary of State by inserting (1) and (2) and deleting former (1)(b) relating to Legislative Council review after such submission.

1981 Amendment: Inserted "containing the text of the proposed measure" after "sample sheet" in the first sentence of (1); inserted subsection (1)(b) referring to review by the Legislative Council.

Case Notes

Sufficiency of Title of 1988 Welfare Referendum — Applicable Standard: The title of a referendum "allowing the legislature greater discretion to determine the eligibility, duration, and level of economic assistance and social services to those in need" was found by the Supreme Court to be legally sufficient after applying the constitutional requirement of clarity of title set out in Art. V, sec. 11, Mont. Const., and employing the rules of construction developed under State ex rel. Wenzel v. Murray, 178 M 441, 585 P2d 633 (1978), and St. v. McKinney, 29 M 375, 74 P 1095 (1904). The court refused to intervene to remove the referendum from the ballot prior to a vote of the people so as not to violate the constitutional rights of popular sovereignty and self-government. Recognizing important distinctions between the processes of referendum and initiative, the standard applied to the referendum was the same applied to examination of the title of other products of the Legislature. The court affirmed the District Court finding of no statutory authority for preelection nullification of a legislative referendum and noted a strong presumption in favor of the constitutionality of legislative enactments. The ballot language was not purposely misleading and sufficiently identified the measure to provide for an informed vote. Harper v. Greely, 234 M 259, 763 P2d 650, 45 St. Rep. 1889 (1988), distinguishing State ex rel. Steen v. Murray, 144 M 61, 394 P2d 761 (1964), and State ex rel. Harper v. Waltermire, 213 M 425, 691 P2d 826, 41 St. Rep. 2212 (1984). See also State ex rel. Boese v. Waltermire, 224 M 230, 730 P2d 375, 43 St. Rep. 2156 (1986), and T&W Chevrolet v. Darvial, 196 M 287, 641 P2d 1368 (1982).

Misleading Summary of Proposed Initiative: Under section 37-104.1, R.C.M. 1947 (now repealed), an Attorney General's summary of a proposed initiative which could mislead the voters because it was not a "true and impartial statement of the purpose of the measure in plain, easily understood language" was improper. Jordan v. Murray, 171 M 29, 554 P2d 749 (1976).

Revisions of Attorney General's Summary: Section 37-106, R.C.M. 1947 (now repealed), gave the Attorney General the authority to revise his summary of a proposed initiative. Jordan v. Murray, 171 M 29, 554 P2d 749 (1976).

Collateral References

Statutes *key* 315, 355.

82 C.J.S. Statutes §133.

42 Am. Jur. 2d Initiative and Referendum §§33 through 36.

13-27-204. Petition for initiative.

Compiler's Comments

2003 Amendment: Chapter 323 in (1)(a) substituted "one-half of the counties" for "34 legislative representative districts"; and in (2) substituted "county of residence, and printed last name and first and middle initials of the signer" for "legislative representative district number, and printed last name of the signer". Amendment effective July 1, 2003.

2001 Amendment: Chapter 537 in (1)(e) after "address" inserted "or telephone number"; in (2) in second sentence after "signature" substituted "residence address" for "post-office address" and inserted third and fourth sentences allowing the signer to provide the signer's post-office address or home telephone number in place of a residence address and providing that an address provided on a petition by the signer that differs from the signer's address as shown on the signer's voter registration card may not be used as the only means to disqualify the signature of that petition signer; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 51 in (1)(b) after "measure on the ....." substituted "20..." for "19..."; in (1)(e) near middle after "voter" substituted "registration" for "registry"; and made minor changes in style. Amendment effective January 1, 2000.

1981 Amendment: Inserted (1)(a) referring to number of signatures needed; inserted (1)(b) referring to title of measure and statement of implication; inserted (1)(c) urging voters to read measure and explaining that signature is only to put measure on ballot; inserted (1)(e) requiring signature to be same as on voter registry card; changed "a qualified elector of the state" to "a legally registered Montana voter"; deleted "or imprisonment in the state prison for a term not to exceed 10 years"; and made changes in phraseology in (1)(d); deleted language relating to form for petition for initiative.

Attorney General's Opinions

Address on Petition Different From That on Voter Registry Card: A signature of a properly registered voter on a petition for a ballot measure should not be disqualified if the address on the petition is not the same as the address on the voter registry card. 39 A.G. Op. 50 (1982).

Collateral References

Statutes *key* 307.
82 C.J.S. Statutes §§132 through 134.
42 Am. Jur. 2d Initiative and Referendum §18.

13-27-205. Petition for referendum.

Compiler's Comments

2003 Amendment: Chapter 323 in (2) near end of second sentence inserted "and first and middle initials". Amendment effective July 1, 2003.

2001 Amendment: Chapter 537 in (1)(e) after "address" inserted "or telephone number"; in (2) in second sentence after "signature" substituted "residence address" for "post-office address" and inserted third and fourth sentences allowing the signer to provide the signer's post-office address or home telephone number in place of a residence address and providing that an address provided on a petition by the signer that differs from the signer's address as shown on the signer's voter registration card may not be used as the only means to disqualify the signature of that petition signer; and made minor changes in style. Amendment effective October 1, 2001.

1981 Amendments — Composite: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Chapter 488 inserted (1)(a) referring to number of signatures needed; inserted (1)(b) referring to title of referendum and statement of implication; inserted (1)(c) urging voters to read measure and explaining that signature is only to put measure on ballot; inserted (1)(e) requiring signature to be same as on voter registry card; in (1)(d) changed "a qualified elector of the state" to "a legally registered Montana voter"; deleted "or imprisonment in the state prison for a term not to exceed 10 years", and made changes in phraseology; deleted language relating to the form for petition for referendum.

In preparing the composite for this section, the Code Commissioner did not include the language relating to a $50,000 fine as indicated by Ch. 198 because the apparent intent of Ch. 198, sec. 7(3) and (4), was to provide for a fine of $50,000 only where a felony prison term was provided for and Ch. 488 removed the felony prison term of 10 years.

Attorney General's Opinions

Address on Petition Different From That on Voter Registry Card: A signature of a properly registered voter on a petition for a ballot measure should not be disqualified if the address on the petition is not the same as the address on the voter registry card. 39 A.G. Op. 50 (1982).

Collateral References

Statutes *key* 347.
82 C.J.S. Statutes §§132 through 134.
42 Am. Jur. 2d Initiative and Referendum §18.

13-27-206. Petition for initiative for constitutional convention.

Compiler's Comments

2003 Amendment: Chapter 323 in (2) near end of second sentence inserted "and first and middle initials". Amendment effective July 1, 2003.

2001 Amendment: Chapter 537 in (1)(e) after "address" inserted "or telephone number"; in (2) in second sentence after "signature" substituted "residence address" for "post-office address" and inserted third and fourth sentences allowing the signer to provide the signer's post-office address or home telephone number in place of a residence address and providing that an address provided on a petition by the signer that differs from the signer's address as shown on the signer's voter registration card may not be used as the only means to disqualify the signature of that petition signer; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 51 in (1)(b) after "convention on the ....." substituted "20..." for "19..."; in (1)(e) near middle after "voter" substituted "registration" for "registry" and made minor changes in style. Amendment effective January 1, 2000.

1981 Amendments — Composite: Pursuant to sec. 7, Ch. 198, L. 1981, inserted language allowing the court to fine the offender a maximum of $50,000 in lieu of imprisonment or to punish the offender by both a fine and imprisonment.

Chapter 488 inserted (1)(a) referring to number of signatures needed; inserted (1)(b) referring to title of initiative and statement of implication; inserted (1)(c) explaining that signature is only to put measure on ballot; inserted (1)(e) requiring signature to be same as on voter registry card; in (1)(d) changed "a qualified elector of the state" to "a legally registered

Montana voter"; deleted "or imprisonment in the state prison for a term not to exceed 10 years"; and made changes in phraseology; deleted language relating to the form for initiative petition on the question of calling a constitutional convention.

In preparing the composite for this section, the Code Commissioner did not include the language relating to a $50,000 fine as indicated by Ch. 198 because the apparent intent of Ch. 198, sec. 7(3) and (4), was to provide for a fine of $50,000 only where a felony prison term was provided for and Ch. 488 removed the felony prison term of 10 years.

Attorney General's Opinions

Address on Petition Different From That on Voter Registry Card: A signature of a properly registered voter on a petition for a ballot measure should not be disqualified if the address on the petition is not the same as the address on the voter registry card. 39 A.G. Op. 50 (1982).

Collateral References

Constitutional Law *key* 8.
16 C.J.S. Constitutional Law §8.
16 Am. Jur. 2d Constitutional Law §23.

13-27-207. Petition for initiative for constitutional amendment.

Compiler's Comments

2003 Amendment: Chapter 323 in (1)(a) substituted "one-half of the counties" for "40 legislative districts"; and in (2) near end of second sentence substituted "county of residence, and printed last name and first and middle initials of the signer" for "legislative representative district number, and printed last name of the signer". Amendment effective July 1, 2003.

2001 Amendment: Chapter 537 in (1)(e) after "address" inserted "or telephone number"; in (2) in second sentence after "signature" substituted "residence address" for "post-office address" and inserted third and fourth sentences allowing the signer to provide the signer's post-office address or home telephone number in place of a residence address and providing that an address provided on a petition by the signer that differs from the signer's address as shown on the signer's voter registration card may not be used as the only means to disqualify the signature of that petition signer; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 51 in (1)(b) after "amendment on the ....." substituted "20..." for "19..."; in (1)(e) near middle after "voter" substituted "registration" for "registry"; and made minor changes in style. Amendment effective January 1, 2000.

1981 Amendment: Inserted (1)(a) referring to number of signatures needed; inserted (1)(b) referring to title and statement of implication; inserted (1)(c) urging voters to read measure and explaining that signature is only to put measure on ballot; inserted (1)(e) requiring signature to be same as on voter registry card; in (1)(d) changed "a qualified elector of the state" to "a legally registered Montana voter"; deleted "or imprisonment in the state prison for a term not to exceed 10 years"; and made changes in phraseology; deleted language relating to the form of a petition proposing a constitutional amendment by the initiative.

Case Notes

Severance of Constitutional Amendment Language Not Curative of Defect When Initiative Improperly Submitted to Voters: Constitutional Initiative No. 75 (CI-75) expressly amended three parts of the Montana Constitution without allowing a separate vote on each amendment and thus was unconstitutional under Art. XIV, sec. 11, Mont. Const. Language in the initiative that would have severed the invalid parts from the valid parts could not cure the constitutional defect in CI-75 because the defect was in the submission of CI-75 to voters with more than one constitutional amendment. Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999).

Submission of Constitutional Initiative Amending Three Parts of Constitution Violative of Separate Vote Requirement: Plaintiffs filed an original application for declaration of judgment and injunctive relief, challenging the validity of Constitutional Initiative No. 75 (CI-75), which was passed by the voters and stated that no new tax or tax increase could be enacted unless approved by a majority of the electorate. The initiative amended Art. VIII, Mont. Const., revising state revenue and finance provisions; amended Art. II, sec. 18, Mont. Const., providing that sovereign immunity did not shield public officials or employees from appropriate civil liability for violating CI-75; and provided that notwithstanding the referendum provisions of Art. VI, sec. 10, Mont. Const., before a bill imposing new or increased taxes is referred to the people, the Governor had veto power. The dispositive issue was that CI-75 had two or more constitutional amendments, in violation of Art. XIV, sec. 11, Mont. Const., which is a cogent constitutional recognition of the circumstances under which Montana voters receive constitutional initiatives,

namely that a separate vote is required for each proposed constitutional amendment. Citing Armatta v. Kitzhaber, 959 P2d 49 (Oreg. 1998), the Supreme Court held that the separate vote requirement is distinguishable as different and narrower than the single subject requirement in Art. V, sec. 11, Mont. Const., and that to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, holdings to the contrary in State ex rel. Teague v. Bd. of Comm'rs, 34 M 426, 87 P 450 (1906), State ex rel. Hay v. Alderson, 49 M 387, 142 P 210 (1914), and State ex rel. Corry v. Cooney, 70 M 355, 225 P 1007 (1924), were overruled. Because CI-75 expressly amended three parts of the Montana Constitution without allowing a separate vote on each amendment, CI-75 was unconstitutional under Art. XIV, sec. 11, Mont. Const. Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999), following State ex rel. Hinz v. Moody, 71 M 473, 230 P 575 (1924), and Sawyer Stores, Inc. v. Mitchell, 103 M 148, 62 P2d 342 (1936).

Initiative Amendment Void — Material Language Difference — Improper Publication Procedures: The language of an amendment to Art. II, sec. 16, Mont. Const., as filed and certified by the Secretary of State, was not the same language submitted to the voters at the election. Because the difference in language was material and because publication of the proposed initiative prior to election did not follow constitutional mandates, the purported amendment was held to be void. State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 227 M 85, 738 P2d 1255, 44 St. Rep. 913 (1987). Petitions for rehearing, reconsideration, and clarification denied, 44 St. Rep. 929A (1987).

Attorney General's Opinions

Address on Petition Different From That on Voter Registry Card: A signature of a properly registered voter on a petition for a ballot measure should not be disqualified if the address on the petition is not the same as the address on the voter registry card. 39 A.G. Op. 50 (1982).

Law Review Articles

Constitutional Initiative 30: What Constitutional Rights Did Montanans Surrender in Hopes of Securing Liability Insurance?, Burke, 48 Mont. L. Rev. 53 (1987).

Collateral References

Constitutional Law *key* 4 through 9.
16 C.J.S. Constitutional Law §7.
42 Am. Jur. 2d Initiative and Referendum §§5, 6.

13-27-208. Petitions to be made available in each county election administrator's office.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 396 at end of last sentence substituted "a fee, which must be set and deposited in accordance with 2-15-405" for "a fee sufficient to reimburse the secretary of state for the cost of providing copies of the petition and signature sheets to each county election administrator". Amendment effective July 1, 2001.

Chapter 537 at beginning of first sentence substituted "Upon final approval" for "When the secretary of state sends written notice of the final approval". Amendment effective October 1, 2001.

1999 Amendment: Chapter 191 in first sentence after "notice" substituted "of the final approval of a petition" for "of the approval of the form of a petition"; and made minor changes in style. Amendment effective October 1, 1999.

Applicability: Section 5, Ch. 191, L. 1999, provided: "[This act] applies to initiative petitions submitted to the secretary of state after October 1, 1999."

Part 3
Submission and Processing of Petitions

Part Case Notes

Petitions Once Lodged With Clerk Not Returnable: Under section 37-103, R.C.M. 1947 (now repealed), after referendum petitions had been lodged with the County Clerk they could not be returned by him to the persons delivering them, since he was required to forward them, with certificate attached, to the Secretary of State. State ex rel. Holloran v. McGrath, 104 M 490, 67 P2d 838 (1937).

Referendum Petitions Open to Inspection by Public: Irrespective of whether or not referendum petitions constitute public records and as such are open to inspection, they are "other matters" within the meaning of 2-6-104, which declares that "public records and other

matters in the office of any officer" are open to the inspection of any person during office hours. Therefore, mandamus is proper to compel the County Clerk to permit inspection. State ex rel. Holloran v. McGrath, 104 M 490, 67 P2d 838 (1937).

13-27-301. Submission of petition sheets — withdrawal of signatures.

Compiler's Comments

2003 Amendment: Chapter 323 in (1) near beginning inserted "with original signatures"; inserted (2) relating to use of copies for facsimiles; and made minor changes in style. Amendment effective July 1, 2003.

1991 Amendment: Near end of (1) increased from 2 weeks to 4 weeks the minimum time for submission of signed petitions to county officials.

1987 Codification: Section 15, Ch. 298, L. 1987, was codified as (2).

Collateral References

Statutes *key* 315, 355.
82 C.J.S. Statutes §129.
42 Am. Jur. 2d Initiative and Referendum §33.

13-27-302. Certification of signatures.

Compiler's Comments

2003 Amendment: Chapter 323 in text of affidavit sample near beginning substituted "person who is the signature gatherer), swear that I gathered or assisted in gathering the signatures on the petition to which this affidavit is attached on the stated dates" for "person who circulated this petition), swear that I circulated or assisted in circulating the petition to which this affidavit is attached", inserted provision for date first signature was gathered, and in both places under signature lines substituted "signature gatherer" for "circulator"; and made minor changes in style. Amendment effective July 1, 2003.

2001 Amendment: Chapter 537 in affidavit form near end of paragraph after "registered at the address" inserted "or have the telephone number"; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 51 near beginning of petition form after "petition)" substituted "swear" for "affirm, or being first sworn, depose and say" and near end after "day of ....." substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

1981 Amendment: Inserted "are the signatures of Montana electors who are registered at the address following their signature" near the middle of the affirmation; inserted "address of petition circulator" following affirmation; made minor changes in phraseology.

Case Notes

Challenging Qualifications of Signers: Section 37-103, R.C.M. 1947 (now repealed), did not purport to make the County Clerk's certificate conclusive. Therefore, the qualifications of persons signing the petition could be inquired into by the courts if the question was presented before the election. Martin v. Highway Comm'n, 107 M 603, 88 P2d 41 (1939).

Manner of Withdrawal of Signatures: Certification of petitions for the withdrawal of signatures appearing on petitions for initiation of a measure, in the form prescribed by section 37-103, R.C.M. 1947 (now repealed), for certification of original petitions, was prima facie sufficient to show qualification and genuineness of signatures. Ford v. Mitchell, 103 M 99, 61 P2d 815 (1936).

Collateral References

Statutes *key* 312, 352.
82 C.J.S. Statutes §125.
42 Am. Jur. 2d Initiative and Referendum §28.

13-27-303. Verification of signatures by county official — allocating voters following reapportionment — duplicate signatures.

Compiler's Comments

2003 Amendment: Chapter 323 in (2) near beginning substituted "referendum or a call of a constitutional convention" for "ballot issue". Amendment effective July 1, 2003.

1995 Amendment: Chapter 374 in (2), near middle after "before", substituted "the first gubernatorial election following the filing of" for "members of the house of representatives have been elected and qualified under" and at end substituted "new districts must be used with the number of signatures needed for each legislative representative district being the total votes cast

for governor in the last gubernatorial election divided by the number of legislative representative districts" for "legislative representative districts among which the signatures must be allocated must be those in existence when the plan was filed". Amendment effective April 12, 1995.

1987 Amendment: At beginning of (1) substituted "Except as required by 13-27-104, within 4 weeks after receiving the sheets or sections of a petition, the county official" for "The county official receiving the sheets or sections of a petition"; and inserted (3) allowing, upon discovery of fraudulent or duplicate signatures, submission of names to County Attorney for investigation.

Case Notes

Address on Petition for Identification Purposes Only: The only purpose of the address on a petition for a proposed initiative is to aid the Clerk and Recorder in the identification of the signer for certification of the signature. State ex. rel. Miller v. Murray, 183 M 499, 600 P2d 1174 (1979).

No Mandamus to Certify Signatures: A Writ of Mandate may not be issued to control discretion, absent an abuse thereof. The function of the County Clerk and Recorder in deciding if signatures on a petition for a ballot issue are "signed in substantially the same manner" as the signatures on the voter registry cards involves the exercise of discretion. Therefore, the District Court properly refused to issue a Writ to compel the certification of certain signatures. State ex rel. Miller v. Murray, 183 M 499, 600 P2d 1174 (1979).

Attorney General's Opinions

Address on Petition Different From That on Voter Registry Card: A signature of a properly registered voter on a petition for a ballot measure should not be disqualified if the address on the petition is not the same as the address on the voter registry card. 39 A.G. Op. 50 (1982).

Collateral References

Statutes *key* 315, 345.
82 C.J.S. Statutes §124.
42 Am. Jur. 2d Initiative and Referendum §28.

13-27-304. County official to forward verified sheets.

Compiler's Comments

2003 Amendment: Chapter 323 in body of form after "Representative District No. ___" inserted "or the County of _____", after "district" inserted "or county", and after "telephone number" deleted "and legislative representative district number"; and made minor changes in style. Amendment effective July 1, 2003.

2001 Amendment: Chapter 537 in certificate form near end of paragraph after "post-office address" inserted "residence address, or telephone number". Amendment effective October 1, 2001.

Collateral References

Statutes *key* 315, 355.
82 C.J.S. Statutes §125.
42 Am. Jur. 2d Initiative and Referendum §34.

13-27-306. Challenge to signatures by elector of county.

Case Notes

Challenging Qualifications of Signers:

When the charge was made that the Secretary of State counted signatures not properly certified and that if the signatures so disputed were not counted there would not have been the required number for the petition to be certified, such charge had to be made before the election and became immaterial after the general election. State ex rel. Graham v. Bd. of Examiners, 125 M 419, 239 P2d 283 (1952).

Section 37-103, R.C.M. 1947 (now repealed), did not purport to make the County Clerk's certificate conclusive, and the qualifications of persons signing the petition could be inquired into by the courts if the question was presented before the election. Martin v. Highway Comm'n, 107 M 603, 88 P2d 41 (1939).

Collateral References

Statutes *key* 315, 355.
82 C.J.S. Statutes §128.
42 Am. Jur. 2d Initiative and Referendum §36.

13-27-307. Consideration and tabulation of signatures by secretary of state.

Compiler's Comments

2003 Amendment: Chapter 323 in (1) at end of first sentence deleted "and each certificate is prima facie evidence of the facts stated in the certificate" and inserted second, third, and fourth sentences relating to rejection of petitions; in (2) in body of certificate before "legislative district" substituted "or" for "and"; and made minor changes in style. Amendment effective July 1, 2003.

1999 Amendment: Chapter 51 in (2) in first paragraph of form after "acquainted with" substituted "all" for "each", after "affixed to the" substituted "attached" for "annexed", after "I know" deleted "of my own knowledge", and near end after "day of ....." substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

Case Notes

Challenging Qualifications of Signers: When the charge was made that the Secretary of State counted signatures not properly certified and that if the signatures so disputed were not counted there would not have been the required number for the petition to be certified, such charge had to be made before the election and became immaterial after the general election. State ex rel. Graham v. Bd. of Examiners, 125 M 419, 239 P2d 283 (1952).

Difference in Text of Petitions: When two petitions differ substantially in text of the proposed law, they could not be considered as parts of one petition for the purpose of the sufficiency of the number of signatures. Ford v. Mitchell, 103 M 99, 61 P2d 815 (1936).

Collateral References

Statutes *key* 315, 355.
82 C.J.S. Statutes §123.
42 Am. Jur. 2d Initiative and Referendum §§33, 34.

13-27-308. Certification of petition to governor.

Case Notes

Definition of "Immediately": Under section 37-104, R.C.M. 1947 (now repealed), the expression "immediately upon the filing" meant not at once, but within sufficient time reasonably and accurately to perform the duties. Ford v. Mitchell, 103 M 99, 61 P2d 815 (1936).

Collateral References

Statutes *key* 315, 355.
82 C.J.S. Statutes §125.
42 Am. Jur. 2d Initiative and Referendum §33.

13-27-310. Transmittal of ballot forms to attorney general.

Case Notes

Specific Intent to Place Referendum on Primary Ballot as Overriding General Filing Time Provisions: Petitioners argued that because a legislative referendum was passed less than 6 months before the special election at which it was, by order of the Legislature, to be placed on the ballot and because the referendum was therefore necessarily submitted to the Attorney General less than the 6 months before the election required by subsection (2) of this section, it should be removed from the ballot as violative of the time constraints in subsection (2) of this section. However, the statement of particular intent in the referendum that the measure appear on the special election ballot controlled over the statement of general intent in this section, and a petition for a writ of injunction preventing placement of the measure on the ballot was therefore denied. State ex rel. Gould v. Cooney, 253 M 90, 831 P2d 593, 49 St. Rep. 410 (1992).

13-27-311. Publication of proposed constitutional amendments.

Case Notes

Initiative Amendment Void — Material Language Difference — Improper Publication Procedures: The language of an amendment to Art. II, sec. 16, Mont. Const., as filed and certified by the Secretary of State, was not the same language submitted to the voters at the election. Because the difference in language was material and because publication of the proposed initiative prior to election did not follow constitutional mandates, the purported amendment was held to be void. State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 227 M 85, 738 P2d 1255, 44 St. Rep. 913 (1987). Petitions for rehearing, reconsideration, and clarification denied, 44 St. Rep. 929A (1987).

Summary of Constitutional Amendment Insufficient: Article XIV, sec. 9, Mont. Const., requires "the amendment" in a constitutional initiative to be published as provided by law. The

provision in 13-27-311 that "[a] summary of the amendment" would suffice itself constitutes an amendment to the constitution insofar as initiatives are concerned and should not be allowed. Any initiative amendment adopted in this statutory manner is void. State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 227 M 85, 738 P2d 1255, 44 St. Rep. 913 (1987). Petitions for rehearing, reconsideration, and clarification denied, 44 St. Rep. 929A (1987).

Referenda: Legislature, by repealing section 537, R.C.M. 1935, and leaving in effect section 23-201, R.C.M. 1947 (now repealed), requiring publication of proposed constitutional amendments, indicated its intent to dispense with publication prior to general election both of legislative acts referred to the people by the Legislature and of the Governor's proclamation that such act would be voted upon at such election. Nordquist v. Ford, 112 M 278, 114 P2d 1071 (1941).

Collateral References

Statutes *key* 319, 359.
82 C.J.S. Statutes §135.
42 Am. Jur. 2d Initiative and Referendum §37.

13-27-312. Review of petition by attorney general — preparation of statements — fiscal note.

Compiler's Comments

2003 Amendment: Chapter 132 in (4) inserted second sentence requiring that statements of implication be written so that a positive vote indicates support and a negative vote indicates opposition; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 191 in first sentence in (1) inserted "legal sufficiency, as provided in 13-27-202"; inserted (8) requiring attorney general to forward to secretary of state within 30 days determination regarding legal sufficiency if petition form is approved; and made minor changes in style. Amendment effective October 1, 1999.

Applicability: Section 5, Ch. 191, L. 1999, provided: "[This act] applies to initiative petitions submitted to the secretary of state after October 1, 1999."

1991 Amendment: In (2), in second sentence, substituted "shall prepare" for reference to appointment by Attorney General of a five-member committee to recommend the statement of purpose and statement of implication; deleted former (2) that read: "(2) The attorney general may accept, reject, or modify the statements recommended by the committee. If the committee is unable to recommend one or both statements, the attorney general shall prepare the statements"; in (5), after "purpose", deleted "prepared pursuant to subsection (1) or (2)"; in (6), near beginning after "similar to", inserted "but not limited to"; in (7), in first sentence, increased from 10 days to 21 days the time allowed Attorney General to forward comments if a petition is rejected; and made minor change in style.

1985 Amendment: Deleted brackets around entire (3); bracketed subsection was amendatory language in Ch. 336, L. 1981, to former subsection (2) which was deleted by Ch. 488, L. 1981. The Code Commissioner had included the language in brackets in 1981 because it appeared to reflect a separable concept not in conflict with Ch. 488 and the apparent intent was to incorporate the concept into the law.

1981 Amendments — Composite Section: Chapter 336 inserted the material relating to fiscal liability and a fiscal note after "petition as to form" in the first sentence through "completing the fiscal note" in the second sentence in (1); inserted subsection (3) referring to fiscal statement; and inserted "and the fiscal statement if applicable" after "implication" in (7).

Chapter 488 rewrote subsection (1), adding subsections (1)(a) and (1)(b) to change a requirement that attorney general prepare a statement explaining the purpose of the measure and a separate requirement that he prepare a statement of the implication of a vote for or against a ballot issue to a requirement that the attorney general "seek out parties on both sides of the issue and obtain their advice" and ", if he deems it necessary, appoint a five member committee to recommend the statements" and inserted provisions relating to committee composition and manner of arriving at statements and requisites for statements in (1); inserted (2) allowing attorney general to accept, reject, or modify statements or to prepare statements in certain cases; and inserted (4) requiring statements of purpose and implication to be true and unbiased.

In preparation of the composite of the Ch. 336 and Ch. 488 amendments to this section, the Code Commissioner omitted from the composite the Ch. 336 amendment to former subsection (2) which raised the restriction in the number of words allowable in a statement of implication prepared by the attorney general from 25 to 50 words because former subsection (2) was entirely

deleted by Ch. 488, which is in the nature of a repealer (see 1-2-204) and the increase directly conflicts with the new language of subsection (1)(b), which was added by Ch. 488, specifically designating the number of words allowable. Any inconsistency between the official enrolled bill and the MCA is to be resolved in favor of the official enrolled bill (see 1-11-103).

Case Notes

Sufficiency of Title of 1988 Welfare Referendum — Applicable Standard: The title of a referendum "allowing the legislature greater discretion to determine the eligibility, duration, and level of economic assistance and social services to those in need" was found by the Supreme Court to be legally sufficient after applying the constitutional requirement of clarity of title set out in Art. V, sec. 11, Mont. Const., and employing the rules of construction developed under State ex rel. Wenzel v. Murray, 178 M 441, 585 P2d 633 (1978), and St. v. McKinney, 29 M 375, 74 P 1095 (1904). The court refused to intervene to remove the referendum from the ballot prior to a vote of the people so as not to violate the constitutional rights of popular sovereignty and self-government. Recognizing important distinctions between the processes of referendum and initiative, the standard applied to the referendum was the same applied to examination of the title of other products of the Legislature. The court affirmed the District Court finding of no statutory authority for preelection nullification of a legislative referendum and noted a strong presumption in favor of the constitutionality of legislative enactments. The ballot language was not purposely misleading and sufficiently identified the measure to provide for an informed vote. Harper v. Greely, 234 M 259, 763 P2d 650, 45 St. Rep. 1889 (1988), distinguishing State ex rel. Steen v. Murray, 144 M 61, 394 P2d 761 (1964), and State ex rel. Harper v. Waltermire, 213 M 425, 691 P2d 826, 41 St. Rep. 2212 (1984). See also State ex rel. Boese v. Waltermire, 224 M 230, 730 P2d 375, 43 St. Rep. 2156 (1986), and T&W Chevrolet v. Darvial, 196 M 287, 641 P2d 1368 (1982).

Initiative Amending Montana Major Facility Siting Act: The Attorney General's explanatory statement regarding Initiative 80, empowering voters to approve or reject any proposed nuclear power facility, did not have to contain the word "ban" or a word of like import. State ex rel. Wenzel v. Murray, 178 M 441, 585 P2d 633 (1978).

Misleading Summary of Proposed Initiative: Under section 32-104.1, R.C.M. 1947 (now repealed), an Attorney General's summary of a proposed initiative which could mislead the voters because it is not a "true and impartial statement of the purpose of the measure in plain, easily understood language" is improper. Jordan v. Murray, 171 M 29, 554 P2d 749 (1976).

Revisions of Attorney General's Summary: Section 37-106, R.C.M. 1947 (now repealed), gave the Attorney General the authority to revise his summary of a proposed initiative. Jordan v. Murray, 171 M 29, 554 P2d 749 (1976).

Length of Title: Although section 37-105, R.C.M. 1947 (now repealed), limited the title of an act referred to the people to 100 words, the fact that Ch. 168, L. 1939, contained 138 words, a point not raised until after the people had approved the act, was merely a procedural defect and as such insufficient to invalidate it, particularly so in view of Ch. 45, L. 1941, validating all bond issues theretofore authorized, thus including the issue for erection of buildings at the State Hospital for the Insane. Nordquist v. Ford, 112 M 278, 114 P2d 1071 (1941).

Legal Requirements Mandatory — Injunction: The law prescribes the necessary steps for submission of an initiative measure to the voters. Such steps are mandatory and must be followed. Under section 37-105, R.C.M. 1947 (now repealed), which required the title to be "descriptive", the title attached to the proposed Initiative Measure No. 39, the "chain store law", under the facts presented was not "descriptive" but deceptive for various reasons. The Supreme Court had jurisdiction to entertain proceeding to enjoin the Secretary of State from certifying the measure to the County Clerks, and a Writ of Injunction was issued. Sawyer Stores, Inc. v. Mitchell, 103 M 148, 62 P2d 342 (1936).

Collateral References

Statutes *key* 320, 360.
82 C.J.S. Statutes §133.
42 Am. Jur. 2d Initiative and Referendum §40.

13-27-313. Review of ballot forms by attorney general.

Collateral References

Statutes *key* 320, 360.
82 C.J.S. Statutes §133.
42 Am. Jur. 2d Initiative and Referendum §40.

13-27-315. Statements by attorney general on issues referred by legislature.

Compiler's Comments

1981 Amendment: Inserted (1) requiring fiscal note and fiscal statement in certain cases.

Collateral References

Statutes *key* 320, 360.
82 C.J.S. Statutes §134.
42 Am. Jur. 2d Initiative and Referendum §40.

13-27-316. Court review of attorney general opinion or statements.

Compiler's Comments

2001 Amendment: Chapter 537 in (1) near middle after "within 10 days of" substituted "the secretary of state's or attorney general's determination" for "receipt of the notice from the secretary of state or of the attorney general's determination". Amendment effective October 1, 2001.

1999 Amendment: Chapter 191 in (1) near middle after "13-27-312" inserted "or believe that the attorney general was incorrect in determining that the petition was legally deficient", after "secretary of state" inserted "or of the attorney general's determination regarding legal sufficiency", after "adequacy of statement" inserted "or the attorney general's determination", and at end after "statement" inserted "or modify the attorney general's determination"; in middle of (2) after "13-27-312" inserted "or believe that the attorney general was incorrect in determining that the petition was legally sufficient", near end after "statement" inserted "or the attorney general's conclusion", and at end after "alter the statement" inserted "or overrule the attorney general's determination concerning the legal sufficiency of the petition"; in second sentence in (3) after "challenged statement" inserted "or determination of the attorney general" and at end after "13-27-312" inserted "or an opinion as to the correctness of the attorney general's determination"; and made minor changes in style. Amendment effective October 1, 1999.

Applicability: Section 5, Ch. 191, L. 1999, provided: "[This act] applies to initiative petitions submitted to the secretary of state after October 1, 1999."

1981 Amendment: Inserted "or the fiscal statement" after "statements of implication of a vote" in (1) and (2).

Case Notes

Extent of Court Consideration of Constitutional Amendment Initiative: Unless it appears to be absolutely essential, the Supreme Court will not interfere with the right retained by the people to change the Montana Constitution by initiative, and an initiative will not be removed from the ballot prior to vote unless it is clearly unconstitutional on its face or has been improperly submitted. The court will not accept jurisdiction to decide if the statement of purpose and statement of implication are untrue unless the challenge procedure in 13-27-316 is followed. State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 224 M 273, 729 P2d 1283, 43 St. Rep. 2192 (1986).

Challenged Initiative Title — Reasonableness of Statutory Procedure for Judicial Review: While the 10-day period for filing a challenge to an initiative in District Court is not long, it provides a reasonable procedure for immediate access to the courts by initiative opponents to allow correction of a challenged title in time to allow the initiative to appear on the ballot. State ex rel. Boese v. Waltermire, 224 M 230, 730 P2d 375, 43 St. Rep. 2156 (1986). See also State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 224 M 273, 729 P2d 1283, 43 St. Rep. 2192 (1986).

Challenge of Multiplicitous Initiative Subjects — Procedural Review Requirements to Be Met: An opponent who challenges an initiative on the grounds that the title contains more than one subject, in violation of Art. V, sec. 11, Mont. Const., must meet the procedural review requirements of 13-27-316. State ex rel. Boese v. Waltermire, 224 M 230, 730 P2d 375, 43 St. Rep. 2156 (1986). See also State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 224 M 273, 729 P2d 1283, 43 St. Rep. 2192 (1986).

Reasonableness of Time Periods: Under 13-27-316(2), certification by the Secretary of State to the Governor of qualification for the ballot triggers the time in which opponents to the measure may act. The opponents have 10 days following certification to file a challenge in District Court. The opponent has the time from the petition's initiation until its certification to prepare the action but is not required to act until it qualifies for the ballot. The statutes then provide for immediate access to the courts. This is a reasonable procedure for challenging the sufficiency of the title of an initiative. St. ex rel. Boese v. Waltermire, 224 M 230, 730 P2d 375, 43 St. Rep. 2156 (1986).

Law Review Articles

Pre-Election Judicial Review of Initiatives and Referendums, Gordon & Magleby, 64 Notre Dame L. Rev. 298 (1989).

Collateral References

Statutes *key* 320, 360.

82 C.J.S. Statutes §138.

42 Am. Jur. 2d Initiative and Referendum §40.

Capacity of taxpayers to maintain suit to enjoin submission of initiative, referendum, or recall measure to voters. 6 ALR 2d 557.

Part 4
Voter Information Pamphlets

Part Administrative Rules

Title 44, chapter 3, subchapter 13, ARM Voter information pamphlet.

Part Collateral References

Statutes *key* 319, 359.

82 C.J.S. Statutes §135.

42 Am. Jur. 2d Initiative and Referendum §37.

13-27-401. Voter information pamphlet.

Compiler's Comments

1993 Amendment: Chapter 390 inserted (4) authorizing Secretary of State to prescribe by rule format and manner of submission of arguments concerning ballot issue; and made minor changes in style. Amendment effective July 1, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 390, L. 1993, provided: "A statement of intent is required for this bill because 13-27-401 authorizes the secretary of state to prescribe the format for the voter information pamphlet. These rules must permit the orderly, efficient presentation of the arguments that will help in reducing the costs of preparation of the voter information pamphlet."

1981 Amendment: Inserted "fiscal statement if applicable" in (1)(a).

Severability Clause: Section 75, Ch. 365, L. 1977, was a severability clause.

Case Notes

Initiative Amendment Void — Material Language Difference — Improper Publication Procedures: The language of an amendment to Art. II, sec. 16, Mont. Const., as filed and certified by the Secretary of State, was not the same language submitted to the voters at the election. Because the difference in language was material and because publication of the proposed initiative prior to election did not follow constitutional mandates, the purported amendment was held to be void. State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 227 M 85, 738 P2d 1255, 44 St. Rep. 913 (1987). Petitions for rehearing, reconsideration, and clarification denied, 44 St. Rep. 929A (1987).

Law Review Articles

Constitutional Initiative 30: What Constitutional Rights Did Montanans Surrender in Hopes of Securing Liability Insurance?, Burke, 48 Mont. L. Rev. 53 (1987).

13-27-402. Committees to prepare arguments for and against ballot issues.

Compiler's Comments

1999 Amendment: Chapter 374 in (2) at beginning substituted "committee advocating approval of a legislative act referred to the people either by the legislature or by referendum petition or advocating approval of a constitutional amendment referred by the legislature" for "committees"; deleted former (2)(c)(i) and (2)(c)(ii) that read: "(i) the committee advocating approval of an act referred to the people or of a constitutional amendment proposed by the legislature; or

(ii) the committee advocating approval of an act referred to the people by referendum petition"; in (4)(b) after "rejection of any" deleted "ballot issue that is a"; in (5) at beginning of last sentence substituted "If possible" for "All"; in (6) in first sentence inserted exception for legislative appointments; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 47 in (6) inserted second sentence allowing filling of vacancy by unanimous written consent in certain cases; and made minor changes in style. Amendment effective March 13, 1997.

1987 Amendment: Renumbered (1)(a) through (1)(d) as (2) through (5); renumbered (2) as (6); near beginning of (2) inserted "following committees"; near beginning of (3) substituted "an act" for "a ballot issue" and inserted "of a constitutional amendment" before "proposed by the legislature"; at beginning of (4) inserted "The following shall be"; at end of (6) inserted "and the person making an appointment must have written acceptance of appointment from the appointee"; and made minor changes in style and phraseology.

1983 Amendment: Inserted (2) allowing persons to refuse to serve on committees.

13-27-403. Appointment to committee.

Compiler's Comments

1997 Amendment: Chapter 47 in (1), near end after "later than", substituted "1 week prior to the deadline for filing arguments on the ballot issue under 13-27-406" for "6 months before the election at which the ballot issue will be voted on by the people"; in (2), at end of first sentence, substituted "must be made no later than 1 week before the deadline for filing arguments on the ballot issue under 13-27-406" for "that is approved less than 7 months before the election at which the ballot issue will be voted on by the people shall be made no later than 30 days after the measure is approved for circulation by the secretary of state" and inserted fourth sentence allowing filling of vacancy by unanimous written consent in certain cases; substituted (3) regarding notice provisions for former language that read: "All appointees to a committee pursuant to subsection (1) must be notified by the secretary of state by certified mail, with return receipt requested, no later than 5 days after the deadline set for appointment of committee members, of the deadlines for submission of the committee's arguments"; deleted former (4) and (5) that read: "(4) All appointees to a committee pursuant to subsection (2) must be notified by the secretary of state by certified mail, with return receipt requested, no later than 35 days after the petition has been approved for circulation, of the deadlines for submission of the committee's arguments.

(5) Committees appointed under subsections (2)(b), (4), and (5) of 13-27-402 must be vacated and have no further obligation if the ballot measure for which they were appointed fails to receive sufficient signatures to place it on the ballot. The secretary of state shall notify the committee members of the failure of a ballot measure to receive sufficient signatures no later than 3 days after the filing deadline set in 13-27-104"; and made minor changes in style. Amendment effective March 13, 1997.

1991 Amendment: In (1), at beginning, inserted exception clause and after "legislature" inserted "or a ballot measure referred to the people by referendum petition or proposed by any type of initiative petition"; in (2), in first sentence after "initiative petition", inserted "that is approved less than 7 months before the election at which the ballot issue will be voted on by the people"; and made minor changes in style.

1987 Amendment: In (1) increased time to 6 months from 4 months; at end of (1) deleted "All persons responsible for appointing members to such committees shall submit to the secretary of state the names and addresses of three prospective appointees for each position, set forth in the order of preference of appointment, no later than 3 weeks before the deadline for making such appointments"; in first sentence of (2) increased time to 30 days from 10 days, at end of first sentence substituted "approved for circulation by the secretary of state" for "certified to the governor", and at end of second sentence substituted "the appointees no later than the date set by this subsection. Such submission must include the written acceptance of appointment from each appointee required by section 13-27-402(6)" for "two prospective appointees for each position, set forth in the order of preference of appointment, no later than 2 weeks after the final date for filing the petition in accordance with 13-27-301"; near beginning of (3) deleted "prospective" before "appointees"; at end of (3) substituted "no later than 5 days after the deadline set for appointment of committee members, of the deadlines for submission of the committee's arguments" for "at least 15 days before the appointment deadline specified in subsection (1). A prospective appointee may assent or decline to serve on the committee by so informing the secretary of state. Lack of response to the secretary of state for any reason 10 days after mailing of notice is considered to be refusal of appointment"; near beginning of (4) deleted "prospective" before "appointees"; at end of (4) substituted "no later than 35 days after the petition has been approved for circulation, of the deadlines for submission of the committee's arguments" for "at least 8 days before the appointment deadline specified in subsection (2). A prospective appointee may assent or decline to serve on the committee by so informing the secretary of state. Lack of

response to the secretary of state for any reason 5 days after mailing of notice is considered to be refusal of appointment"; and substituted (5), providing that committees be vacated if ballot measure fails to receive sufficient signatures to place it on ballot and that Secretary of State notify committee members of such failure, for former language that read: "The secretary of state shall determine which of the prospective appointees assenting to serve on the committee shall be appointed, according to the order of preference specified by the appointing authority, and shall so notify all prospective appointees by the appointment deadline specified in subsection (1) or (2), respectively."

1983 Amendment: In (1), in first sentence after "shall be" changed "filed with the secretary of state" to "made" and inserted second sentence referring to submission of names of proposed appointees to committees advocating approval or rejection of a constitutional amendment an act referred to the people; in (2) in first sentence after "shall be" changed "filed with the secretary of state" to "made" and substituted second sentence, referring submission of names of proposed appointees to committees advocating approval or rejection of a ballot measure referred by referendum or proposed by initiative, for former second sentence which read: "At the same time the certification of the sufficiency of a petition is made to the governor, the secretary of state shall notify all persons responsible for appointing members of committees advocating approval or rejection of the issues of the date by which such appointments must be filed in his office"; and inserted (3) referring notice to and response from appointees to committees advocating approval or rejection of an act referred to people of a constitutional amendment; inserted (4) referring to notice to and response from appointees to committees advocating approval or rejection of ballot measure referred by referendum or proposed by initiative; and inserted (5) referring to Secretary of State's determination of appointments.

13-27-406. Limitation on length of argument — time of filing.

Compiler's Comments

1999 Amendment: Chapter 374 in first sentence inserted "side of a single" and inserted second, third, and fourth sentences limiting argument to written material prepared in a font and type style prescribed by the secretary of state; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 47 in first sentence, after "limited to", substituted "a single 7 ½-inch by 10-inch page and must be filed, in a black-and-white, camera-ready format" for "500 words and must be filed, in typewritten form". Amendment effective March 13, 1997.

1995 Amendment: Chapter 119 increased time for submitting arguments advocating acceptance or rejection of a ballot measure from 85 days to 105 days; and made minor changes in style.

13-27-407. Rebuttal arguments.

Compiler's Comments

1999 Amendment: Chapter 374 inserted second, third, and fourth sentences limiting argument to written material prepared in a font and type style prescribed by the secretary of state; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 47 in second sentence, after "longer than", substituted "one-half the size of the arguments under 13-27-406 that must be filed, in a black-and-white, camera-ready format" for "250 words that shall be filed, in typewritten form"; and made minor changes in style. Amendment effective March 13, 1997.

13-27-410. Printing and distribution of voter information pamphlet.

Compiler's Comments

2003 Amendment: Chapter 475 in (4) inserted second sentence providing that the mailing label may include an address line and in third sentence substituted "30 days" for "2 weeks". Amendment effective January 1, 2004.

1999 Amendment: Chapter 208 in (4) inserted "who is on the active voter list". Amendment effective March 30, 1999.

1995 Amendment: Chapter 119 increased time for requisition of voter information pamphlet from 90 days to 110 days before an election; increased time for printing and shipping of voter information pamphlet from 30 days to 45 days before an election; and made minor changes in style.

1993 Amendment: Chapter 390 at end of second sentence in (4), after "weeks", substituted "before the election" for "after the pamphlets are received from the printer"; and made minor changes in style. Amendment effective July 1, 1993.

Part 5
Election Procedure

13-27-501. Secretary of state to certify ballot form — abbreviated ballot.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) near beginning after "for preparation" deleted "and printing"; and made minor changes in style. Amendment effective October 1, 2003.

1983 Amendment: In (2), substituted "Except as provided in subsection (4)" for "Unless otherwise provided in the legislative act or petition placing the issue on the ballot"; and in (3) inserted "when required to do so" in two places in opening paragraph; inserted (4) providing for abbreviated ballot and which was enacted as a separate section by sec. 2, Ch. 669, L. 1983.

1981 Amendment: Inserted in list of requirements "the fiscal statement if applicable".

Case Notes

Injunction of Improper Ballot: When proposed ballot for an initiative measure did not meet statutory requirements, the Secretary of State could be enjoined from certifying the measure to the County Clerks. Sawyer Stores, Inc. v. Mitchell, 103 M 148, 62 P2d 342 (1936).

Collateral References

Statutes *key* 317.
82 C.J.S. Statutes §§137, 138.
42 Am. Jur. 2d Initiative and Referendum §40.

13-27-502. Preparation of ballots with ballot issues.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) near beginning substituted "the preparation of the ballots shall provide for the ballot issues to appear" for "the preparation and printing of the ballots shall print the ballot issues"; in (2) in first sentence substituted current text concerning placement of ballot issues on ballot for former text that read: "All ballot issues shall be placed on the official ballot prescribed by 13-12-207, 13-12-212, and 13-17-206 unless specific written approval by the secretary of state for placing the ballot issues on a separate ballot is received by the official responsible for printing the ballot" and in second sentence at end substituted "the same official ballot as the candidates" for "the official ballot as prescribed by 13-12-207, 13-12-212, and 13-17-206"; and made minor changes in style. Amendment effective October 1, 2003.

1981 Amendment: Substituted "13-12-207, 13-12-212, and 13-17-206" for "13-12-212, 13-17-205, and 13-17-206, or 13-18-201 through 13-18-206" in two places.

Collateral References

Statutes *key* 320, 360.
82 C.J.S. Statutes §138.
42 Am. Jur. 2d Initiative and Referendum §40.

13-27-503. Determination of result of election.

Compiler's Comments

1981 Amendment: Substituted "board of state canvassers" for "state board of canvassers"; made minor change in punctuation.

Collateral References

Statutes *key* 321, 361.
82 C.J.S. Statutes §§142, 143.
42 Am. Jur. 2d Initiative and Referendum §37.

13-27-504. Copy of approved issues to be sent to legislative services division.

Compiler's Comments

1995 Amendment: Chapter 545 near middle substituted "legislative services division" for "executive director of the legislative council"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

CHAPTER 35
ELECTION AND CAMPAIGN PRACTICES AND CRIMINAL PROVISIONS

Chapter Compiler's Comments

Preamble: The preamble attached to Ch. 414, L. 2003, provided: "WHEREAS, the U.S. Supreme Court in Bush v. Gore, 531 U.S. 98 (2000), found that the lack of uniform procedures for determining voter intent in Florida during the 2000 presidential election led to a violation of the U.S. Constitution's Equal Protection Clause of the 14th Amendment; and

WHEREAS, at the request of the 57th Legislature, the State Administration and Veterans' Affairs Interim Committee devoted much of the 2001-2002 interim to a review of Montana election laws with respect to voting systems and counting processes in light of Bush v. Gore; and

WHEREAS, the interim study found that Montana's statutory provisions relating to ballots, voting systems, and vote counting processes needed to be updated, clarified, and in some instances revised to better define uniform standards and procedures to provide equal protection for votes cast by Montana voters; and

WHEREAS, the Subcommittee on Voting Systems of the State Administration and Veterans' Affairs Interim Committee agreed that statutory changes should be made with an eye on future technology but should also standardize current practices to the greatest extent possible.

THEREFORE, this legislation will enable the Secretary of State to adopt a statewide benchmark performance measure that voting systems must meet before they can be approved for use in the state; allow local election administrators to continue to choose which of the approved voting systems should be used locally; require the Secretary of State to adopt uniform statewide rules regarding ballot form, votes and vote counts, and other operational procedures specific to each voting system and to provide training to local election administrators; and require all counting boards to use the uniform counting procedures specified."

Severability Clause: Section 48, Ch. 334, L. 1977, was a severability clause.

Chapter Administrative Rules

Title 44, chapter 10, ARM Commissioner of Political Practices.

Chapter Law Review Articles

Electoral Bribery (Special Edition on Electoral Regulation and Representation), Hughes, 7 Griffith L. Rev. 209 (1998).

Consideration of Illegal Votes in Legislative Election Contests, Junell, Seidlits, & Shuffler, 28 Tex. Tech L. Rev. 1095 (1997).

Lies My Politician Told Me: Friesen v. Hammel and the Nature of Election Fraud (British Columbia), Heard, 35 Alberta L. Rev. 1057 (1997).

Chapter Collateral References

Elections *key* 231, 309 through 332.

29 C.J.S. Elections §§323 through 356.

26 Am. Jur. 2d Elections §§465 through 495.

21 Am. Jur. POF Equal Broadcast Time for Political Candidates, pp. 513 through 549.

15 Am. Jur. Trials, Unfair Election Campaign Practices, pp. 1 through 146.

Criticism or disparagement of character, competence, or conduct of candidate for office as defamation. 37 ALR 4th 1088.

Election campaign activities as ground for disciplining attorney. 26 ALR 4th 170.

Liability of radio or television company for failure to afford equal time to political candidates. 31 ALR 3d 1448.

Political candidate's right to equal broadcast time under 47 U.S.C.S. §315. 35 ALR Fed. 856.

Constitutionality, construction, and application of 18 U.S.C.S. §610, prohibiting national banks, corporations, and labor organizations from making contributions or expenditures in connection with federal elections. 24 ALR Fed. 162.

Montana Campaign Finance and Practices Laws and Administrative Rules, Commissioner of Political Practices (January 2000).

Part 1
General Provisions

13-35-101. Election code not to supersede criminal code — statute of limitations.

Collateral References

Elections *key* 310, 311.

29 C.J.S. Elections §324.

26 Am. Jur. 2d Elections §466.

13-35-102. Trivial benefits not covered by criminal provisions.

Collateral References

Elections *key* 309, 316, 317.

29 C.J.S. Elections §324.

26 Am. Jur. 2d Elections §465.

13-35-103. Violations as misdemeanor.

Attorney General's Opinions

Servicepersons — Registration to Vote — Tax Liability: The fact that a member of the military service has registered to vote in Montana is evidence, though not conclusive proof, that he is a Montana resident and is thus not exempt, under the federal Soldiers' and Sailors' Civil Relief Act of 1940, from property and income taxation by Montana. Montana's election law requires one to be a resident of Montana before voting in the state's elections, so a serviceperson who has registered to vote in Montana (thereby claiming to be a resident) may not claim tax exemption under the federal Act without offering convincing evidence that he is in fact not a Montana resident after all. However, to claim he is not in fact a resident after having registered to vote in Montana would subject him to prosecution for the misdemeanor of fraudulent registration. 41 A.G. Op. 2 (1985).

Collateral References

Elections *key* 323, 332.

29 C.J.S. Elections §353.

13-35-104. Attempt as a violation.

Collateral References

29 C.J.S. Elections §336.

13-35-105. Aiding and abetting.

Collateral References

29 C.J.S. Elections §336.

13-35-106. Ineligibility to hold office because of conviction.

Collateral References

Elections *key* 231, 323.

29 C.J.S. Elections §353.

13-35-107. Voiding election.

Compiler's Comments

1985 Amendment: In (1) in first sentence, substituted "75 days" for "60 days".

Case Notes

Applicability: This section, prior to its amendment in 1979, did not apply to a case involving violations by election officials. The section only applied to violations by a candidate or political

committee. In re Recount of Ravalli County Primary Election, Petition of Thoft, 178 M 272, 583 P2d 430 (1978).

Political Party Selection: This section is permissive in empowering the Court to direct the appropriate political party to select a new candidate if a violation occurs during a primary election. The Court is not required to do so. In re Recount of Ravalli County Primary Election, Petition of Thoft, 178 M 272, 583 P2d 430 (1978).

Collateral References

Elections *key* 231.
29 C.J.S. Elections §353.
26 Am. Jur. 2d Elections §468.

13-35-108. Powers of district court.

Collateral References

Elections *key* 324 through 332.

Part 2
Specific Provisions

13-35-201. Electors and ballots.

Collateral References

Elections *key* 231, 312, 313.
29 C.J.S. Elections §324.
26 Am. Jur. 2d Elections §465.

13-35-202. Conduct of election officials and election judges.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) substituted "a paper ballot that is not marked as official" for "a ballot on which the official stamp, as provided by law, does not appear"; substituted (2) concerning examination of ballot for former (2) that read: "(2) prior to putting the ballot of an elector in the ballot box, attempt to find out any name on the ballot or open or examine the folded ballot of an elector"; and in (4) before "ballot" deleted "folded". Amendment effective October 1, 2003.

Collateral References

Elections *key* 228, 314.
29 C.J.S. Elections §§327, 340.
26 Am. Jur. 2d Elections §469.

13-35-203. Interference with officials.

Collateral References

Elections *key* 233, 319.
29 C.J.S. Elections §§330, 344.

13-35-204. Official misconduct.

Collateral References

Elections *key* 228, 231, 314.
29 C.J.S. Elections §§327, 340.
26 Am. Jur. 2d Elections §469.

13-35-205. Tampering with election records and information.

Compiler's Comments

2003 Amendment: Chapter 414 in (2) substituted "a vote" for "the vote on a machine"; in (4) substituted "completed by the elector" for "deposited in the ballot box"; and made minor changes in style. Amendment effective October 1, 2003.

Collateral References

Elections *key* 318.
29 C.J.S. Elections §§334, 349.
26 Am. Jur. 2d Elections §465.

13-35-206. Injury to election equipment, materials, and records.

Compiler's Comments

2003 Amendment: Chapter 414 in (2)(a) substituted "instructions for" for "the cards printed for the instruction of"; in (2)(b) substituted "voting station" for "booths or compartments"; in (4) inserted "or other equipment"; in (7) substituted "system with the intent to alter the outcome of an election" for "machine"; in (8) substituted "system" for "machine"; and made minor changes in style. Amendment effective October 1, 2003.

Collateral References

29 C.J.S. Elections §§334, 349.
26 Am. Jur. 2d Elections §465.

13-35-207. Deceptive election practices.

Collateral References

Elections *key* 228, 231, 317.
29 C.J.S. Elections §§326, 334, 349.
26 Am. Jur. 2d Elections §§465, 468, 469.

13-35-208. Deceiving an elector.

Compiler's Comments

1981 Amendment: Substituted "13-13-118 or 13-13-119" for "[13-13-108 or 13-17-303]".

Collateral References

Elections *key* 228, 231, 232, 317, 318.
29 C.J.S. Elections §§324, 346.
26 Am. Jur. 2d Elections §465.

13-35-209. Fraudulent registration.

Attorney General's Opinions

Servicepersons — Registration to Vote — Tax Liability: The fact that a member of the military service has registered to vote in Montana is evidence, though not conclusive proof, that he is a Montana resident and is thus not exempt, under the federal Soldiers' and Sailors' Civil Relief Act of 1940, from property and income taxation by Montana. Montana's election law requires one to be a resident of Montana before voting in the state's elections, so a serviceperson who has registered to vote in Montana (thereby claiming to be a resident) may not claim tax exemption under the federal Act without offering convincing evidence that he is in fact not a Montana resident after all. However, to claim he is not in fact a resident after having registered to vote in Montana would subject him to prosecution for the misdemeanor of fraudulent registration. 41 A.G. Op. 2 (1985).

Collateral References

Elections *key* 312.
29 C.J.S. Elections §§326, 342.
26 Am. Jur. 2d Elections §468.

13-35-210. Limits on voting rights.

Collateral References

Elections *key* 313.
29 C.J.S. Elections §§325, 341.
26 Am. Jur. 2d Elections §468.

13-35-211. Electioneering — soliciting information from electors.

Compiler's Comments

2001 Amendment: Chapter 401 in (1) near middle after "is being held or within" substituted "100 feet of any entrance to the building in which the polling place is located" for "200 feet thereof"; and made minor changes in style. Amendment effective October 1, 2001.

1989 Amendment: In (3), after "held", deleted "or within 200 feet thereof".

1985 Amendment: Inserted (3) prohibiting soliciting information from electors.

Administrative Rules

ARM 44.10.311 Interpretive rule defining "electioneering".

Attorney General's Opinions

Gathering Initiative Petition Signatures at Primary Election Polling Places The orderly gathering of initiative petition signatures at primary election polling places that does not interfere with the election process or obstruct voter access to the polling place may not be prohibited. Any interference with the initiative process must be narrowly construed in light of the state constitution's provisions guaranteeing an open initiative process. 39 A.G. Op. 62 (1982).

Law Review Articles

Clearing CBS, Inc. v. Smith [681 F. Supp. 794] From the Path to the Polls: A Proposal to Legitimize States' Interest in Restricting Exit Polls, 74 Iowa L. Rev. 737 (1989).

Exit Polls and the First Amendment, 98 Harv. L. Rev. 1927 (1985).

Collateral References

Elections *key* 231, 317.

26 Am. Jur. 2d Elections §467.

13-35-213. Preventing public meetings of electors.

Collateral References

Elections *key* 233, 234, 319.

29 C.J.S. Elections §§330, 344.

26 Am. Jur. 2d Elections §§473, 474.

13-35-214. Illegal influence of voters.

Collateral References

Elections *key* 228, 231, 316, 317.

29 C.J.S. Elections §§218, 332, 343.

26 Am. Jur. 2d Elections §§280 through 376, 470, 478, 483.

13-35-215. Illegal consideration for voting.

Collateral References

Elections *key* 228, 231, 316, 317.

29 C.J.S. Elections §§218, 332, 343.

26 Am. Jur. 2d Elections §§280 through 376, 470, 478, 483.

13-35-217. Officers not to influence voter.

Compiler's Comments

1981 Amendment: Deleted "or clerk of election" after "officer".

Collateral References

Elections *key* 228, 231, 314.

29 C.J.S. Elections §§220, 327, 340.

26 Am. Jur. 2d Elections §§469, 470 through 474, 478, 483.

13-35-218. Coercion or undue influence of voters.

Compiler's Comments

1981 Amendment: In (5) inserted "on election day" after "No person" at the beginning; and added "or engage in any solicitation of a voter within the room where votes are being cast or elsewhere in any manner which in any way interferes with the election process or obstructs the access of voters to or from the polling place" at the end.

Case Notes

Initiative Solicitation in School Polling Place Constitutional: Plaintiff was not allowed to gather signatures for an initiative petition on a general election day in a school building used as a polling place. The school district had a general policy prohibiting solicitation of any kind in school buildings. The District Court granted summary judgment to the school district. On appeal, the Supreme Court said that although this section permits some manner of solicitation at polling places on election day, it does not guarantee the right. The court found the initiative process to be within the protection of Montana's counterparts of the first amendment. This does not assure that the process may not be regulated, however. The court, relying on the time, place, and manner regulations on the right to use public places for expressive activity found in Grayned v. City of Rockford, 408 US 104 (1972), and Tinker v. Des Moines School District, 393 US 503 (1969), found that the school district's policy was not narrowly tailored to further its interests in undisrupted school functioning. The policy applied regardless of whether classes were being held and applied to all solicitors, regardless of whether they acted peaceably. Fear of disruption was

not sufficient to overcome the right to freedom of expression. The school district's policy was found unconstitutional. Dorn v. Bd. of Trustees, 203 M 136, 661 P2d 426, 40 St. Rep. 348 (1983).

Legislative Intent — Plain Meaning: Plaintiff was not allowed to gather signatures for an initiative petition on a general election day in a school building used as a polling place. The school district had a general policy prohibiting solicitation of any kind in school buildings. Plaintiff contended the policy violated this section by prohibiting solicitation permitted by that section. The Supreme Court held that its function in construing and applying statutes is to effect legislative intent. The primary tool for ascertaining intent is the plain meaning of the words used. The court properly refers to legislative history only when intent cannot be determined from the content of the statute. This section did not necessitate such an inquiry. The court held that it clearly and unambiguously proscribes a manner of solicitation which results in interference with the election process or obstructing access to and from the polls but in no way guarantees access to persons whose solicitation effects no interference or obstruction. The most that can be said is that some manner of solicitation at polling places on election day may be permitted. Dorn v. Bd. of Trustees, 203 M 136, 661 P2d 426, 40 St. Rep. 348 (1983).

Attorney General's Opinions

Gathering Initiative Petition Signatures at Primary Election Polling Places The orderly gathering of initiative petition signatures at primary election polling places that does not interfere with the election process or obstruct voter access to the polling place may not be prohibited. Any interference with the initiative process must be narrowly construed in light of the state constitution's provisions guaranteeing an open initiative process. 39 A.G. Op. 62 (1982).

Collateral References

Elections *key* 231, 234, 314, 316, 317, 320.
29 C.J.S. Elections §§220, 333, 344.
26 Am. Jur. 2d Elections §§280 through 376, 470 through 474, 478, 483.

13-35-220. Bribing members of political gatherings.

Compiler's Comments

Commissioner Correction: The Code Commissioner, 1979, changed an incorrect reference in subsection (2) from "45-7-101(2)" to "45-7-101(3)". This error resulted during recodification because of subsection renumbering in 45-7-101.

Collateral References

Elections *key* 230, 316.
29 C.J.S. Elections §§218, 332, 343.
26 Am. Jur. 2d Elections §§377, 470.

13-35-221. Improper nominations.

Collateral References

26 Am. Jur. 2d Elections §§465, 470.

13-35-225. Election materials not to be anonymous — statement of accuracy.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 415 in (1) at beginning of first sentence substituted "All" for "Whenever a person makes an expenditure for the purpose of financing", near middle after "bumper sticker" inserted "internet website", and after "conspicuously" substituted "include the attribution "paid for by" followed by" for "state", inserted second sentence requiring the attribution to be the name of the candidate when the expenditure is financed by the candidate, and in third sentence after "name" inserted "of the committee, the name of the committee treasurer" and after "address of the" inserted "committee or the committee"; inserted (3) concerning information required in printed election material; in (4) near beginning after "requirements of" substituted "subsections (1) through (3)" for "subsection (1)" and near end after "commissioner" inserted "of political practices"; in (5) near beginning of introductory clause after "required in" substituted "subsections (1) through (3)" for "subsection (1)", after "upon" substituted "discovery of or notification about" for "discovering", and after "omission, the" inserted "candidate responsible for the material or the"; in (5)(a) after "commissioner" inserted "of political practices" and after "5 days" inserted "of the discovery or notification"; in (5)(b) at end substituted "subsections (1) through (3)" for "subsection (1)"; inserted (5)(c) concerning withdrawal of noncompliant communications; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 419 in (1) at beginning of first sentence substituted "All" for "Whenever a person makes an expenditure for the purpose of financing" and near middle after "conspicuously" substituted "include the attribution "paid for by" followed by" for "state", inserted second sentence requiring the attribution to be the name of the candidate when the expenditure is financed by the candidate, and in third sentence after "name" inserted "of the committee, the name of the committee treasurer" and after "address of the" inserted "committee or the committee"; inserted (3) concerning information required in printed election material; in (4) near beginning after "requirements of" substituted "subsections (1) through (3)" for "subsection (1)", after "included, the" inserted "candidate responsible for the material or the", near end after "commissioner" inserted "of political practices", and after "information" substituted "or statement, at the time of" for "prior to"; in (5) near beginning of introductory clause after "required in" substituted "subsections (1) through (3)" for "subsection (1)", after "is" deleted "inadvertently", after "upon" substituted "discovery or notification about" for "discovering", and after "omission, the" inserted "candidate responsible for the material or the"; in (5)(a) after "5 days" substituted "of the discovery or notification" for "and make every reasonable effort to"; in (5)(b) at end after "compliance" deleted "with subsection (1)"; inserted (5)(c) concerning withdrawal of noncompliant communications; and made minor changes in style. Amendment effective October 1, 2003.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

1991 Amendments: Chapter 23 near middle of (1), after "conspicuously state", deleted "the name and address of the printer, if printed commercially, and". Amendment effective February 14, 1991.

Chapter 482 in (1) inserted second sentence requiring statement of party affiliation or inclusion of party symbol; and made minor changes in style.

1987 Amendment: In (2), near middle after "included", deleted "or if necessary information is inadvertently omitted" and at end inserted "prior to its public distribution"; and inserted (3) requiring notification and correction of omissions in information required on election materials.

Collateral References

Elections *key* 231, 317.

29 C.J.S. Elections §§215, 329, 346.

26 Am. Jur. 2d Elections §§376 through 384.

Validity and construction of state statute prohibiting anonymous political advertising. 4 ALR 4th 741.

13-35-226. Unlawful acts of employers and employees.

Compiler's Comments

2003 Amendment: Chapter 114 in (5) near middle substituted "13-37-128" for "13-27-128". Amendment effective October 1, 2003.

2001 Amendment: Chapter 401 in (2)(b) at end deleted former last sentence that read: "This section applies to corporations, individuals, and public officers and employees"; in (3) near beginning after "A person may not" deleted "attempt to"; in (5) substituted text regarding liability in civil action brought by commissioner or county attorney for former text that read: "Any person who violates the provisions of this section shall be fined an amount not to exceed $1,000, be imprisoned in the county jail for a term not to exceed 6 months, or both, for each separate offense"; and made minor changes in style. Amendment effective October 1, 2001.

1995 Amendment: Chapter 562 in (3) substituted "subject to 2-2-121" for "nothing in"; and made minor changes in style. Amendment effective July 1, 1995.

1983 Amendment: In (2), near beginning, after "employee to" substituted "support or oppose any political committee, the nomination or election of any person to public office, or the passage of a ballot issue" for "give money, service, or other thing of value to aid or promote any political committee or to aid or promote the nomination or election of any person to public office"; and in (3) near beginning after "solicit" substituted "support for or opposition to" for "any money, influence, service, or other thing of value or otherwise aid or promote" and near middle after "public office" inserted "or the passage of a ballot issue".

Collateral References

Elections *key* 231, 317.

29 C.J.S. Elections §§334, 346.

26 Am. Jur. 2d Elections §§478, 483.

13-35-227. Prohibited contributions from corporations.

Compiler's Comments

2003 Amendment: Chapter 59 in (1) at beginning deleted "Except as provided in subsection (4)" and in two places after "candidate" deleted "a ballot issue"; deleted former (1)(b) that read: "(b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations"; deleted former (4) that read: "(4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas and that:

(a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for-profit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for-profit corporations"; and made minor changes in style. Amendment effective March 5, 2003.

Preamble: The preamble attached to Ch. 59, L. 2003, provided: "WHEREAS, in Montana Chamber of Commerce v. Argenbright, 226 F3d 1049 (9th Cir. 2000), the Ninth Circuit Court of Appeals held that corporate wealth has not distorted the ballot issue process in Montana and that therefore the first amendment to the United States Constitution does not permit the section 13-35-227, MCA, provision that prohibits a corporation from making a contribution or expenditure in connection with a ballot issue."

1997 Amendment — Rejected: The amendments made by Ch. 294, L. 1997 (House Bill No. 575), were removed from this section because House Bill No. 575 was rejected by the electorate in an initative referendum held November 3, 1998.

Preamble: The preamble attached to I.M. No. 125 provided: "WHEREAS, corporations are not allowed to directly spend money to influence political candidate campaigns in Montana; and

WHEREAS, corporations are not allowed to directly contribute money to a political party in Montana; and

WHEREAS, the processes of initiative and referendum are a vital part of the political process in Montana; and

WHEREAS, corporations are not restricted in the direct use of corporate funds to support or oppose the adoption or rejection of ballot issues in Montana; and

WHEREAS, corporations are now making direct corporate expenditures of overwhelming amounts of money in Montana initiatives; and

WHEREAS, participation in the political system needs to be kept fair to citizens of normal financial means; and

WHEREAS, limitations on direct corporate contributions work toward that fairness.

NOW, THEREFORE, BE IT RESOLVED BY THE PEOPLE OF THE STATE OF MONTANA:

That the prohibition on the direct use of corporate funds in the Montana political process be expanded to prohibit direct corporate expenditures in support of or in opposition to initiative and referendum ballot issues."

Severability: Section 4, I.M. No. 125, was a severability clause.

Case Notes

Corporate Expenditures in Connection With Ballot Issues: The District Court did not clearly err in finding that corporate wealth has not distorted the ballot issue process in Montana and that the first amendment therefore does not permit this section's provision that prohibits a corporation from making a contribution or expenditure in connection with a ballot issue. The provision is unconstitutional. Mont. Chamber of Commerce v. Argenbright, 226 F3d 1049 (9th Cir. 2000).

Statutory Limits on Contributions to Ballot Issue Committees Held Unconstitutional: A city ordinance placing a $250 limit on contributions to committees formed to support or oppose ballot measures is an unconstitutional interference with the first amendment rights of association and free speech. Citizens Against Rent Control v. Berkeley, 454 US 290, 70 L Ed 2d 492, 102 S Ct 2d 434 (1981).

Corporate Free Speech — United States Constitution: The portion of this section (prior to 1979 amendment) that totally prohibited payments or contributions by corporations in support of or opposition to ballot issues was an unconstitutional restriction of corporate rights to free speech guaranteed by the first amendment to the United States Constitution (similar to Art. II, sec. 7, Mont. Const.). C & C Plywood Corp. v. Hanson, 583 F2d 421 (9th Cir. 1978), affirming 420 F. Supp. 1254 (D.C. Mont. 1976).

Law Review Articles

Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, Wright, 82 Colum. L. Rev. 609 (1982).

The Constitutionality of Limitations on Ballot Measure Contributions, Mueller & Parrinello, 57 N.D. L. Rev. 391 (1981).

Prohibition of Corporate Political Expenditures: The Effect of First National Bank v. Bellotti, 1979 Utah L. Rev. 95 (1979).

Corporations' Right to Free Speech in Referendum Elections: First National Bank v. Bellotti, 32 SW. L. J. 1359 (1979).

Collateral References

Elections *key* 231, 317.

29 C.J.S. Elections §§216, 329, 346.

26 Am. Jur. 2d Elections §§378, 483.

Power of corporation to make political contribution or expenditure under state law. 79 ALR 3d 491.

13-35-228. Prohibition of salary increase contribution.

Collateral References

Elections *key* 231, 317.

29 C.J.S. Elections §§334, 346.

26 Am. Jur. 2d Elections §§378, 483.

13-35-231. Unlawful for political party to endorse judicial candidate.

Collateral References

29 C.J.S. Elections §§324, 346.

26 Am. Jur. 2d Elections §465.

Part 3
Code of Fair Campaign Practices

13-35-301. Adoption of code of fair campaign practices.

Collateral References

Elections *key* 231, 317.

Criticism or disparagement of character, competence, or conduct of candidate for office as defamation. 37 ALR 4th 1088.

13-35-302. Candidates to be given opportunity to subscribe to campaign practices code.

Compiler's Comments

1993 Amendment: Chapter 128 at beginning of (1), after "commissioner of", substituted "political" for "campaign"; in (2) substituted first sentence concerning sending forms for former language that read: "Each candidate required to file statements or reports with the commissioner shall be sent a copy of this form"; in (3) deleted former first sentence that read: "The commissioner shall supply the secretary of state, the county registrars, and the city and town clerks with forms" and near end, after "from the commissioner", deleted "the secretary of state, a county registrar, or a city or town clerk"; and made minor changes in style.

Collateral References

Montana Campaign Finance and Practices Laws and Administrative Rules, Commissioner of Political Practices (January 2000).

CHAPTER 36
CONTESTS

Chapter Administrative Rules

ARM 44.10.307 Filing of complaints of violations with Commissioner of Political Practices.

Chapter Collateral References

Elections *key* 269 through 308.

29 C.J.S. Elections §§245 through 322.

26 Am. Jur. 2d Elections §§412 through 460.

Montana Campaign Finance and Practices Laws and Administrative Rules, Commissioner of Political Practices (January 2000).

Part 1
General Provisions

13-36-101. Grounds for contest of nomination or election to public office.

Case Notes

Failure to Prove Illegal Voting — Summary Judgment Proper: Walker claimed that illegal votes were cast by five voters who were not residents of the town of Darby. Higgins established that they were each registered to vote in Darby and that their names appeared on the precinct voting register, which constitutes prima facie evidence of the right to vote. Despite residency questions, Walker failed to produce material and substantial evidence that votes were illegally cast, and summary judgment for Higgins was proper. Walker v. Higgins, 277 M 443, 922 P2d 1154, 53 St. Rep. 719 (1996).

Freeholder Requirement Constitutional — Reasonable Relationship Standard Applied: A landowner within an irrigation district filed a petition seeking to have the election of an irrigation district commissioner set aside on the grounds that the elected commissioner did not own irrigable land within the district as required by 85-7-1501. The District Court set aside the election, and the commissioner appealed on the grounds that the land ownership requirement violates the equal protection clause of the United States Constitution. The Supreme Court affirmed and held that the freeholder requirement does not violate the right to equal protection under the federal constitution. Johnson v. Killingsworth, 271 M 1, 894 P2d 272, 52 St. Rep. 274 (1995).

Election Not Affected by Voting Irregularities: Appellants appealed District Court order denying petition to invalidate school board election and mill levy, alleging election officials improperly distributed and tabulated absentee ballots and that several voters failed to meet residency requirements. In affirming the order, the Supreme Court ruled that the issue of validity was moot and that voting irregularities caused by the election officials had no effect on election results. Baker v. Bink, 223 M 375, 726 P2d 822, 43 St. Rep. 1801 (1986).

Unstamped and Excess Ballots: Although discarding the ballots in excess of the number of names on the pollbooks would not have affected the outcome of a legislative primary election, the District Court properly ordered a new election when it could not be determined with mathematical certainty that petitioner had won the nomination because some ballots had not been endorsed with the official stamp and the number of such unstamped ballots cast for petitioner was unknown. In re Recount of Ravalli County Primary Election, Petition of Thoft, 178 M 272, 583 P2d 430 (1978).

False Swearing as to Unconstitutional Freeholder Requirement Not a Violation: The freeholder requirement contained in 7-4-4401, prior to its amendment in 1979, was unconstitutional since it bore no relation to a person's qualifications and ability to serve as City Councilman, resulting in an invidious discrimination violative of equal protection. Thus, appellant's false swearing as to freeholder status in his filed declaration of nomination did not constitute a violation of the election laws. Sadler v. Connolly, 175 M 484, 575 P2d 51 (1978), distinguished in Johnson v. Killingsworth, 271 M 1, 894 P2d 272, 52 St. Rep. 274 (1995).

Effect of Failure of Judges to Sign Registry Books: Failure of the election judges of a precinct to require the electors to sign the registry books before voting at a primary election was the fault of the judges and not of the electors, and therefore their votes were legal and properly counted. Thompson v. Chapin, 64 M 376, 209 P 1060 (1922).

Collateral References

Elections *key* 271.

29 C.J.S. Elections §§249 through 251.

26 Am. Jur. 2d Elections §417.

State court jurisdiction over contests involving primary election for member of Congress. 68 ALR 2d 1320.

13-36-102. Time for commencing contest.

Compiler's Comments

1981 Amendment: In (2), substituted "day of election" for "return day of the election".

Collateral References

Elections *key* 278.

29 C.J.S. Elections §§258 through 260.
26 Am. Jur. 2d Elections §§418, 419.

13-36-103. Court having jurisdiction of proceedings.

Collateral References
Elections *key* 275.
29 C.J.S. Elections §§252, 253.
26 Am. Jur. 2d Elections §§421 through 424.

Part 2
Procedure

13-36-201. Contents of contest petition.

Collateral References
Elections *key* 283 through 285.
29 C.J.S. Elections §§267 through 269.
26 Am. Jur. 2d Elections §§432 through 434.

13-36-202. Reception of illegal votes — allegations and evidence.

Case Notes
Evidence: Under former law, when it appeared in an election contest that a voter's ballot had been endorsed by the judges of election, as required by law, it was necessary to show that it could not thereby be identified, in order to let in, as secondary evidence, testimony as to how he voted. Lane v. Bailey, 29 M 548, 75 P 191 (1904).

Collateral References
Elections *key* 290 through 295.
29 C.J.S. Elections §§267, 268.
26 Am. Jur. 2d Elections §§425, 426, 432 through 434.
Admissibility of parol evidence of election officials to impeach election returns. 46 ALR 2d 1385.

13-36-203. Form of complaint.

Compiler's Comments
1999 Amendment: Chapter 51 in (1) in third paragraph after "day of ....." substituted "20..." for "A.D. 19...", and in seventh paragraph at end substituted "find appropriate" for "seem just and legal in the premises"; and made minor changes in style. Amendment effective January 1, 2000.

Collateral References
Elections *key* 285.
29 C.J.S. Elections §268.
26 Am. Jur. 2d Elections §§433, 434.

13-36-204. Bond required.

Collateral References
29 C.J.S. Elections §321.
26 Am. Jur. 2d Elections §460.

13-36-205. Recovery of costs.

Case Notes
Award of Attorney Fees Reasonable: Paulsen contested an election and lost. The District Court awarded $4,582.14 in attorney fees to the prevailing party, Huestis. Paulsen argued on appeal that the attorney fees were not warranted. The Supreme Court found that the District Court had reviewed the evidence presented and had ruled consistently with the factors in determining reasonableness set out in Swenson v. Janke, 274 M 354, 908 P2d 678 (1995). The award was not an abuse of discretion under this section and was therefore affirmed. Paulsen v. Huestis, 2000 MT 280, 302 M 157, 13 P3d 931, 57 St. Rep. 1170 (2000).
Award of Attorney Fees Proper: The award of attorney fees in a case challenging the legality of voter residency in a city election was proper, after consideration of the factors constituting reasonableness set out in Swenson v. Janke, 274 M 354, 908 P2d 678 (1995). Walker v. Higgins, 277 M 443, 922 P2d 1154, 53 St. Rep. 719 (1996).

Award of Attorney Fees Not Abuse of Discretion: Marsh argued that the District Court should not have awarded Overland attorney fees because due to the actions of the election judges and the recount, it was inevitable that either he or Overland would have initiated the election contest proceeding. The Supreme Court held that the District Court in its discretion could have accepted Marsh's arguments but that not to do so and the award of attorney fees to Overland were not an abuse of discretion. The Supreme Court also granted Overland's request that Marsh be required to pay Overland's costs and attorney fees on appeal on the basis that the award on appeal furthered the purpose of this section. Marsh v. Overland, 274 M 21, 905 P2d 1088, 52 St. Rep. 1099 (1995).

Collateral References

Elections *key* 306.
29 C.J.S. Elections §§319 through 322.
26 Am. Jur. 2d Elections §§459, 460.

13-36-206. Notice of filing — prompt hearing.

Case Notes

Docketing Priority in Cases of Contested Nominations: This section provides for prompt resolution of an election dispute and requires a court to give a contest petition precedence over other pending cases. The court is to conduct a hearing on a priority basis, and the contestee must make an appearance and answer the petition. However, there is no stated requirement that the hearing be held within 7 days after a petition is filed. Under 13-36-208, there is some discretion regarding postponements or continuances when necessary. Taylor v. Matejovsky, 261 M 514, 863 P2d 1022, 50 St. Rep. 1434 (1993).

Collateral References

Elections *key* 280, 300.
29 C.J.S. Elections §§254 through 257.
26 Am. Jur. 2d Elections §§425, 426.

13-36-207. Hearing of contest.

Case Notes

Scope of Testimony and Evidence Allowed at Hearing on Petition: This section allows the contestant and contestee to produce evidence at the hearing and includes witness testimony in addition to tangible forms of evidence, as long as it is proffered by one of the parties. The court has discretion to determine the admissibility of the testimony under the general rules of evidence, but it is not to be rejected on the basis that this section permits only the parties to the action to testify. Taylor v. Matejovsky, 261 M 514, 863 P2d 1022, 50 St. Rep. 1434 (1993).

Ordering New Primary Election: When a nomination is declared vacant, the District Court has, without question, the power to order a new election. In re Recount of Ravalli County Primary Election, Petition of Thoft, 178 M 272, 583 P2d 430 (1978).

Collateral References

Elections *key* 300.
29 C.J.S. Elections §§300, 301.
26 Am. Jur. 2d Elections §§448 through 452.

13-36-208. Advancement of cases — dismissal — privileges of witnesses.

Case Notes

Docketing Priority in Cases of Contested Nominations: Section 13-36-206 provides for prompt resolution of an election dispute and requires a court to give a contest petition precedence over other pending cases. The court is to conduct a hearing on a priority basis, and the contestee must make an appearance and answer the petition. However, there is no stated requirement that the hearing be held within 7 days after a petition is filed. Under this section, there is some discretion regarding postponements or continuances when necessary. Taylor v. Matejovsky, 261 M 514, 863 P2d 1022, 50 St. Rep. 1434 (1993).

Collateral References

Elections *key* 296, 297.
29 C.J.S. Elections §§300, 301.
26 Am. Jur. 2d Elections §§448 through 452.

13-36-209. Forfeiture of nomination or office for violation of law — when inappropriate.

Collateral References

Elections *key* 323.
29 C.J.S. Elections §305.
26 Am. Jur. 2d Elections §453.

13-36-210. Punishment.

Case Notes

False Swearing as to Unconstitutional Freeholder Requirement Not a Violation: The freeholder requirement contained in 7-4-4401, prior to its amendment in 1979, was unconstitutional since it bore no relation to a person's qualifications and ability to serve as City Councilman, resulting in an invidious discrimination violative of equal protection. Thus, appellant's false swearing as to freeholder status in his filed declaration of nomination did not constitute a violation of the election laws. Sadler v. Connolly, 175 M 484, 575 P2d 51 (1978), distinguished in Johnson v. Killingsworth, 271 M 1, 894 P2d 272, 52 St. Rep. 274 (1995).

Collateral References

Elections *key* 302.
29 C.J.S. Elections §305.
26 Am. Jur. 2d Elections §453.

13-36-211. When nomination or election not to be vacated.

Case Notes

Failure to Prove Illegal Voting — Summary Judgment Proper: Walker claimed that illegal votes were cast by five voters who were not residents of the town of Darby. Higgins established that they were each registered to vote in Darby and that their names appeared on the precinct voting register, which constitutes prima facie evidence of the right to vote. Despite residency questions, Walker failed to produce material and substantial evidence that votes were illegally cast, and summary judgment for Higgins was proper. Walker v. Higgins, 277 M 443, 922 P2d 1154, 53 St. Rep. 719 (1996).

Nonprejudicial Defects in Proceedings: An election will not be declared void by reason of nonprejudicial defects in the manner in which nomination was declined when question was raised after election. Stackpole v. Hallahan, 16 M 40, 40 P 80 (1895).

Collateral References

Elections *key* 302 through 304.
29 C.J.S. Elections §§249 through 251, 305.
26 Am. Jur. 2d Elections §§417, 453.

13-36-212. Declaration of result of election after rejection of illegal votes.

Collateral References

Elections *key* 302.
29 C.J.S. Elections §306.
26 Am. Jur. 2d Elections §453.

CHAPTER 37
CONTROL OF CAMPAIGN PRACTICES

Chapter Compiler's Comments

Section Not Codified: Section 23-4776, R.C.M. 1947, which provided: "It is the purpose of this act to establish clear and consistent requirements for the full disclosure and reporting of the sources and disposition of funds used in Montana to support or oppose candidates, political committees, or issues, and to consolidate and clarify the authority to enforce the election and campaign finance laws as specified in Title 23, R.C.M. 1947", was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 480, L. 1975.

Chapter Administrative Rules

Title 44, chapter 10, ARM Commissioner of Political Practices.

Chapter Law Review Articles

State Campaign Finance Schemes and Equal Protection, Hamilton, 61 Ind. L.J. 251 (1986).

Campaign Hyperbole: The Advisability of Legislating False Statements Out of Politics, Neel, 2 J. L. & Pol. 405 (1985).

Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?, Shockley, 39 U. Miami L. Rev. 377 (1985).

The Rise and Fall of the Contribution Expenditure Distinction: Redefining the Acceptable Range of Campaign Finance Reforms, Richards, 18 N. Eng. L. Rev. 367 (1983).

Campaign Finance Re-Reform: The Regulation of Independent Political Committees, Buchsbaum, 71 Calif. L. Rev. 673 (1983).

Buying Back the First Amendment: Regulation of Disproportionate Corporate Spending in Ballot Issue Campaigns, Easley, 17 Ga. L. Rev. 675 (1983).

Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, Wright, 82 Colum. L. Rev. 609 (1982).

Constitutional Issues in the Regulation of the Financing of Election Campaigns, Cox, 31 Clev. St. L. Rev. 395 (1982).

Minor Political Parties and Campaign Disclosure Laws, 13 Harv. Civil Rights L. Rev. 475 (1978).

Chapter Collateral References

Elections *key* 317.

29 C.J.S. Elections §§216, 329.

26 Am. Jur. 2d Elections §§381 through 384.

15 Am. Jur. Trials, Unfair Election Campaign Practices, p. 1.

Criticism or disparagement of character, competence, or conduct of candidate for office as defamation. 37 ALR 4th 1088.

Validity and construction of orders and enactments requiring public officers and employees, or candidates for office, to disclose financial condition, interests or relationships. 22 ALR 4th 237, superseding 37 ALR 3d 1338.

Accounting and Reporting Manual for Candidates, Commissioner of Political Practices (January 2000).

Accounting and Reporting Manual for Political Committees, Commissioner of Political Practices (January 2000).

Montana Campaign Finance and Practices Laws and Administrative Rules, Commissioner of Political Practices (January 2000).

Part 1
Commissioner of Political Practices

Part Compiler's Comments

1980 Name Change: Section 19, Initiative No. 85, 1980, provided: "The office of the commissioner of campaign finances and practices, created by 13-37-102, shall be known as the office of the commissioner of political practices." The Code Commissioner has changed the name in this part accordingly. See 1-11-101(2)(g).

Part Administrative Rules

Title 44, chapter 10, ARM Commissioner of Political Practices.

13-37-101. Commissioner of political practices.

Compiler's Comments

1980 Initiative Amendment: Changed name to Commissioner of Political Practices from Commissioner of Campaign Finances and Practices.

13-37-102. Creation of office.

Compiler's Comments

1980 Initiative Amendment: Changed name to Commissioner of Political Practices from Commissioner of Campaign Finances and Practices.

Administrative Rules

ARM 44.1.101(1)(d) Organizational rule of Secretary of State — Commissioner attached.

ARM 44.10.101 Organizational rule of the Commissioner.

Case Notes

Advisory Body Meeting Without Notice — Mootness of Issues When Ultimate Action Becomes Final: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person. A suit was filed to void the appointment on the grounds that the submission of the list was void because there was no notice of the meeting. The committee was granted summary judgment in the District Court, and plaintiffs appealed. Before the appeal was heard, the Senate confirmed the appointment. That the confirmation vested the title to the office in the appointee did not make the appeal and issue moot because alleged violations of the state constitutional right to know and open meeting statutes could occur again, both in the context of this committee and similar advisory entities. To allow an alleged violation to escape judicial scrutiny simply because legal proceedings are not always swift would take away the people's constitutional right to know. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Appointment by Governor Not Voided by Failure of Recommending Committee to Give Notice of Meeting at Which Recommended Persons Chosen: The committee that recommends persons to the Governor, who appoints the Commissioner of Political Practices, violated the open meeting law when it met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person, and the Senate confirmed the appointment. Since the Governor is free to disregard the recommended persons, the Governor did not violate the law in appointing one of the recommended persons, and the appointment was not voided. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Failure to Give Notice of Meeting of Committee That Recommends Persons Governor May Appoint as Commissioner of Political Practices: When three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor and gave no public notice of the meeting, the committee violated the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

"Meeting" Held When Three of Four Members Met to Select Recommended Persons for Position Appointed by Governor: A meeting was held within the meaning of the open meeting law when three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Public or Governmental Bodies — Committee to Recommend Commissioner of Political Practices Appointees to Governor: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices is not a board, bureau, commission, or agency within the meaning of those terms as used in the open meeting law. However, the committee is a "public or governmental body" under the plain meaning of those terms as used in that law because it has a clear public and governmental purpose and was created for a specific governmental task and is thus subject to the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

13-37-106. Salary.

Compiler's Comments

1997 Amendments: Chapter 42 substituted "an annual salary of $31,551" for "a salary of $30,303 in fiscal year 1992 and $31,551 in fiscal year 1993 and thereafter". Amendment effective March 12, 1997.

Chapter 417 in (1) substituted "salary of $31,551 and beginning October 1, 1997, is entitled to receive a salary equal to the market salary of a grade 18 classified employee as provided in 2-18-312" for "salary of $30,303 in fiscal year 1992 and $31,551 in fiscal year 1993 and thereafter"; inserted (2) relating to longevity and benefits; inserted (3) prohibiting reduction in salary; and made minor changes in style. Amendment effective July 1, 1997.

1991 Amendment: Increased salary by $1,248 in each year of biennium. Amendment effective April 29, 1991.

1989 Amendment: Increased salary of Commissioner from $27,665 a year to $28,346 for fiscal year 1990 and to $29,055 for fiscal year 1991 and thereafter. Amendment effective May 11, 1989.

1985 Amendments: Chapter 236 deleted former (2) that read: "(2) The salary commission must review the commissioner's salary and may recommend salary increases to the legislature." Amendment effective July 1, 1987, upon approval by the electorate of HB 463 that repealed Art. XIII, sec. 3, of the Constitution.

Chapter 693 in (1) increased salary to present amount from $26,794.

1983 Amendment: In (1), increased the salary of the Commissioner of Political Practices from that authorized in fiscal year 1982 and fiscal years after 1982, $23,794 and $25,754, to $26,269 in fiscal year 1984 and $26,794 in fiscal years after 1984.

1981 Amendment: In (1), substituted "a salary of $23,794 in fiscal year 1982 and $25,754 after June 30, 1982" for "an annual salary of $22,000".

13-37-111. Investigative powers and duties.

Compiler's Comments

2001 Amendment: Chapter 401 in six places throughout section after reference to chapter 35 of this title deleted reference to chapter 36; and made minor changes in style. Amendment effective October 1, 2001.

Administrative Rules

ARM 44.10.101 Organizational rule of the Commissioner.

ARM 44.10.307 Procedure for submission of complaints to Commissioner.

Attorney General's Opinions

Jurisdiction: In an opinion written before the general revision of the election laws in 1979, the Attorney General held that the scope of the investigative, enforcement, and prosecutorial powers and duties of the Commissioner of Campaign Finances and Practices (now Commissioner of Political Practices) extends to all of Title 13. 36 A.G. Op. 42 (1975).

13-37-112. Personnel and budget.

Compiler's Comments

2001 Amendment: Chapter 401 in (1) after reference to chapter 35 of this title deleted reference to chapter 36; and made minor changes in style. Amendment effective October 1, 2001.

13-37-113. Hiring of attorneys — prosecutions.

Compiler's Comments

2001 Amendment: Chapter 401 in six places throughout section after reference to chapter 35 of this title deleted reference to chapter 36; and made minor changes in style. Amendment effective October 1, 2001.

13-37-114. Rules.

Compiler's Comments

2001 Amendment: Chapter 401 after reference to chapter 35 of this title deleted reference to chapter 36; and made minor changes in style. Amendment effective October 1, 2001.

Statement of Intent: The statement of intent that accompanied SB 65 (Ch. 571, L. 1979) provided in part: "In section 233, the bill amends 13-37-114, MCA, to limit the rulemaking authority of the commissioner of campaign finances and practices [now commissioner of political practices] to chapters 35, 36, and 37 of Title 13 in conformance with other amendments and provisions throughout the bill to clearly define the authority of the commissioner, the secretary of state, and local election officials."

Administrative Rules

Title 44, chapter 10, ARM Commissioner of Political Practices.

13-37-117. Commissioner to provide forms, manuals, and election laws.

Compiler's Comments

2003 Amendment: Chapter 109 in (3) near beginning after "shall" deleted "at the expense of the state"; inserted (4) requiring the commissioner of political practices to provide copies of forms, manuals, and election laws electronically and to provide paper copies upon request; and made minor changes in style. Amendment effective July 1, 2003.

2001 Amendment: Chapter 401 in each subsection after reference to chapter 35 of this title deleted reference to chapter 36; and made minor changes in style. Amendment effective October 1, 2001.

1993 Amendment: Chapter 113 in (1), in two places, and in (2) substituted "reports" for "statements"; in (3), near beginning after "commissioner shall", substituted "at the expense of the state, furnish copies of the election laws relating to penalties, campaign practices, campaign finances, and contested elections to candidates and to any other persons required to file reports or other information pursuant to chapter 35, 36, or 37 of this title" for "prescribe the manner in which the county clerk and recorders shall receive, file, collate, and maintain reports filed with them under chapters 35, 36, or 37 of this title"; and made minor changes in style.

Administrative Rules

ARM 44.10.401 Procedure for obtaining and filing forms.

ARM 44.10.405 Information required of political committees.

ARM 44.10.501 How to obtain manual prescribing uniform system of accounts.

Collateral References

Accounting and Reporting Manual for Candidates, Commissioner of Political Practices (January 2000).

Accounting and Reporting Manual for Political Committees, Commissioner of Political Practices (January 2000).

13-37-118. Information voluntarily supplied.

Compiler's Comments

2001 Amendment: Chapter 401 at end after reference to chapter 35 of this title deleted reference to chapter 36; and made minor changes in style. Amendment effective October 1, 2001.

13-37-119. Availability of information.

Administrative Rules

ARM 44.10.309 Copying charge for public records on file with Commissioner.

Collateral References

State of Montana Campaign Financing 1996, Commissioner of Political Practices (1997) (updated after every election since 1982).

13-37-120. Reports.

Compiler's Comments

1993 Amendment: Chapter 349 deleted former first sentence that read: "The commissioner shall at the close of each fiscal year report to the legislature and the governor concerning the action he has taken, including the names, salaries, and duties of all individuals in his employ and the money he has disbursed" and at beginning, after "commissioner", substituted "may report as necessary" for "shall also make further reports"; and made minor changes in style.

13-37-121. Inspection of statements and reports — issuance of orders of noncompliance.

Compiler's Comments

2001 Amendment: Chapter 401 in (1) in first sentence near end increased days allowed for inspection of report from 10 days to 20 days, inserted second sentence regarding days to be excluded from time computation, and inserted fourth sentence regarding notification by commissioner; and inserted (5) regarding initiation of other administrative or judicial action. Amendment effective October 1, 2001.

1995 Amendment: Chapter 410 at end of (1) inserted "If the person fails to comply after the notification, the commissioner shall issue an order of noncompliance as provided in this section"; in (2) substituted "may" for "shall"; in (3) and (4), near end of first sentence, substituted "order" for "notice"; adjusted subsection references; and made minor changes in style.

13-37-124. Consultation and cooperation with county attorney.

Compiler's Comments

2001 Amendment: Chapter 401 in (1) in first sentence near middle and in (3) at end after reference to chapter 35 of this title deleted reference to chapter 36; and made minor changes in style. Amendment effective October 1, 2001.

1987 Amendment: Near end of (4), after "commissioner", inserted "except those paid to or imposed by a justice's court".

Case Notes

Jurisdiction of District Court — Defective Affidavit of Probable Cause: The failure of the Commissioner of Campaign Finances and Practices (now Commissioner of Political Practices) to

recite, in an affidavit supporting a request for leave to initiate prosecution by information, the fact that the County Attorney had waived under 13-37-124 his right to prosecute the defendant was not a jurisdictional defect, and the court improperly granted the defendant's motion to dismiss. Such a defect is a procedural matter, not a substantive one, and does not require dismissal of the charge. St. v. Matthews, 183 M 405, 600 P2d 188 (1979).

Collateral References

29 C.J.S. Elections §§339 through 347.

13-37-125. Powers of county attorney to investigate.

Compiler's Comments

2001 Amendment: Chapter 401 in (1) in first sentence near beginning and near middle and in (2)(d) at end after reference to chapter 35 of this title deleted reference to chapter 36; and made minor changes in style. Amendment effective October 1, 2001.

Collateral References

29 C.J.S. Elections §§339 through 347.

13-37-126. Names not to appear on ballot.

Compiler's Comments

2003 Amendment: Chapter 414 in (1) near beginning and in (3) in first sentence near end substituted "appear" for "be printed". Amendment effective October 1, 2003.

2001 Amendment: Chapter 401 in (1) near middle after "if the candidate or a" deleted "political". Amendment effective October 1, 2001.

1997 Amendment: Chapter 25 in (3) inserted second sentence regarding notification deadlines; and made minor changes in style.

13-37-127. Withholding of certificates of nomination or election.

Compiler's Comments

2001 Amendment: Chapter 401 in (1) in first sentence near middle after "until the candidate or" substituted "the candidate's treasurer" for "his political treasurer"; and made minor changes in style. Amendment effective October 1, 2001.

13-37-128. Cause of action created.

Compiler's Comments

2001 Amendment: Chapter 401 in (2) near middle after "13-35-228, or this chapter" inserted "or who violates 13-35-226". Amendment effective October 1, 2001.

1997 Amendment: Chapter 42 at beginning of (1) deleted exception clause referring to 13-37-306; and made minor changes in style. Amendment effective March 12, 1997.

13-37-129. Liability and disposition of fines.

Compiler's Comments

1987 Amendment: In second and fourth sentences inserted "in a court other than a justice's court".

13-37-130. Limitation of action.

Compiler's Comments

1997 Amendment: Chapter 42 at end of third sentence deleted exception clause referring to 13-37-306; and made minor changes in style. Amendment effective March 12, 1997.

13-37-131. Misrepresentation of voting record — political civil libel.

Compiler's Comments

1999 Amendment: Chapter 352 in (1) near beginning after "person to" substituted "misrepresent" for "willfully or negligently make or publish a false statement about" and at end substituted "or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false" for "or to make or publish a false statement that reflects unfavorably upon a candidate's character or morality"; in (2) near beginning after "person to" substituted "misrepresent to a candidate another candidate's public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false" for "willfully or negligently provide false information to a candidate concerning another candidate's public voting record when the person knows or should know that the information will be made public during the course of a campaign"; and in (3) near middle of

second sentence after "person's" substituted "reckless disregard" for "willful or negligent conduct". Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 352, L. 1999, provided: "WHEREAS, in National Right to Life Political Action Committee v. Argenbright, Cause No. CV 96-85-H-CCL, U.S. District Court, Helena Division (1997), section 13-35-233, MCA, prohibiting solicitation of votes on election day, was declared unconstitutional; and

WHEREAS, in Parisot v. Argenbright, Cause No. CDV-96-1555, First Judicial District, Lewis and Clark County (1997), the negligence standard for publishing false statements about a candidate's voting record was declared invalid."

Collateral References

Criticism or disparagement of character, competence, or conduct of candidate for office as defamation. 37 ALR 4th 1088.

Part 2
Campaign Finance

Part Administrative Rules

Title 44, chapter 10, subchapter 4, ARM Campaign finance statements and reports.

Title 44, chapter 10, subchapter 5, ARM Campaign treasurer — records and reporting.

Part Law Review Articles

Montana's Role in the Free Speech vs. Equal Speech Debate, Lopach, 60 Mont. L. Rev. 475 (1999).

Campaign Finance Reform 'Dollar for Votes' — the American Democracy, Nawaz, 14 St. John's J. Legal Commentary 155 (1999).

Symposium: Money, Politics, and Equality, 77 Tex. L. Rev. 1603 (1999).

Toward a Democracy-Centered Reading of the First Amendment, Neuborne, 93 Nw. U.L. Rev. 1055 (1999).

Campaign Finance Reform: Let's Limit Big Money, Not Public Participation (Dollars, Discourse and Democracy: A Look at Campaign Finance Reform), Sweeney, 10 Stan. L. & Pol'y Rev. 81 (1998).

Political Parties and Financial Disclosure Laws (Special Edition on Electoral Regulation and Representation), Somes, 7 Griffith L. Rev. 174 (1998).

The Demise of Reform: Buckley v. Valeo, the Courts, and the "Corruption Rationale" (Dollars, Discourse and Democracy: A Look at Campaign Finance Reform), Bauer, 10 Stan. L. & Pol'y Rev. 11 (1998).

Parties, PACs, and Campaign Finance: Preserving First Amendment Parity, 110 Harv. L. Rev. 1573 (1997).

Developments in the State Regulation of Major and Minor Political Parties, Black, 82 Cornell L. Rev. 109 (1996).

Shouting Down the Voice of the People: Political Parties, Powerful PACs and Concerns About Corruption, Long, 46 Stan. L. Rev. 1161 (1994).

State Campaign Finance Laws: The Necessity and Efficacy of Reform, Cherry, 3 J.L. & Pol. 567 (1987).

Constitutional Law: Campaign Finance Reform and the First Amendment—All the Free Speech Money Can Buy, Bernhardt, 39 Okla. L. Rev. 729 (1986).

Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine (Symposium: Money in Politics: Political Campaign Finance Reform), Nicholson, 10 Hastings Const. L.Q. 601 (1983).

Part Collateral References

29 C.J.S. Elections §216.

26 Am. Jur. 2d Elections §§381 through 384.

Solicitation or receipt of funds by public officer or employee for political campaign expenses or similar purposes as bribery. 55 ALR 2d 1137.

13-37-201. Campaign treasurer.

Compiler's Comments

1991 Amendment: In last sentence, after "appropriate", substituted "election administrator" for "county clerk and recorder".

Administrative Rules

ARM 44.10.325, 44.10.327, 44.10.329 Interpretive and procedural rules regarding political committees for the purposes of Title 13, ch. 35 and 37.

Title 44, chapter 10, subchapter 4, ARM Campaign finance statements and reports.

ARM 44.10.503 Campaign treasurer to make deposits and expenditures.

ARM 44.10.507 All contributions to be transferred to campaign treasurer.

13-37-202. Deputy campaign treasurers.

Administrative Rules

ARM 44.10.325, 44.10.327, 44.10.329 Interpretive and procedural rules regarding political committees for the purposes of Title 13, ch. 35 and 37.

Title 44, chapter 10, subchapter 4, ARM Campaign finance statements and reports.

13-37-204. Removal of campaign and deputy campaign treasurers.

Administrative Rules

ARM 44.10.403 Amendments to statements and reports.

13-37-205. Campaign depositories.

Compiler's Comments

1981 Amendment: In the middle of the section, substituted "Only a bank, credit union, savings and loan association, or building and loan association authorized to transact business in Montana may be designated as a campaign depository." for "Only a bank authorized to transact business in Montana may be designated as a campaign depository."

Administrative Rules

Title 44, chapter 10, subchapter 4, ARM Campaign finance statements and reports.

ARM 44.10.503 Deposits and expenditures through depository.

13-37-206. Exception for certain school districts and certain special districts.

Compiler's Comments

2003 Amendment: Chapter 191 in (1) near end substituted "campaigns" for "committees"; in (2) near middle substituted "campaigns" for "committees" and after "special district issue" deleted "when the special district is"; in (3) inserted first sentence defining special district, at beginning of second sentence inserted "The term includes but is not limited to" and inserted references to weed management district and community college district, and inserted last sentence referring to district or entity formed by interlocal agreement; and made minor changes in style. Amendment effective October 1, 2003.

1991 Amendment: Inserted (2) excepting candidates for certain special district offices from campaign finance requirements; and made minor changes in style. Amendment effective April 6, 1991.

13-37-207. Deposit of contributions — statement of campaign treasurer.

Compiler's Comments

1981 Amendment: Inserted "share draft account, share checking account, or negotiable order of withdrawal account" after "in a checking account" near the end of (1).

Administrative Rules

ARM 44.10.503 Deposits and expenditures through depository.

ARM 44.10.505 Receipt form for cash contributions.

ARM 44.10.507 Transfer to campaign treasurer of funds received by candidate, agent of the candidate, or political committee.

ARM 44.10.521 Deposit of proceeds from mass collections made at a fundraising event.

13-37-209. Inspection of records.

Case Notes

Bipartisan Organization Not Political Within Meaning of Inspection Statute: Bipartisan organization to promote the sales tax referendum was legislative in nature and not political within the meaning of section 94-1431, R.C.M. 1947 (now repealed), requiring access to books of "any political party, committee, or organization". State ex rel. Nybo v. District Court, 158 M 429, 492 P2d 1395 (1972).

13-37-215. Petty cash funds allowed.

Compiler's Comments

1987 Amendment: In (1)(b) increased fund amount to $25 from $20; and in (2), in first sentence, inserted "postage stamps" and increased allowable expenditure to $25 from $10.

Administrative Rules

ARM 44.10.503 Accounting records required for petty cash fund.

13-37-216. Limitations on contributions.

Compiler's Comments

2003 Amendment: Chapter 462 increased contribution limits as follows: in (1)(a)(i) from $400 to $500; in (1)(a)(ii) from $200 to $250; in (1)(a)(iii) from $100 to $130; in (3)(a) from $15,000 to $18,000; in (3)(b) from $5,000 to $6,500; in (3)(c) from $2,000 to $2,600; in (3)(d) from $800 to $1,050; in (3)(e) from $500 to $650; and made minor changes in style. Amendment effective October 1, 2003.

1994 Amendment: Section 1, I.M. No. 118, approved at the general election held Nov. 8, 1994, in (1)(a) substituted "each election" for "all elections", after "campaign by" inserted "a political committee or by", and after "to a candidate" deleted "and political committees organized on his behalf"; in (1)(a)(i) decreased amount from $1,500 to $400; in (1)(a)(ii) decreased amount from $750 to $200; in (1)(a)(iii) decreased amount from $250 to $100; deleted former (1)(c) that read: "for a candidate for public service commissioner, district court judge, or state senator, not to exceed $400"; added (1)(b) concerning contributions to committees; in (2)(a) inserted first sentence concerning committee that is not independent and in second sentence substituted "section" for "subsection"; inserted (2)(b) concerning leadership political committee; in (3) inserted first sentence concerning applicability of section and substituted remainder of subsection concerning political party organizations for former text that read: "For the purpose of limitation on contributions, political party organizations are independent committees. Aggregate contributions by an independent committee to a candidate and political committees organized on his behalf for all elections in a campaign are limited as follows"; in (3)(a) increased amount from $8,000 to $15,000; in (3)(b) increased amount from $2,000 to $5,000; in (3)(c) increased amount from $1,000 to $2,000; in (3)(d) increased amount from $600 to $800; in (3)(e) increased amount from $300 to $500; substituted (4) concerning prohibition on excess contributions for former text that read: "The limitations imposed by this section do not apply to public funds contributed to a candidate under part 3 of this chapter"; and inserted (5) defining an election. Amendment effective January 1, 1995.

Administrative Rules

ARM 44.10.321 Interpretive rule regarding definition of "contribution" for the purposes of Title 13 ch. 35 and 37.

ARM 44.10.523 Rule defining "aggregate contributions" and contributions to multicandidate campaign committees.

Case Notes

Provisions Limiting Contributions to Individual and Political Action Committees and Imposing Aggregate Dollar Amounts From Committees Constitutional: To reform campaign finance laws, Montana voters in 1994 passed Initiative Measure No. 118, which included two provisions that lowered the maximum dollar amount that a political action committee and an individual could contribute to a political candidate and imposed an aggregate dollar amount that a candidate could receive from all political action committees. The Montana Right to Life Association filed suit, alleging that the provisions unduly burdened constitutionally protected free speech and associational rights. The District Court upheld the provision as sufficiently tailored to achieve Montana's important interest in preventing corruption and the appearance of corruption in Montana politics. On appeal, the Ninth Circuit Court applied the standards articulated by the U.S. Supreme Court in Buckley v. Valeo, 424 US 1 (1976), and Nixon v. Shrink Mo. Gov't PAC, 528 US 377 (2000), in which the court held that a state's campaign contribution limits would be upheld if the limits furthered a sufficiently important state interest and were closely drawn so that they focused narrowly on the state's interest, left a contributor free to affiliate with a candidate, and allowed a candidate to amass sufficient resources to wage an effective campaign. In affirming the District Court decision, the Ninth Circuit Court ruled that the limits imposed on individual and committee contributions and on the aggregate dollar amount that a candidate could receive from all political action committees were sufficiently tailored to achieve Montana's important interest in preventing corruption and the appearance of

corruption in Montana politics. Mont. Right to Life Ass'n v. Eddleman, 343 F3d 1085 (9th Cir. 2003).

Statutory Limits on Contributions to Ballot Issue Committees Held Unconstitutional: A city ordinance placing a $250 limit on contributions to committees formed to support or oppose ballot measures is an unconstitutional interference with the first amendment rights of association and free speech. Citizens Against Rent Control v. Berkeley, 454 US 290, 70 L Ed 2d 492, 102 S Ct 2d 434 (1981).

Corporate Free Speech — Contributions for Ballot Issues: The portion of 13-35-227 (prior to 1979 amendment) that totally prohibited payments or contributions by corporations in support of or opposition to ballot issues was an unconstitutional restriction of corporate rights to free speech guaranteed by the first amendment to the United States Constitution (similar to Art. II, sec. 7, Mont. Const.). C & C Plywood Corp. v. Hanson, 583 F2d 421 (9th Cir. 1978), affirming 420 F. Supp. 1254 (D.C. Mont. 1976).

Limitations on Contributions Constitutional: Federal Election Campaign Act's limits on contributions to campaigns for election to federal office do not unconstitutionally impair first amendment freedoms of expression and association and are not invidiously discriminatory, as such a ceiling is a valid guard against the corrupting potential of large financial contributions to candidates. Buckley v. Valeo, 424 US 1 (1976).

Law Review Articles

Corporate Political Speech, Campaign Spending, and First Amendment Doctrine, Garrison, 27 Am. Bus. L.J. 163 (1989).

Money, Equality and the Regulation of Campaign Finance, Nichol, 6 Const. Commentary 319 (1989).

Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, Wright, 82 Colum. L. Rev. 609 (1982).

Constitutionality of Limitations on Individual Political Campaign Contributions and Expenditures: The Supreme Court Decision in Buckley v. Valeo, 25 Emory L. J. 400 (1976).

Collateral References

State regulation of the giving or making of political contributions or expenditures by private individuals. 94 ALR 3d 944.

13-37-217. Contributions in name of undisclosed principal.

Administrative Rules

ARM 44.10.519 Reporting earmarked contributions received from an intermediary candidate or political committee.

Collateral References

Validity and construction of state statute prohibiting anonymous political advertising. 4 ALR 4th 741.

13-37-218. Limitations on receipts from political committees.

Compiler's Comments

2003 Amendment: Chapter 462 in first sentence increased contribution limits for candidates for state senate from $1,000 to $2,150 and for state house of representatives from $600 to $1,300; in second sentence after "factor" substituted formula for determining inflation factor for "as defined in 15-30-101 for the year in which general elections are held"; and made minor changes in style. Amendment effective October 1, 2003.

The amendments to this section made by sec. 41, Ch. 544, L. 2003, were rendered void by sec. 5, Ch. 462, L. 2003, a coordination section.

2001 Amendment: Chapter 143 in second sentence near middle after "as defined in" substituted "15-30-101" for "15-30-101(8)"; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 19, Ch. 143, L. 2001, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to tax years beginning after December 31, 2001.

(2) [Section 8] [15-30-124] applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 2000.

(3) [Section 6] [15-30-1113, the January 1, 2003, version] applies to tax years beginning after December 31, 2002."

1994 Amendment: Section 2, I.M. No. 118, approved at the general election held Nov. 8, 1994, in fourth sentence substituted "must" for "may not". Amendment effective January 1, 1995.

1993 Amendment — Rejected: The amendments made by Ch. 634, L. 1993 (House Bill No. 671), were removed from this section because House Bill No. 671 was rejected by the electorate in a referendum held November 8, 1994.

Effective Date — Retroactive Applicability: Section 23, Ch. 634, L. 1993, provided: "[This act] is effective on passage and approval [approved May 11, 1993] and applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1992."

Administrative Rules

ARM 44.10.331 Limitations on receipts from political committees.

Case Notes

Provisions Limiting Contributions to Individual and Political Action Committees and Imposing Aggregate Dollar Amounts From Committees Constitutional: To reform campaign finance laws, Montana voters in 1994 passed Initiative Measure No. 118, which included two provisions that lowered the maximum dollar amount that a political action committee and an individual could contribute to a political candidate and imposed an aggregate dollar amount that a candidate could receive from all political action committees. The Montana Right to Life Association filed suit, alleging that the provisions unduly burdened constitutionally protected free speech and associational rights. The District Court upheld the provision as sufficiently tailored to achieve Montana's important interest in preventing corruption and the appearance of corruption in Montana politics. On appeal, the Ninth Circuit Court applied the standards articulated by the U.S. Supreme Court in Buckley v. Valeo, 424 US 1 (1976), and Nixon v. Shrink Mo. Gov't PAC, 528 US 377 (2000), in which the court held that a state's campaign contribution limits would be upheld if the limits furthered a sufficiently important state interest and were closely drawn so that they focused narrowly on the state's interest, left a contributor free to affiliate with a candidate, and allowed a candidate to amass sufficient resources to wage an effective campaign. In affirming the District Court decision, the Ninth Circuit Court ruled that the limits imposed on individual and committee contributions and on the aggregate dollar amount that a candidate could receive from all political action committees were sufficiently tailored to achieve Montana's important interest in preventing corruption and the appearance of corruption in Montana politics. Mont. Right to Life Ass'n v. Eddleman, 343 F3d 1085 (9th Cir. 2003).

Law Review Articles

Election Law: Limitations of Independent PACs Held Unconstitutional. Federal Election Commission v. National Conservative Political Action Committee, 105 S. Ct. 1459, Morgan, 61 Tul. L. Rev. 185 (1986); 69 Marq. L. Rev. 143 (1985).

Campaign Finance Re-Reform: The Regulation of Independent Political Committees, Buchsbaum, 71 Calif. L. Rev. 673 (1983).

13-37-225. Reports of contributions and expenditures required.

Compiler's Comments

1991 Amendment: In (1), in three places, substituted reference to election administrator for reference to county clerk and recorder.

Administrative Rules

ARM 44.10.321 Interpretive rule regarding definition of "contribution" for the purposes of Title 13, ch. 35 and 37.

ARM 44.10.323 Interpretive rule regarding definition of "expenditure" for the purposes of Title 13, ch. 35 and 37.

Title 44, chapter 10, subchapter 4, ARM Campaign finance statements and reports.

Title 44, chapter 10, subchapter 5, ARM Campaign treasurer — records and reporting.

Case Notes

Limitations on Expenditures Unconstitutional: Limits on campaign expenditures by candidates, from personal or family resources, for federal office or by other individuals or campaign committees to advocate election or defeat of candidates for federal office are an impermissible burden on first amendment freedom of expression because candidates must have an unfettered opportunity to make their views known so that the electorate may intelligently evaluate candidates' personal qualities and positions on vital public issues before choosing among the candidates on election day. Debate on public issues should be uninhibited, robust, and wide open to assure unfettered interchange of ideas for bringing about political and social changes desired by the people. Buckley v. Valeo, 424 US 1 (1976).

Collateral References

Validity and construction of orders and enactments requiring public officers and employees, or candidates for office, to disclose financial condition, interests, or relationships. 22 ALR 4th 237.

Validity and construction of enactments requiring public officers or candidates for office to disclose financial conditions and relationships. 37 ALR 3d 1338.

Validity, construction, and application of provisions of Federal Election Campaign Act of 1971 (2 U.S.C.S. §§431 through 454) pertaining to disclosure of campaign funds. 18 ALR Fed. 949.

13-37-226. Time for filing reports.

Compiler's Comments

2001 Amendment: Chapter 401 in (1)(b) decreased from $500 to $200 minimum amount of contribution requiring reporting within 24 hours; in (2)(a) near middle after "calendar quarter in which" substituted "the text of the proposed measure is submitted for review and approval pursuant to 13-27-202" for "funds are received or expended" and near end after "that an issue" deleted "subject to a referendum"; and in (6) near middle after "to which organizations that are" deleted "not primary political committees but are". Amendment effective October 1, 2001.

1995 Amendments — Composite Section: Chapter 18 near end of (7) substituted reference to 13-37-228(2) for reference to 13-37-225(2); and made minor changes in style.

Chapter 86 in (3)(a) extended reporting time to 48 hours from 24 hours and inserted second sentence authorizing the report to be made by mail or by electronic communication; and made minor changes in style.

In (5)(c), at beginning, the Code Commissioner inserted "a report" for consistency of style.

1993 Amendments — Composite Section: Chapter 10 in (7) deleted superfluous internal reference; and made minor changes in style.

Chapter 208 in (3)(a) and (5)(a) substituted "12th day" for "10th day"; in (3)(a) substituted "17th day" for "15th day"; and made minor changes in style.

One style change in (4) was slightly different in the two chapters. The codifier chose the more appropriate of the two.

1991 Amendment: Deleted former (1)(a)(ii) that required quarterly filing of a report on an issue subject to a referendum or expected to be on ballot; inserted (2) regarding filings required of political committees organized to support or oppose a statewide ballot issue; and made minor changes in style.

1989 Amendment: Inserted (1)(a) relating to quarterly filing of reports.

Administrative Rules

ARM 44.10.327 Principal, independent, and incidental committees.

ARM 44.10.329 Classification of committees by Commissioner.

Title 44, chapter 10, subchapter 4, ARM Campaign finance statements and reports.

Title 44, chapter 10, subchapter 5, ARM Campaign treasurer — records and reporting.

13-37-227. Comprehensive report when several candidates or issues involved.

Compiler's Comments

Statement of Intent: The statement of intent that accompanied SB 65 (Ch. 571, L. 1979) provided in part: "In section 257, the bill amends 13-37-227, MCA, to require the commissioner of campaign finances and practices [now commissioner of political practices] to adopt additional rules relating to political committees which file periodic reports with the federal election commission and those headquartered outside of Montana. It is the intent of the Legislature that the commissioner adopt rules which will allow these committees to comply with Montana laws by filing copies of federal reports, whenever possible."

Administrative Rules

ARM 44.10.413 Filing requirements for nonresident committees and committees required to file with the Federal Election Commission.

13-37-228. Time periods covered by reports.

Compiler's Comments

2001 Amendment: Chapter 401 in (1) inserted second sentence regarding reports by political committees organized to support or oppose statewide ballot issues; and made minor changes in style. Amendment effective October 1, 2001.

1991 Amendment: At end of (1) and (2) changed references to subsections of 13-37-226.

13-37-229. Disclosure of contributions received.

Compiler's Comments

2003 Purported Amendment: Although sec. 3, Ch. 462, L. 2003, purported to amend this section, the final version of the text remained unamended, except for nonsubstantive style changes.

1991 Amendment: Near beginning of (2) and in middle of (6) substituted reference to employer for reference to principal place of business; in (2), near middle after "contributions", inserted "other than loans, of $35 or more to a candidate or political committee" and at end, after "events)", deleted remainder of (2) and former (2)(a) and (2)(b) that read: "other than loans, to the candidate or political committee, of:

(a) $75 or more if the candidate has filed for a state office to be filled by a statewide vote of all the electors of Montana or if the political committee was specifically organized to support or oppose a particular statewide candidate or issue; or

(b) $35 or more for any other candidate or political committee"; at end of (3) inserted "for all reporting periods"; in (8), after "less than", deleted "$75 under subsection (2)(a)" and after "$35" deleted "under subsection (2)(b)"; and made minor changes in style.

1987 Amendment: In (2) substituted (a), referring to contributions to statewide candidates and political committees interested in statewide candidates and issues, and (b), referring to contributions to other candidates and political committees, for "$25 or more"; divided former (2) into present (2), referring to persons making contributions greater than certain amounts, and (3), referring to aggregate amount of contributions; in (8) substituted language referring to $75 and $35 for $25; and made minor changes in phraseology.

Administrative Rules

ARM 44.10.321 Interpretive rule regarding definition of "contribution" for the purposes of Title 13, ch. 35 and 37.

Title 44, chapter 10, subchapter 4, ARM Campaign finance statements and reports.

Title 44, chapter 10, subchapter 5, ARM Campaign treasurer — records and reporting.

Law Review Articles

Preserving the Purity of Elections: A Case for Limiting Contributions to Ballot Question Committees, Reinholm, 4 Cooley L. Rev. 391 (1987).

13-37-230. Disclosure of expenditures made.

Administrative Rules

ARM 44.10.323 Interpretive rule regarding definition of "expenditure" for the purposes of Title 13, ch. 35 and 37.

Title 44, chapter 10, subchapter 4, ARM Campaign finance statements and reports.

Title 44, chapter 10, subchapter 5, ARM Campaign treasurer — records and reporting.

Case Notes

Limitations on Expenditures Unconstitutional: Limits on campaign expenditures by candidates, from personal or family resources, for federal office or by other individuals or campaign committees to advocate election or defeat of candidates for federal office are an impermissible burden on first amendment freedom of expression because candidates must have an unfettered opportunity to make their views known so that the electorate may intelligently evaluate candidates' personal qualities and positions on vital public issues before choosing among the candidates on election day. Debate on public issues should be uninhibited, robust, and wide open to assure unfettered interchange of ideas for bringing about political and social changes desired by the people. Buckley v. Valeo, 424 US 1 (1976).

13-37-240. Surplus campaign funds.

Compiler's Comments

Effective Date: Section 6, I.M. No. 118, provided that this section is effective January 1, 1995. Approved November 8, 1994.

13-37-250. Voluntary spending limits.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 414 in (1)(b) near beginning deleted reference to subsection (18)(b) of 13-1-101. Amendment effective October 1, 2003.

Chapter 462 in (3) increased expenditure limits from $150,000 to $195,000; in (4) increased fine from $5,000 to $6,500; and inserted (5) providing for an inflation factor. Amendment effective October 1, 2003.

Chapter 475 in (1)(b) near middle after "defined in" substituted "13-1-101(20)(b)" for "13-1-101(18)(b)". Amendment effective January 1, 2004.

1999 Amendment: Chapter 51 in (1)(b) near beginning of first sentence after "13-1-101" substituted "(18)(b)" for "(12)(b)". Amendment effective March 15, 1999.

1997 Amendment — Rejected: The amendments made by Ch. 294, L. 1997 (House Bill No. 575), were removed from this section because House Bill No. 575 was rejected by the electorate in an initative referendum held November 3, 1998.

Preamble: The preamble attached to I.M. No. 125 provided: "WHEREAS, corporations are not allowed to directly spend money to influence political candidate campaigns in Montana; and

WHEREAS, corporations are not allowed to directly contribute money to a political party in Montana; and

WHEREAS, the processes of initiative and referendum are a vital part of the political process in Montana; and

WHEREAS, corporations are not restricted in the direct use of corporate funds to support or oppose the adoption or rejection of ballot issues in Montana; and

WHEREAS, corporations are now making direct corporate expenditures of overwhelming amounts of money in Montana initiatives; and

WHEREAS, participation in the political system needs to be kept fair to citizens of normal financial means; and

WHEREAS, limitations on direct corporate contributions work toward that fairness.

NOW, THEREFORE, BE IT RESOLVED BY THE PEOPLE OF THE STATE OF MONTANA:

That the prohibition on the direct use of corporate funds in the Montana political process be expanded to prohibit direct corporate expenditures in support of or in opposition to initiative and referendum ballot issues."

Severability: Section 4, I.M. No. 125, was a severability clause.

CHAPTER 38
POLITICAL PARTIES

Chapter Law Review Articles

American Political Parties Under the First Amendment, Wigton, 7 J.L. & Pol'y 411 (1999).

Developments in the State Regulation of Major and Minor Political Parties, Black, 82 Cornell L. Rev. 109 (1996).

Shouting Down the Voice of the People: Political Parties, Powerful PACs, and Concerns About Corruption, Long, 46 Stan. L. Rev. 1161 (1994).

Federal Courts and the Changing Role of American Political Parties, Brisbin, 5 N. Ill. U.L. Rev. 31 (1984).

The Legal Regulation of Political Parties, Fay, 9 J. Legis. 263 (1982).

Chapter Collateral References

29 C.J.S. Elections §§83 through 88.

25 Am. Jur. 2d Elections §§128, 133, 134, 137, 156, 168, 170 through 175, 182, 200, 201.

Part 1
General Provisions

13-38-101. Powers of parties.

Attorney General's Opinions

Vacancies — How Filled: The Office of a Public Service Commissioner who dies after the primary election date must be placed on the general election ballot. The elected successor will take office when elected and qualified and will serve out the unexpired term. Political party nominations for the general election may be made in accordance with the custom of each political party. Nominations for independent candidates or candidates of parties not eligible for the direct primary must be made in accordance with Title 13, ch. 10, part 5. 35 A.G. Op. 95 (1974).

Collateral References

29 C.J.S. Elections §87.

25 Am. Jur. 2d Elections §128.

13-38-104. Party rules to be filed with secretary of state.

Collateral References

29 C.J.S. Elections §87.

25 Am. Jur. 2d Elections §201.

13-38-105. County committee rules to be filed with election administrator.

Collateral References

29 C.J.S. Elections §85.

25 Am. Jur. 2d Elections §§128, 133, 137, 156, 168, 170 through 173, 182, 201.

Part 2
Committee Structure

13-38-201. Election of committeemen at primary.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 367 at beginning of (1) and (3) inserted exception clause; inserted (4) allowing election administrator to decline precinct election in primary election if only one person of each sex nominated to fill precinct position and requiring county governing body to declare candidate nominated for precinct committeeman position elected by acclamation if precinct election not held during primary election; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 414 in (3) substituted "must appear" for "shall be printed"; and made minor changes in style. Amendment effective October 1, 2003.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Attorney General's Opinions

Dual Candidacy Authorized: A candidate for State Representative may also be a candidate for precinct committeeman. 36 A.G. Op. 80 (1976).

Collateral References

Elections *key* 121.

29 C.J.S. Elections §86.

25 Am. Jur. 2d Elections §§128, 133, 137, 156, 168, 170 through 173, 182.

13-38-202. Committeemen as party representatives — county and city central committees.

Collateral References

Elections *key* 121.

29 C.J.S. Elections §85.

25 Am. Jur. 2d Elections §§128, 133, 137, 156, 168, 170 through 173, 182.

13-38-203. Powers of county and city central committees — role of state central committee where no county central committee exists.

Collateral References

29 C.J.S. Elections §85.

25 Am. Jur. 2d Elections §§128, 133, 137, 156, 168, 170 through 173, 182.

Constitutionality of statute relating to power of committee or officials of political party. 69 ALR 924.

13-38-204. Committees to fill vacancies among nominees under certain circumstances.

Case Notes

Failure to Accept Nomination — No Vacancy Created: When a successful write-in candidate at a nominating election failed to file his acceptance within 10 days after election day, his subsequent resignation did not result in a vacancy which the county central committee of his party could fill. State ex rel. Wilkinson v. McGrath, 111 M 102, 106 P2d 186 (1940).

Death After Election: Sections 23-915 and 23-929, R.C.M. 1947 (now repealed), did not empower county central committee to make an original nomination of a candidate to an office to be filled at a special election when the officer-elect died after election and before induction into office. State ex rel. Smith v. Duncan, 55 M 376, 177 P 248 (1918), distinguished in LaBorde v. McGrath, 116 M 283, 149 P2d 913 (1944).

Time for Filling Vacancies: Under section 1320, Political Code of 1895, when a convention had made a nomination and authorized its committee to fill any vacancy that may have occurred, the filling of the vacancy by the committee, upon the death or resignation of the candidate or because the original certificate of nomination was or became insufficient or inoperative, could be made at any time before the day of election. State ex rel. Galen v. Hays, 31 M 227, 78 P 301 (1904); State ex rel. Scharnikow v. Hogan, 24 M 397, 62 P 683 (1900).

Attorney General's Opinions

Vacancy With No Opportunity to Nominate in Primary: When the office of County Commissioner has become vacant with no opportunity to nominate candidates in the primary election, the selection of candidates for the general election will be made by each political party according to 13-10-327; and, pursuant to 13-12-208 (now repealed), write-in candidates may also seek the office. The appointee to fill the immediate vacancy will hold that office until the next general election. 37 A.G. Op. 147 (1978).

Collateral References

29 C.J.S. Elections §87.
25 Am. Jur. 2d Elections §182.

13-38-205. Organization and operation of committee.

Collateral References

Elections *key* 121.
29 C.J.S. Elections §85.
25 Am. Jur. 2d Elections §§128, 133, 137, 156, 168, 170 through 173, 182.

TITLE 14
RESERVED

DOES NOT
CIRCULATE

State Law Library of Montana
3 0000 00121921 5

DOES NOT
CIRCULATE

